

**People v Johnson**

2019 NY Slip Op 34182(U)

January 4, 2019

County Court, Westchester County

Docket Number: 18-0586

Judge: Anne E. Minihan

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**FILED  
AND  
ENTERED**  
ON 1-7-2019  
**WESTCHESTER  
COUNTY CLERK**

COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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

- against -

DECISION AND ORDER

ROBERT JOHNSON,

**FILED** No. 18-0586

Defendant.

JAN - 7 2019

-----X  
Minihan, J.,

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

An indictment has been filed against the defendant charging him with intimidating a Witness in the 3<sup>rd</sup> Degree, Menacing in the 3<sup>rd</sup> Degree and Harassment in the 2<sup>nd</sup> Degree (two counts). The allegations are that on May 9, 2018, at approximately 7:00 a.m. at 401 South 8<sup>th</sup> Avenue in the City of Mount Vernon, that the defendant did, while knowing that Laketa Sutton, the alleged victim in a pending criminal case who possessed information relating to that criminal transaction which had occurred the previous day, did attempt to compel her from communicating this information to the court by instilling fear of physical injury to her. It is further alleged, that Mr. Johnson did commit these actions by physical menace and did place Ms. Sutton in fear of imminent physical injury and did intentionally harass, annoy and alarm her by threatening to kill her if the criminal case went forward. It is further alleged that, in so doing, Mr. Johnson subjected Ms. Sutton to physical contact by throwing a cup of hot water on her face and body. October 20, 2016 and again on November 3, 2016, that the defendant did knowingly and unlawfully sell, and possess with the intent to sell, a quantity of cocaine which he exchanged with a confidential informant in exchange for United States currency. The only pre-trial hearing that was requested and not waived was a Sandoval hearing that commenced and was concluded on January 4, 2019.

Like every other witness in a civil or criminal matter, a defendant who chooses to testify on his own behalf at a criminal trial may be cross examined regarding prior crimes and bad acts which bear upon his credibility, veracity or honesty (*see People v Hayes*, 97 NY2d 203, 207 [2002]; *People v Bennett*, 79 NY2d 464, 468 [1992]; *People v Marable*, 33 AD3d 723, 726 [2d Dept 2006]; *see People v Sandoval*, 34 NY2d 371[1974]). Although the questioning about prior crimes and past conduct is not automatically precluded simply because the crime or conduct inquired about is similar to the crime charged (*see People v Hayes*, 97 NY2d at 208; *People v Walker*, 83 NY2d 455, 459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]), "cross-examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial, in view of the risk, despite the most clear and forceful

limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility” (*People v Sandoval*, 34 NY2d at 377; see *People v Brothers*, 95 AD3d 1227, 1228-1229 [2d Dept 2012]). Thus, “a balance must be struck between, on the one hand, the probative worth of evidence of prior specific criminal, vicious or immoral acts on the issue of the defendant’s credibility, and, on the other, the risk of unfair prejudice to the defendant, measured both by the impact of such evidence if it is admitted after his testimony and by the effect its probable introduction may have in discouraging him from taking the stand on his own behalf” (*People v Sandoval*, 34 NY2d at 375). By so doing, the defendant may make an informed decision as to whether or not to testify at his trial (*People v Sandoval*, 34 NY2d at 375).

The People seek leave to use fourteen of the defendant’s prior convictions, related to 6 separate incidents, all of which occurred in the City of Mount Vernon and all of which were procured by defendant’s pleas of guilty on the same date – June 25, 2018. On that date, the defendant pled guilty to Criminal Mischief in the 4<sup>th</sup> degree (in connection with an incident wherein he kicked and damaged a cell door and police desk), Criminal Mischief in the 4<sup>th</sup> Degree, Petit Larceny, Resisting Arrest, Obstructing Governmental Administration in the 2<sup>nd</sup> Degree and Harassment in the 2<sup>nd</sup> Degree (in connection with an incident in which the defendant entered a deli, took a sandwich and thereafter threatened the clerk who tried to stop him, fought with and threatened police who effected his arrest and was in possession of a BB gun and spit in the face of a member of the Mount Vernon Police Department), Criminal Mischief in the 4<sup>th</sup> Degree (in connection with an incident wherein the defendant climbed on top of an unoccupied mobile police command center, ripped off the antenna and caused damage to the control center and, as to this conviction, the People seek to inquire as to the facts of this incident), Assault in the 3<sup>rd</sup> Degree, Criminal Mischief in the 4<sup>th</sup> Degree, Resisting Arrest and Obstructing Governmental Administration in the 2<sup>nd</sup> Degree (in connection with an incident wherein the defendant entered a the same deli as previously mentioned and yelled at both a customer and the same clerk involved in the previously mentioned incident, punched the customer and fought with both the customer and clerk, damaged property and fought with police who effected his arrest and, as to these convictions, the People seek to inquire as to the facts of the incident), Criminal Contempt in the 2<sup>nd</sup> Degree (in connection with an incident wherein the defendant was observed by police in a vehicle with a woman in whose favor an order of protection had been issued against the defendant and, as to this incident, the People seek to use the date of its occurrence [February 7, 2017]) and Criminal Mischief in the 4<sup>th</sup> Degree and Criminal Contempt in the 2<sup>nd</sup> Degree (in connection with an incident wherein the defendant kicked the door of the same woman previously mentioned in whose favor an order of protection had been issued against the defendant).

The People also seek to leave to inquire as to a July 12, 2017 conviction for Petit Larceny (in connection with an incident wherein the defendant punched an individual, threatened him and took his wallet and money) and another conviction on that same date for Petit Larceny (in connection with an incident wherein the defendant went into a Metro PCS store, asked to see 2 cellular telephones and then walked out of the store with the phones). Finally, the People ask that they be permitted to inquire as to two of the defendant’s felony convictions, the first of which occurred on November 1, 2017 for Criminal Possession of a Weapon in the 2<sup>nd</sup> Degree and the second which occurred on June 4, 2007 for Criminal Sale of a Controlled Substance in the 3<sup>rd</sup> Degree. As to these two, the People seek to be permitted to inquire only as to whether the

defendant was convicted of felonies and the date of the convictions. They do not seek to inquire as to the defendant's parole violation, his several pending criminal matters or the defendant's 2005 conviction for Aggravated Unlicensed Operation of a Motor Vehicle in the 3<sup>rd</sup> Degree.

The People principally argue that they should be given leave to inquire as to these convictions, as set forth above, because they are relevant to the defendant's testimonial credibility, veracity and honesty and demonstrative of his willingness to place his own interests above that of society. As to the defendant's prior conviction for Assault in the 3<sup>rd</sup> Degree, the People maintain that the incident was a calculated, not impulsive, act of violence and thus is germane to the defendant's apparent willingness to advance his own interests above those of the community.

Defendant seeks a compromise under which the People would be permitted to inquire whether the defendant had two or three prior convictions. He maintains that they should not be permitted to cross examine him any further as to his prior convictions because prejudice would inure to him and because in several instances the underlying facts are similar to those alleged in the instant case. The defendant contends that he has testimony to offer at this trial related to the conversation which preceded the event giving rise to the charges and that since the video evidence does not also have sound, his own version of what transpired is essential to his defense and thus that there is a particular reason why his prior criminal history should not adversely affect his decision as to whether to testify.

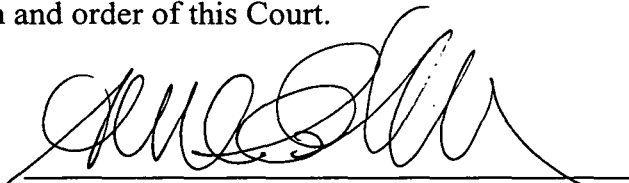
To properly balance the probative value of the defendant's prior convictions against any potential for undue prejudice, and to permit the defendant the opportunity to make an informed and meaningful decision as to whether he should testify at the trial, the court directs a *Sandoval* compromise pursuant to which the People will be permitted to inquire on cross examination of the defendant, should he choose to testify, as to whether he has been convicted of two felonies and more than ten misdemeanors. They may use the dates of these convictions but they are precluded from questioning the defendant as to the specific offenses or the underlying facts. By limiting impeachment questioning in this way, any undue prejudice which could result from the fact that many of the defendant's prior convictions involved behavior that was violent, menacing and threatening in a fashion not dissimilar to the facts alleged here will be obviated. The defendant's prior convictions, particularly for Criminal Contempt, Petit Larceny, Criminal Mischief, Resisting Arrest and Obstruction of Governmental Administration, but also for Criminal Possession of a Weapon and Criminal Sale of a Controlled Substance, sufficiently bear upon the defendant's demonstrated willingness to advance his own interests above those of the community over and over again however the combative and assaultive behavior leading to or underlying the convictions about which the People seek leave to question the defendant as to the facts, are not sufficiently probative on the issue of testimonial credibility to permit factual inquiry at the expense of the prejudice which would likely result in the eyes of the jury.

The defendant may not use the *Sandoval* ruling as both a sword and a shield (*see People v Marable*, 33 AD3d at 725). If the defendant chooses to testify and then deny or equivocate as to having been convicted, or should he contend that in prior cases he never engaged in the sort of behavior of which he is accused here, or that he pleaded guilty in prior cases because he was in fact guilty and did not plead guilty here because he is not guilty, he will have opened the door to

cross examination exploring his true motivation for the prior guilty pleas and the People will, upon their application to the court, be permitted to impeach his credibility with questions about the underlying facts of his prior criminal convictions (*People v Fardan*, 82 NY2d 638, 646 [1993]; *People v Thomas*, 47 AD3d 850 [2d Dept 2008]; *People v Mirable*, 33 AD2d at 725). The defendant is thus cautioned not to misuse the protection afforded him under this ruling. If the People believe that the defense has opened the door, and seek either a curative instruction or for leave to use prior convictions, violations of probation, or uncharged crimes that were limited by this decision and order they shall raise the issue outside the presence of the jury and the matter will be addressed at that time.

This constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York  
January 4, 2019



Hon. Anne E. Minihan, A.J.S.C

TO:

HON. ANTHONY A. SCARPINO  
District Attorney, Westchester County  
By: Brian Bendish, Esq.  
Assistant District Attorney

RICHARD FERRANTE, ESQ.  
Counsel to Defendant Robert Johnson