

People v Olmos

2019 NY Slip Op 34275(U)

January 18, 2019

County Court, Westchester County

Docket Number: Indictment No. 2018-861

Judge: David S. Zuckerman

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
JAN 18 2019
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

JOSE OLMOS,

Ind. No.: 2018-861

Defendants.

-----X

ZUCKERMAN, J.

Defendant stands accused under Indictment No. 2018-861 of Murder in the First Degree (Penal Law §125.27 [1][a][vii]. As set forth in the Indictment, it is alleged that, on or about July 27, 2018, Defendant, with intent to cause the death of another, caused the death of that other person in the course or commission of, or in immediate flight from, a Robbery, and was over 18 years of age. By Order to Show Cause dated January 9, 2019, with accompanying Affirmation, the People move to compel Defendant to submit to the taking of a DNA sample by a buccal swab. Defendant has responded by correspondence, dated January 15, 2019, indicating that he does not oppose the motion.

THE PEOPLE'S DNA MOTION

The People move, pursuant to Criminal Procedure Law §240.40(2)(b)(v), to compel production by Defendant of a saliva sample via buccal swab in connection with the above-mentioned matter. The swab would then be sent to the New York State Police Forensic Identification Center (FIC) for processing. The People have affirmed that, at the time of Defendant's arrest, he was

wearing dark-colored sweat-pants. Their moving papers also make clear that biological evidence was collected from the sweat-pants, and that subsequent analysis indicates that, in fact, DNA is present thereon. Finally, their moving papers make clear that, subsequent to the incident, the Grand Jury has indicted Defendant for Murder in the First Degree.

In *Matter of Abe. A.*, 56 NY2d 288, 291 (1982), the Court of Appeals held that a court may order an individual to provide a bodily fluid sample if the People establish probable cause to believe the accused has committed the crime charged, there is a "clear indication" that relevant material evidence will be found, and that the method used to secure the evidence is safe and reliable. This standard applies whether or not the suspect has been indicted.

In their Affirmation, the People set forth sufficiently reliable factual allegations to establish that Defendant was known, described and identified as the person who allegedly participated in the above-described criminal acts. Therefore, there is probable cause to believe that these crimes were committed and that this defendant committed them. Combined with evidence that some biological material was recovered from an items seized when he was arrested, the court can say that the taking of defendant's saliva samples via a buccal swab will likely provide relevant evidence. Finally, the samples requested herein would be taken from the defendant by way of buccal swab and, as commonly done, would not

constitute unreasonable intrusions or risks to the health of the defendants.

In sum, the People seek saliva samples to confirm and corroborate that Defendant is the perpetrator of the aforementioned crime. Even if it may or may not be dispositive of any single issue, evidence regarding the source of the DNA recovered from the scene of the crime may be relevant to "logically complete the evidentiary picture and avoid trial smokescreens." *People v Wesley*, 140 Misc2d 306 (County Court, Albany County, 1988); *aff'd* 183 AD2d 75 (3d Dept 1992), *aff'd* 83 NY2d 417 (1994); *People v Russell*, 165 AD2d 327 (2d Dept 1991). Therefore, the People have established *prima facie* entitlement to the relief sought.

Based on the foregoing, the People's unopposed motion for an order directing that Defendant submit to having a saliva sample taken from him is granted. Such sample shall be taken by buccal swabbing the inside cheek of said defendant by qualified medical personnel in the presence of a representative of the Westchester County District Attorney, Westchester County Department of Public Safety and/or local police department. The extraction of the samples shall be taken upon at least three (3) days notice to Defendant's counsel.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 18, 2019



HON. DAVID S. ZUCKERMAN, J.C.C.

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