People v Moore
2019 NY Slip Op 34191(U)
March 14, 2019
County Court, Westchester County
Docket Number: 18-0648
Judge: Anne E. Minihan

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION and ORDER
Indictment Number: 18-0648

AUGUSTUS MOORE and
MADISYN PETTAWAY,

Defendants.

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Minihan, J.,

An indictment has been filed against the defendants charging them with Robbery in the 1st Degree (two counts), Burglary in the 1st Degree (two counts), Robbery in the 2nd Degree (Two counts), Burglary in the 2nd Degree and Grand Larceny in the 3rd Degree. Defendant Augustus Moore is charged individually with Criminal Possession of a Weapon in the 3rd Degree and defendant Madisyn Pettaway is charged individually with Criminal Possession of a Weapon in the 4th Degree. The People allege that on January 18, 2018, at approximately 4:45 a.m., at 210 Pelham Road, Apartment 2P in the City of New Rochelle that defendants Moore and Pettaway, while aiding, abetting and acting in concert with each other and another person or persons did knowingly enter and remain unlawfully in the home of Deandre Young with the intent to steal property from Mr. Young, that they did forcibly steal clothing, money and jewelry from Mr. Young and that in so doing, Mr. Moore pointed a black firearm at Mr. Young. It is alleged that both defendants, while aiding, abetting, and acting in concert with each other and another did possess that black firearm.

Defendant Moore, claiming to be aggrieved by the improper or unlawful acquisition of evidence, has moved to suppress a statement allegedly made by him to three members of the New Rochelle Police Department on May 7, 2018 while he was being transported from the parole office in the Bronx to the New Rochelle Police headquarters wherein he repeatedly asked where they were going, claimed never to have been in New Rochelle before, and, upon passing a newly-built building, remarked that it had not been there when he had been in New Rochelle previously.

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Defendant Moore seeks suppression of this statement on the ground that the statement was involuntarily made within the meaning of CPL 60.45. Defendant Moore also moved to suppress a noticed identification which was allegedly made of him by Deandre Young from a blinded photographic array procedure which took place at New Rochelle Police headquarters on March 19, 2018. Finally, defendant Moore seeks a *Sandoval* ruling by the court.

Defendant Pettaway seeks for suppression of three noticed identifications allegedly made of her by Mr. Young from single photographs on January 29, 2018 at New Rochelle Police headquarters.

By Decision and Order dated October 29, 2018, this court (Schwartz, J.,), granted so much of the defendants' motions as sought suppression of defendant Moore's noticed statement of May 7, 2018 to the extent that a hearing pursuant to *People v Huntley* (15 NY2d 72 [1965]) was ordered to be held prior to trial for the purposes of determining the admissibility and voluntariness of the noticed statement (CPL 710.30[1][a]; CPL 710.20[3]; CPL 710.60[3][b]).[1] As to the defendants' motion to suppress noticed identifications, their applications were partially granted by the court to the extent that a hearing was ordered to be held prior to trial to determine whether these noticed identifications were unduly suggestive such that they would taint any in-court identification of the defendant at trial (*United States v Wade*, 388 US 218 [1967]). In the event that any of these noticed identifications were held to be impermissibly suggestive, the hearing court would, in that instance, consider whether the People have proven by clear and convincing evidence that an independent source exists for the witness's proposed in-court identification.

On March 11, 2019, combined *Huntley, Wade/Rodriguez, Mapp/Dunaway* and *Sandoval* hearings were conducted before this court at which the People called four witnesses: Detectives Evangelos Geralis, Joseph Savoca, Christopher Greco and Marc Weinerman, all from the New Rochelle Police Department. Received into evidence at the hearing were the following exhibits: three single photographs of defendant Pettaway, a photographic array consisting of two stapled pages each of which contains the same six photographs (one labeled with the names of the individuals depicted and the other without) and the photo array instruction form. The defense called no witnesses and offered no evidence.

The court finds the testimony offered by the People's witness to be plausible, candid, and fully credible and makes the following findings of fact and conclusions of law.

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[1]While the People noticed the testimony defendant gave to the grand jury, the defendant conceded there was no basis for suppression and thus it was not, pursuant to agreement, part of the pre-trial hearings.

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FINDINGS of FACT

On January 18, 2018, Detective Evangelos Geralis, a 22 year veteran with the New Rochelle Police Department, was assigned to the General Investigations Unit and directed to lead the investigation of a robbery occurring earlier that morning at 210 Pelham Road in the City of New Rochelle. Pursuant to that investigation, he spoke with Deandre Young who told him that he had dated and had a sexual relationship with a woman named Madisyn since the summer of 2017, approximately the previous five to six months. Although Mr. Young was not able to tell Detective Geralis Madisyn's last name, he related that she lived in an apartment near Arthur Avenue, that she had been to his apartment on a number of occasions and that he had, in fact, left her alone in his apartment on previous occasions. Since his cellular telephone had been stolen in the robbery, Mr. Young was unable to give the detective Madisyn's contact information but, using a New Rochelle Police Department issued cellular telephone, pulled up Madisyn's public Snapchat account and showed the detective the photograph linked to that account (People's exhibit 1).

In the days that followed, a subpoena was issued to Snapchat to obtain the subscriber information for Madisyn's social media account which allowed the detective to then obtain the cellular telephone number and e-mail address linked to that account. Using the e-mail information from the Snapchat account, Detective Geralis discovered a public Facebook account using the same e-mail address and observed that the same photograph that Mr. Young had identified as Madisyn from the Snapchat account had also been used on Facebook. Detective Geralis printed out two other photographs posted in this Facebook account (People's exhibits 2 and 3) and, on January 29, 2018, met with Mr. Young to show him the pictures in an effort to confirm that this was the same Madisyn. Mr. Young viewed the photographs and told the detective that they were in fact of the same individual. When he had been shown the Snapchat photograph, Mr. Young had signed the photograph and written "This is a photo from Madisyn Snapchat." When shown the first of the two pictures the detective had pulled from the public Facebook account, Mr. Young said "Yeah, that's her" and signed the picture. When shown the second Facebook photograph, Mr. Young signed the photograph on which he wrote "This is Madisyn." At the top of this photograph is handwritten "Madisyn Michelle Pettaway DOB 8.24.1995." Detective Geralis testified that another detective had written this information at the top but that he could not recall whether that had been done before or after Mr. Young was shown the photograph on January 29, 2018.

On March 13, 2018, Mr. Young called Detective Geralis and said that on defendant's Pettaway's Instagram account, he had located one of the men who had robbed him and he reported that his name was Augustus Moore. Mr. Young reported that he observed some of the clothing that had been stolen from him in the photograph and that he recognized the individual wearing his clothing. He then e-mailed the detective defendant Moore's photograph which he had reportedly observed on defendant Pettaway's Instagram account but actually captured from defendant Moore's Instagram account. Detective Geralis ran defendant Moore's name, which he had learned from Mr. Young, through DCJS to obtain his photograph, which he compared to the Instagram photograph sent to him by Mr. Young. After ascertaining that they both depicted the same individual, Detective Geralis prepared a photographic array.

In preparing the array, Detective Geralis pulled defendant Moore's photograph from DCJS and, by inputting defendant Moore's gender, race, facial hair, height, weight and age, obtained a number of photographs from which he chose five filler photographs of men who he thought looked like defendant Moore. In selecting filler photographs, the relative darkness or lightness of complexion is not one of the characteristics input into the system and, in his testimony, Detective Geralis explained that the photographs do not always depict the true complexion of the individual. The actual array that resulted was composed of two pages. The first page contained only the six photographs under the banner "NEW YORK STATE CJIMS New Rochelle Police Department/General Investigations Unit LINE UP." The second page differed from the first in that the photographs, while the same and in the same order as the first, are slightly smaller and, notably the names, arrest numbers and NYSID numbers appear underneath each of the six photographs on that second page.

When the array was completed, he asked Detective Joseph Savoca, assigned to the Property Theft Unit and entirely uninvolved in the robbery investigation, to show the array to Mr. Young. When Detective Savoca agreed, Detective Geralis handed him a folder which contained both pages of the array (either stapled together as it appeared at the hearing or not) along with a single page of printed instructions (People's exhibits 4, 5, 5a). Detective Geralis did not use defendant Moore's name in speaking with Detective Savoca and he had no reason to believe that Detective Savoca knew defendant Moore or that he was the suspect.

In his testimony, Detective Savoca, a 28 year veteran of the New Rochelle Police Department, confirmed that he had not been involved in any way in the instant robbery investigation and that Detective Geralis is a colleague who works in a different unit and office than he. He recalled meeting with Detective Geralis on March 19, 2018 and being asked to show Mr. Young a photographic array. He was given a packet with the photographic array and instruction sheet but was not told who was in, or not in, the array and nothing was communicated to him about what position the suspect's photograph had been placed. Before showing Mr. Young the photographic array, he read the instruction form verbatim (People's exhibit 4). In so doing, he told Mr. Young, in substance, that "[a]s part of the ongoing investigation into a crime that occurred on [January 18, 2019] at 210 Pelham Rd. Apt 2P [he would] view a photo array" consisting of six photographs each with a number underneath it. He further told Mr. Young that he should take whatever time he wanted to view the array, that the perpetrator's photograph might or might not be among the photographs he was being asked to view, that he should not assume that he [Detective Savoca] knew the identity of the perpetrator, that he should not look to him or anyone else for guidance during the procedure, that the individuals depicted in the photograph might not appear as they had on the date of the incident because features such as hair styles and facial hair are subject to change, that photographs might not depict the true complexion of the people who might be lighter or darker than they appear, that he should pay no attention to markings that might appear on the photographs. Finally, Detective Savoca told Mr. Young that, after he had the opportunity to view the array, he would be asked whether he recognized anyone, if so, the number of the photograph of the person he recognized, and from where he recognized the person. Mr. Young initialed the form after the directions were read to him.

After Mr. Young initialed the instruction sheet, Detective Savoca pulled the array from the folder and showed him the first page only (People's exhibits 5, 5a).[2] Within "a few seconds," Mr. Young chose defendant Moore's photograph (which was the second photograph in the array), identifying him as the person who had robbed him by stating, "That's the guy that robbed me. Him and two other guys." Detective Savoca, who testified that he did not at that time know the name of the person whose photograph had been selected, told Mr. Young to circle the photograph of the individual he selected and place his initials and the date on the photograph itself. Mr. Young complied. Later, Detective Savoca returned the folder and told Detective Geralis that Mr. Young had selected the person depicted in the photograph in the second position. Detective Geralis testified that the individual in that photograph was defendant Moore and, at the hearing, he identified defendant Moore.

On April 4, 2018, Detective Geralis secured an arrest warrant for defendant Moore and later, after learning that defendant Moore was, at that time, incarcerated at Riker's Island on a parole violation, asked that the New Rochelle Police Department be contacted upon his release. This was apparently not done as, approximately one month later, on May 7, 2018, Detective Geralis was informed by his supervisor that a parole officer had contacted the New Rochelle Police Department seeking confirmation that the warrant was still active because defendant Moore was in a parole office in the Bronx.

Later, in the afternoon of May 7, 2018, Detectives Savoca, Christopher Greco and Mark Weinerman were assigned to transport defendant Moore from the parole office in the Bronx to

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[2] It was unclear from the hearing testimony whether the first and second pages of the array were stapled together when shown to Mr. Young or whether the first page only was shown to Mr. Young but it certainly appears likely that the array that was given to Mr. Young to view had the second page with identifying names under the first page and that it was the first page that was actually shown to the witness. Despite the testimony of Detective Geralis that the names under the photographs in the second page are not legible through the first, counsel for defendant Moore maintains that they are and that, at minimum, the names under the photographs in the fourth, fifth and sixth positions can be seen when the first sheet is on top of the second, essentially rendering a six photograph array a three photograph array, since Mr. Young knew defendant Moore's name at the time the identification procedure was conducted and thus, could have excluded the bottom three photographs after reading the names.

Upon examining the original two page array itself (People's exhibit 5a), the court concludes that while it is possible, with close inspection, to discern that there are names under the fourth, fifth and sixth photographs, and that it might be reasonable to conclude that even closer inspection might reveal that identifying names under the first three photographs are also present on the array's second sheet, none of the six names on the second page are readily legible through the first. Since the credible hearing testimony is that Mr. Young viewed the array for only "a few seconds," the court concludes that the first sheet was sufficiently opaque such that the second sheet was not, under the circumstances present here, visible.

New Rochelle Police headquarters. When they arrived, they found defendant Moore, detained in handcuffs. The handcuffs were swapped, Detective Greco was given a bag containing defendant Moore's personal property and then they transported him to New Rochelle Police headquarters in an unmarked police vehicle. Following a directive given to them, none of the officers spoke with the defendant during the twenty to thirty minute trip. Detective Weinerman testified that during the journey, defendant Moore repeated over and over, "Why am I going to New Rochelle? I've never been to New Rochelle before" and that, as they neared headquarters, that the defendant remarked upon passing a newly-built building, "That building was not here the last time I was here." None of the detectives responded to any of defendant Moore's statements. Upon reaching headquarters, the bag of personal property, which was contained two cellular telephones, headphones a charger and other items, was inventoried and placed in a locker that was numbered to correspond to the cell that defendant Moore had been placed in.

CONCLUSIONS of LAW

Mapp/Dunaway

Defendant Moore was placed under arrest upon the strength of an arrest warrant issued out of the City Court of New Rochelle with information that was provided by Detective Geralis. The credible evidence adduced at the hearing establishes the existence of a validly-issued and outstanding warrant pursuant to which defendant Moore was arrested (*see People v Jennings*, 54 NY2d 518, 522 [1981]; *People v Boone*, 269 AD2d 459 [2d Dept 2000]). The law recognizes the prima facie validity of police action where there has been a judicial evaluation and thus a magistrate's consideration of the arrest warrant application generates a presumption that the arrest was issued upon probable cause (CPL 120.20). Since defendant Moore failed to challenge the reliability of the information conveyed to police or the validity of the warrant itself, the presumption of probable cause remained and the People were not required to produce the arrest warrant itself as part of their evidentiary showing (*People v Jenkins*, 47 NY2d 722 [1979]; *People v McCloud*, 182 AD2d 835 [2d Dept 1992]). Accordingly, the People met their burden of demonstrating the legality of police conduct in defendant Moore's arrest.

Defendant Moore has also moved to controvert the search warrant executed in this case with respect to the cellular telephones that were found among his property at his arrest. The contents of a person's cellular telephone implicates the protections of the Fourth Amendment and, absent exigent circumstances, can be searched, incident to arrest, only after a warrant has been issued by a magistrate (*Riley v California*, __ US __; 134 SCt 2473 [2018]). Once approved by a reviewing magistrate, it is presumptively valid; however a defendant is still entitled to challenge the issuance of the search warrant (*Franks v Delaware*, 438 US 154 [1978]; *People v Bigelow*, 66 NY2d 417 [1985]).

The court has examined a copy of the search warrant that was signed by Hon. Anthony Carbone and the sworn affidavit of Detective Geralis as well as the parties' motion papers. Based on this review, defendant's motion to controvert the search warrant is denied in its entirety. Detective Geralis submitted a sworn affidavit regarding an armed robbery occurring on January 18, 2018 at 210 Pelham Road, Apartment 2P in New Rochelle that he and his fellow detective, Michael O'Rourke investigated. Pursuant to that investigation, they spoke with Deandre Young who stated that he had been in a relationship with a woman named "Madison" since the previous summer, that she had been to his apartment on several occasions; that he had left her alone there in fact from time to time and that on the day preceding the robbery, "Madison" had called him asking to buy some of the clothing that he fabricates in his apartment. Mr. Young reported that when "Madison" arrived on the evening of the incident, she appeared to be preoccupied and was observed texting on her cellular telephone. Detective Geralis averred that video recovered from 210 Pelham Road showed three males using cellular telephones while waiting to enter the building and then, following the incident, the video depicted these males getting into the same vehicle as "Madison" and drive off. As reported in detail by Detective Geralis, Mr. Young described the armed robbery that occurred as well as the subsequent investigative steps through which defendant Moore was identified as a suspect and then arrested pursuant to an arrest warrant. These facts as set forth in detail in the affidavit formed the basis for Detective Geralis' belief that evidence of the robbery of Mr. Young and the burglary of his apartment could be recovered from defendant Moore's cellular telephones.

Upon review of Detective Geralis' sworn affidavit, Judge Carbone reasonably concluded that probable cause existed to issue a search warrant of the cellular telephones that were in defendant Moore's possession at his arrest and, as he had the opportunity to determine first-hand, whether there was a sufficient basis to issue the search warrant, no further determination is required by this court (*see People v Keves*, 291 AD2d 571 [2d Dept 2002]; *see generally People v Badilla*, 130 AD3d 744 [2d Dept 2015]; *People v Elysee*, 49 AD3d 33 [2d Dept 2007]). Defendant Moore has failed to demonstrate that the warrant was based upon a sworn affidavit containing false statements made knowingly or intentionally, or with reckless disregard for the truth (*People v McGeachy*, 74 AD3d 989 [2d Dept 2010]). Accordingly, as the warrant was adequately supported by probable cause and was otherwise issued in accord with the mandates of Article 690 of the Criminal Procedure Law, defendant Moore's motion to controvert the search warrant is denied.

Huntley

The test for whether a statement is truly spontaneous is whether it was spoken by a defendant "without apparent external cause" (*People v Stoesser*, 53 NY2d 648, 650 [1981]). That is, courts look to whether a defendant spoke with true spontaneity and not as the result of "inducement, provocation, encouragement or acquiescence, no matter how subtly employed" (*People v Maerling*, 46 NY2d 289, 302-303 [1978]; *see People v Lanahan*, 55 NY2d 711, 713 [1981]; *People v Stoesser*, 53 NY2d at 650).

Here, there is no question but that the noticed statements attributed to defendant Moore were truly spontaneous. The credible evidence reveals that, consistent with their directive not to speak to defendant Moore, that none of the three transporting detectives spoke as much as a single word to him during the twenty to thirty minute ride from the parole office in the Bronx to New Rochelle Police headquarters. Neither is there record evidence to suggest that any of these officers engaged in any non-verbal behavior having the design or effect of procuring a statement. Accordingly, that branch of the defendant Moore's omnibus motion which is to suppress his statement to police is denied in all respects.

Wade/Rodriguez

When a defendant challenges an identification procedure as unduly suggestive, the People have the initial burden of going forward to establish the reasonableness of police conduct and the lack of undue suggestiveness (*see People v Coleman*, 73 AD3d 1200, 1203 [2d Dept 2010]). At a *Rodriguez* hearing, the People bear the burden to demonstrate that the police-arranged identification procedure was merely confirmatory as a result of the defendant been known to the witness to such a degree so as to be impervious to police suggestion (*People v Rodriguez*, 79 NY2d 445, 452 [1992]). The confirmatory identification exception requires a case-by-case analysis which "rests on the length and quality of prior contacts between [the] witness and [the] defendant, but always requires a relationship which is more than 'fleeting or distant'" (*People v Waring*, 183 AD2d 271, 274 [2d Dept 1992], quoting *People v Collins*, 60 NY2d 214, 219 [1983]).

Although no single factor is determinative, under the totality of the circumstances, the court finds that the People sustained their burden to establish that defendant Pettaway was so well known to Mr. Young as to have made Mr. Young impervious to police suggestion. The credible record evidence demonstrates that in the five to six months leading up to the incident, Mr. Young and defendant Pettaway were in an intimate, albeit casual, relationship. Although Mr. Young was unable to tell Detective Geralis defendant Pettaway's last name, he relayed that she lived in an apartment near Arthur Avenue, that since the summer of 2017 they had dated, that she had stayed in his apartment when he was there and that he had allowed her to remain in the apartment on occasions when he was not present. He could not share her telephone number with the detective, reportedly because he had her number stored in his cellular telephone which had been stolen in the robbery, he used a police-issued cellular telephone to locate defendant Pettaway's Snapchat account to obtain a photograph to show Detective Geralis. Subsequent police investigation into defendant Pettaway's social media accounts revealed other photographs which Mr. Young confirmed depicted defendant Pettaway. Such is sufficient evidence that the length and quality of the defendant Pettaway's prior interactions with Mr. Young were such that they were known to each other to such a degree such that the so-called identifications of defendant Pettaway from photographs culled from her social media accounts were not subject to police suggestion. Accordingly, defendant Pettaway's motion to suppress the noticed identifications of her is denied in its entirety.

With respect to the identification of defendant Moore by Mr. Young pursuant to a photographic array procedure, it is useful to begin with the observation that but for the information procured by Mr. Young who, of his own initiative, reached out to Detective Geralis to both identify the defendant Moore by his full name and to provide a photograph him, Detective Geralis would not otherwise have had any information from which he could have developed defendant Moore as a suspect, much less assembled the subject photographic array. In this way, the identification that was ultimately made by Mr. Young pursuant to the identification procedure, was initiated by Mr. Young himself who, by the time he had viewed the array, already knew defendant Moore by both name and likeness. So despite that there is no evidence to support that Mr. Young knew or was acquainted with defendant Moore in a way that would render the identification procedure confirmatory, the issue of suggestiveness is less of a concern since the source of the information used to obtain the DCJS photograph of defendant Moore that was used in the array derived directly from Mr. Young himself.

In any event, the defendant's photograph in the array was in no way highlighted or emphasized nor was the array shown to Mr. Young in a suggestive fashion (*People v Anaya*, 206 AD2d 380 [2d Dept 1994]; *People v Burris*, 171 AD2d 668 [2d Dept 1991]). Mr. Young was given detailed cautionary instructions prior to viewing the array by a detective who was wholly uninvolved with the robbery investigation and there is no record evidence that this detective knew that defendant Moore was the suspect or that he made any comment, suggestion or encouragement during the procedure. Neither is there any indication from the record that Mr. Young viewed the array for more than a few seconds before making a positive identification. Of the six photographs which comprised the array, all of the men depicted were generally of the same age, race and appearance. The backgrounds in the photographs differ somewhat; however, the background in the defendant's photograph is virtually identical to the backgrounds in three of the five other photographs. The hairstyles, facial hair and facial expressions were similar in all of the pictures.

On this record, defendant Moore has failed to demonstrate by a preponderance of the evidence that the photographic identification procedure was unduly suggestive; nor has he shown that there was any misconduct by police in the manner in which the procedure was conducted. The court rejects the defense argument that the identification procedure was tainted because the names printed underneath the photographs in the second page of the array were visible, in whole or in part, when Mr. Young viewed the top page of the array. While the paper on which the first page of the array was printed was not entirely opaque, in order to discern that it was potentially possible to see that there were names under the photographs, the array would have had to have been subject to scrutiny of a duration far longer than the testimony suggests Mr. Young viewed the array before making a positive identification. While it certainly would have been better practice to have shown Mr. Young only the first page of the array, there is no evidence to suggest that the array as viewed by Mr. Young was suggestive or otherwise tainted on this ground.

Accordingly, both defendants' motions to suppress the noticed identifications of them are denied and the court need not reach the issue as to whether there was an independent basis for the Mr. Young's in-court identification of either defendant.

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Sandoval

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 those of his 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 Sandoval,* 34 NY2d 371[1974]; *People v Marable,* 33 AD3d 723, 726 [2d Dept 2006]). 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, proposing a *Sandoval* compromise, ask that they be permitted to inquire as to defendant Moore's prior criminal convictions to the extent that, should he choose to testify, they be permitted to cross-examine him as to his July 25, 2016 conviction for Assault in the 2nd Degree, his September 15, 2019 conviction for Assault in the 3rd Degree and his March 5, 2008 conviction for Assault in the 3rd Degree. They seek leave to inquire as to the respective dates of the incidents, the dates of conviction and the crimes of which he was convicted. In so doing, they maintain that each of these bear upon defendant Moore's testimonial credibility and that they are demonstrative of his apparent willingness to place his own interests above those of society and that they would represent a fair compromise in light of the defendant's overall criminal history and prior interactions with the criminal justice system.

Defendant Moore opposes use of his prior criminal convictions in any way whatsoever, pointing out that, inasmuch as the instant charges involve allegations of violence, the jury would view his prior assault convictions as propensity evidence tending to demonstrate that he is a person prone to violence and that this would unduly prejudice him in the eyes of the jury. As to the misdemeanor assault convictions, he maintains that they are too remote to meaningfully bear upon his present testimonial credibility.

In order 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 the following *Sandoval* compromise. Pursuant to this compromise, the People will not be permitted to inquire at all as to the nature of the defendant's prior criminal convictions. In my view the type of crimes of which the defendant was convicted does not bear sufficiently upon the defendant's credibility, honesty or veracity so as to permit inquiry at the risk of unduly deterring the defendant from testifying on his own behalf and subjecting him to prejudice in the eyes of the jurors should he choose to testify. While each certainly does evince the defendant's willingness to place his own interests above those of society, the fact is that two of the three convictions are not particularly recent and that the relative probative value is outweighed by the real and significant danger of these events being perceived by the jury as propensity towards violence, despite whatever curative instruction it was given. Since each of these convictions is demonstrative of defendant Moore's willingness to place his interest above those of the community and thus are germane to his testimonial veracity and integrity, the People may inquire, should the defendant testify, as to whether he has been convicted of a felony and two misdemeanors as well as the dates of the incidents and the dates of conviction. By limiting impeachment questioning in this way, any undue prejudice which could result from the fact that these offenses, like those charged here, involved violence, is ameliorated.

Defendant Moore may not use the *Sandoval* ruling as both a sword and a shield (*see People v Marable*, 33 AD3d 723, 725 [2d Dept 2006]). If he chooses to testify and then deny or equivocate as to having been convicted, or should he claim to have never acted in violence, or should he contend that in that prior cases that he pleaded guilty because he was in fact guilty, and that he 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 plea and the People will, upon their application to the court, be permitted to impeach his credibility with questions about all of the underlying facts of his prior criminal conviction (*People v Fardan*, 82 NY2d 638, 646 [1993]; *People v Thomas*, 47 AD3d 850 [2d Dept 2008]; *People v Mirable*, 33 AD2d at 725). If defendant Moore testifies and opens the door, the People may make their application, outside the presence of the jury, and the court will make a determination at that time.

Defendant Moore 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 his prior convictions 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
March 14, 2019

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

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