

**People v Weaver**

2018 NY Slip Op 33938(U)

November 19, 2018

County Court, Westchester County

Docket Number: 18-0460

Judge: George E. Fufidio

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COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER  
Indictment Nos.: 18-0460

**FILED**

NOV 19 2018

Defendant  
TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

SHAWN WEAVER,

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FUFIDIO, J.

Defendant, SHAWN WEAVER, having been indicted on or about August 2, 2018 for two counts of assault in the first degree (Penal Law § 120.10 (1)); three counts of assault in the first degree (Penal Law § 120.10 (4)); one count of robbery in the first degree (Penal Law § 160.15 (1)); two counts of robbery in the first degree (Penal Law § 160.15 (3)) and two counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 (1)) has filed omnibus motions which consist of a Notice of Motion, an Affirmation in Support and a Memorandum of Law. In response, the People have filed an Affirmation in Opposition together with a Memorandum of Law. Upon consideration of these papers, the stenographic transcript of the grand jury minutes and the Consent Discovery Order entered in this case, this Court disposes of this motion as follows:

**A. MOTION FOR DISCOVERY, DISCLOSURE AND INSPECTION**  
**CPL ARTICLE 240**

The parties have entered into a stipulation by way of a Consent Discovery Order consenting to the enumerated discovery in this case. Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 240. If there any further items discoverable pursuant to Criminal Procedure Law Article 240 which have not been provided to defendant pursuant to the Consent Discovery Order, they are to be provided forthwith.

As to the defendant's demand for exculpatory material, the People have acknowledged their continuing duty to disclose exculpatory material at the earliest possible date upon its discovery (*see, Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]). In the event that the People are, or become, aware of any material which is arguably exculpatory and they are not willing to consent to its disclosure to the defendant, they are directed to immediately disclose such material to the court to permit an *in camera* inspection and determination as to whether the material must be disclosed to the defendant.

Except to the extent that the defendant's application has been specifically granted herein, it is otherwise denied as seeking material or information beyond the scope of discovery (*see, People v Colavito*, 87 NY2d 423 [1996]; *Matter of Brown v Grosso*, 285 AD2d 642 [2d Dept 2001]; *Matter of Brown v Appelman*, 241 AD2d 279 [2d Dept 1998]; *Matter of Catterson v Jones*, 229 AD2d 435 [2d Dept 1996]; *Matter of Catterson v Rohl*, 202 AD2d 420 [2d Dept 1994]).

## B. MOTION TO INSPECT, DISMISS AND/OR REDUCE

The court grants the defendant's motion to the limited extent that the court has conducted, with the consent of the People, an *in camera* inspection of the stenographic transcription of the grand jury proceedings. Upon such review, the court decides the motion as follows:

The minutes reveal a quorum of the grand jurors was present during the presentation of evidence, that the Assistant District Attorney properly instructed the grand jury on the law, and only permitted those grand jurors who heard all the evidence to vote the matter.

The grand jury was properly instructed (*see People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]). The evidence presented, if accepted as true, is legally sufficient to establish every element of each offense charged (CPL 210.30[2]) except where discussed below. "Courts assessing the sufficiency of the evidence before a grand jury must evaluate whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted--and deferring all questions as to the weight or quality of the evidence--would warrant conviction" (*People v Mills*, 1 NY3d 269, 274-275 [2002]). Legally sufficient evidence means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof (CPL 70.10[1]; *see People v Flowers*, 138 AD3d 1138, 1139 [2d Dept 2016]). "In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v Jessup*, 90 AD3d 782, 783 [2d Dept 2011]). "The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference. That other, innocent inferences could possibly be drawn from those facts is irrelevant to the sufficiency inquiry as long as the Grand Jury could rationally have drawn the guilty inference" (*People v Bello*, 92 NY2d 523, 526 [1998]).

Upon its review of the evidence in the light most favorable to the People and construing all inferences in favor of the People that the evidence allows, the Court is compelled to find that the People have not met their burden at this stage of the case with respect to Counts 3-8 of the indictment which allege assault in the first degree under Penal Law § 120.10 (4) and robbery in the first degree under Penal Law § 160.15 (1) and (3) and accordingly, dismisses those six counts.

In particular, with respect to the robbery charges (counts 6-8), the Court finds that the People have not shown that the Defendant acted with the requisite intent to commit a forcible stealing, that is, that his conscious objective for using force was to compel his victim into either giving up property or to overcome the victim's resistance to having his property taken (*People v Smith*, 79 NY2d 309 [1992]). There is no rational inference the Court could draw, based on the evidence as it was presented, that the Defendant had any conscious objective towards the money that the victim was counting when the Defendant began assaulting him nor is there any evidence showing that he was even consciously aware of the money at any time before or during the assaults. Indeed, the defendant stated his purpose for assaulting the victim and that was vengeance for a rumor he had heard about the victim abusing his mother. The rational inferences the Court does draw based on the testimony is that the money and the taking of the money was wholly tangential to the assaults. The Court does feel that he intended to take the money when he did, but cannot, without more evidence, draw the inference that his purpose for committing the assaults was to forcibly take the money or render the victim unable to resist the taking of

the money. Additionally, the theory on which the People based three counts of assault in the first degree (counts 3-5) and the theory under which the grand jury was instructed was that the Defendant assaulted the victim during the course of a first degree robbery and specifically not some other available felony. Accordingly, counts 3-5 cannot be sustained either.

The Court finds no problems with the proof adduced that supports the charges in counts 1 and 2 and counts 9-11.

Based upon the *in camera* review, since this court does not find release of the grand jury minutes or any portion thereof necessary to assist it in making any determinations and as the defendant has not set forth a compelling or particularized need for the production of the grand jury minutes, defendant's application for a copy of the grand jury minutes is denied (*People v Jang*, 17 AD3d 693 [2d Dept 2005]; CPL 190.25[4][a]).

### C. MOTION TO STRIKE ALIBI NOTICE

The Defendant's motion to strike the alibi notice is denied. Contrary to the Defendant's contentions, it is well-settled that CPL 250.00 is indeed in compliance with the constitutional requirements (*see People v Dawson*, 185 AD2d 854 [2d Dept 1992]; *People v Cruz*, 176 AD2d 751 [2d Dept 1991]; *People v Gill*, 164 AD2d 867 [2d Dept 1990]) and provides equality in the required disclosure (*People v Peterson*, 96 AD2d 871 [2d Dept 1983]; *see generally Wardius v Oregon*, 412 US 470 [1973]).

### D. MOTION FOR SANDOVAL AND VENTIMIGLIA HEARINGS

Defendant has moved for a pre-trial hearing to permit the trial court to determine the extent, if at all, to which the People may inquire into the defendant's prior criminal convictions, prior uncharged criminal act, and vicious or immoral conduct (*see, People v Sandoval*, 34 NY2d 371 [1974]). The People have consented to, and it is now ordered that immediately prior to trial the court will conduct a *Sandoval* hearing.

At the hearing, the People are required to notify the defendant of all specific instances of his criminal, prior uncharged criminal acts and vicious or immoral conduct of which they have knowledge and which they intend to use in an attempt to impeach the defendant's credibility if he elects to testify at trial (CPL 240.43). The defendant shall then bear the burden of identifying any instances of his prior misconduct that he submits the People should not be permitted to use to impeach his credibility. The defendant shall be required to identify the basis of his belief that each event or incident may be unduly prejudicial to him should he decide testify as a witness on his own behalf and thereby prevent him from exercising this right (*see, People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).


Defendant's application for a *Ventimiglia* hearing is denied as premature, because the People have not indicated an intention to use any evidence of prior bad act or uncharged crimes of the defendant in its case in chief (*see, People v Molineaux*, 168 NY2d 264 [1991]; *People v Ventimiglia*, 52 NY2d 350 [1981]). The People have stated that if they do intend to use any *Molineaux* evidence that they will inform the defense and the court of their intention and at that point the defendant may renew this aspect of his motion.

E. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY  
CPL ARTICLE 710

This motion is granted to the extent that a hearing shall be held to consider whether or not the noticed identifications were unduly suggestive (*United States v Wade*, 388 US 218 [1967]). Specifically, the court shall determine whether the identifications were so improperly suggestive as to taint any in-court identification. In the event the identifications are found to be unduly suggestive, the court shall then go on to consider whether the People have proven by clear and convincing evidence that an independent source exists for such witness' proposed in-court identification.

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York  
November 19, 2018

  
Honorable George E. Fufidio  
Westchester County Court Justice

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