

**People v Dean**

2019 NY Slip Op 34415(U)

November 19, 2019

County Court, Westchester County

Docket Number: Indictment No. 19-0813

Judge: David S. Zuckerman

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**FILED**

**NOV 20 2019**

**TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER**

COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

**DECISION & ORDER**

BRANDON DEAN and JERMAL LINCOLN,

Ind. No.: 19-0813

Defendant.

-----X

**ZUCKERMAN, J.**

Defendants stand accused under Indictment No. 19-0813 of Robbery in the Second Degree (Penal Law §160.10[1]), Grand Larceny in the Third Degree (Penal Law §155.30[1]), Criminal Possession of Stolen Property in the Third Degree (Penal Law §165.50), Criminal Mischief in the Fourth Degree (Penal Law §145.00[3]), Reckless Driving (Vehicle and Traffic Law §1212), Failure to Stop at a Stop Sign (Vehicle and Traffic Law §1172), and Illegal Use of an ATV on a Highway (Vehicle and Traffic Law §2403[1]). As set forth in the Indictment, it is alleged that, on or about June 25, 2019, Defendants, in Westchester County, New York, while aiding or abetting and acting in concert with another, actually present, forcibly stole property, valued in excess of Three Thousand Dollars. It is further alleged that, on or about June 25, 2019, Defendant Brandon Dean, in Westchester County, New York, operated a motor vehicle in a manner which unreasonably interfered with the free and proper use of a public highway, passed through a clearly marked stop sign without stopping, and operated an ATV on a highway. By Notice of Motion dated October 17 and October 11,

2019, respectively, with accompanying Affirmations, Defendants move for omnibus relief. In response, the People have submitted Affirmations in Opposition dated October 31, 2019.

The motion is disposed of as follows:

**DEFENDANT DEAN**

**A. DISCOVERY AND INSPECTION**

Discovery is granted to the extent provided for in Criminal Procedure Law Article 240 and/or provided by the People. If any items set forth in CPL Article 240 have not been provided to Defendant pursuant to the consent discovery order in the instant matter, said items are to be provided forthwith. Further, the bill of particulars set forth in the voluntary disclosure form provided to Defendant has adequately informed her of the substance of her alleged conduct and in all respects complies with CPL §200.95.

The People acknowledge their continuing duty to disclose exculpatory material (see *Brady v Maryland*, 373 US 83 [1963] and *Giglio v United States*, 405 US 150 [1971]) at the earliest possible date. If the People are or become aware of any material which is arguably exculpatory but they are not willing to consent to its disclosure, they are directed to disclose such material to the Court for its *in camera* inspection and determination as to whether such will be disclosed to the defendant.

To any further extent, including regarding the production of Rosario material at this time, discovery is denied as such material or information is beyond the scope of discovery (see *People v*

*Colavito*, 87 NY2d 423 [1996]; *Matter of Catterson v Jones*, 229 AD2d 435 [2<sup>nd</sup> Dept 1996]; *Matter of Catterson v Rohl*, 202 AD2d 420 [2<sup>nd</sup> Dept 1994]; *Matter of Brown v Appelman*, 241 AD2d 279 [2<sup>nd</sup> Dept 1998]).

**B. MOTION FOR A WADE HEARING**

Defendant moves to suppress a noticed identification procedure pursuant to CPL §710.20(3). The People, in their Affirmation in Opposition, state that there was no impropriety in conducting the show-up identification procedure noticed to Defendant. The People also consent to a hearing. Consequently, the motion to suppress a noticed identification procedure is granted to the limited extent that a *Wade* hearing is ordered to determine the propriety of the noticed identification procedure.

**C. MOTION FOR A HUNTLEY HEARING**

Defendant moves to suppress noticed statements pursuant to CPL §710.20(3) alleging, *inter alia*, that they were made after a seizure that was not based on probable cause. The People, in their Affirmation in Opposition, state that there was no impropriety in obtaining the statements attributable to Defendant. They do, however, consent to a hearing in the issue. Consequently, the motion to suppress noticed statements is granted to the extent that a *Huntley/Dunaway* hearing is ordered to determine the voluntariness of the noticed statements.

**D. MOTION FOR A MAPP/DUNAWAY HEARING**

Defendant moves to suppress all physical evidence which the

People seek to introduce at trial, including that it was the product of an arrest which was not based on probable cause. The People, in their Affirmation in Opposition, state that there was no impropriety in the search of Defendant, which was based on probable cause. Consequently, the motion to suppress physical evidence is granted to the extent that a pre-trial *Mapp/Dunaway* hearing is ordered to determine the propriety of that search and seizure. arrest.

**E. MOTION TO INSPECT THE GRAND JURY MINUTES  
AND TO DISMISS AND/OR REDUCE THE INDICTMENT**

Defendant moves pursuant to CPL §§210.20(1)(b) and (c) to dismiss the indictment, or counts thereof, on the grounds that the evidence before the Grand Jury was legally insufficient and that the Grand Jury proceeding was defective within the meaning of CPL §210.35. On consent of the People, the Court has reviewed the minutes of the proceedings before the Grand Jury.

Pursuant to CPL §190.65(1), an indictment must be supported by legally sufficient evidence which establishes that the defendant committed the offenses charged. Legally sufficient evidence is competent evidence which, if accepted as true, would establish each and every element of the offense charged and the defendant's commission thereof (CPL §70.10[1]); *People v Jennings*, 69 NY2d 103 [1986]). "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 Bello*, 92 NY2d 523 (1998); *People v Ackies*, 79 AD3d 1050 (2<sup>nd</sup> Dept 2010). In rendering

a determination, "[t]he reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of each element of the charged crimes and whether the grand jury could rationally have drawn the inference of guilt." *Bello, supra*, quoting *People v Boampong*, 57 AD3d 794 (2<sup>nd</sup> Dept 2008-- internal quotations omitted).

A review of the minutes reveals that the evidence presented, if accepted as true, would be legally sufficient to establish every element of the offenses charged (see CPL §210.30[2]). Accordingly, Defendant's motion to dismiss or reduce for lack of sufficient evidence is denied.

With respect to Defendant's claim that the Grand Jury proceeding was defective within the meaning of CPL §210.35, a review of the minutes supports a finding that a quorum of the grand jurors was present during the presentation of evidence and at the time the district attorney instructed the Grand Jury on the law, that the grand jurors who voted to indict heard all the "essential and critical evidence" (see *People v Collier*, 72 NY2d 298 [1988]; *People v Julius*, 300 AD2d 167 [1<sup>st</sup> Dept 2002], *lv den* 99 NY2d 655 [2003]), and that the Grand Jury was properly instructed (see *People v Calbud*, 49 NY2d 389 [1980] and *People v. Valles*, 62 NY2d 36 [1984]).

In making this determination, the Court does not find that release of the Grand Jury minutes or certain portions thereof to the parties was necessary to assist the Court.

**F. MOTION FOR SANDOVAL/VENTIMIGLIA/MOLINEUX HEARING**

1. *Sandoval* - Granted, solely to the extent that a *Sandoval* hearing shall be held immediately prior to trial at which time:

A. The People must notify the Defendant of all specific instances of the Defendant's prior uncharged criminal, vicious or immoral conduct of which the People have knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the Defendant (see, CPL §240.43); and

B. Defendant must then sustain his burden of informing the Court of the prior misconduct which might unfairly affect him as a witness in his own behalf (see, *People v. Malphurs*, 111 A.D.2d 266 [2<sup>nd</sup> Dept. 1985]).

2. *Ventimiglia/Molineux* - Upon the consent of the People, in the event that the People determine that they will seek to introduce evidence at trial of any prior bad acts of the Defendant, including acts sought in their case in chief such as the prior crime used to elevate Count 1 of the Indictment to a Felony, they shall so notify the Court and defense counsel and a *Ventimiglia/Molineux* hearing (see *People v Ventimiglia*, 52 NY2d 350 [1981]; *People v Molineux*, 168 NY 264 [1901]) shall be held immediately prior to trial to determine whether or not any evidence of uncharged crimes may be used by the People, including to prove their case in chief. The People are urged to make an appropriate decision in this regard sufficiently in advance of trial to allow any *Ventimiglia/Molineux* hearing to be consolidated and held with

the other hearings herein.

**DEFENDANT LINCOLN**

**A. MOTION TO INSPECT THE GRAND JURY MINUTES  
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B. Defendant must then sustain his burden of informing the Court of the prior misconduct which might unfairly affect him as a witness in his own behalf (see, *People v. Malphurs*, 111 A.D.2d 266 [2<sup>nd</sup> Dept. 1985]).

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**E. MOTION FOR A MAPP/DUNAWAY HEARING**

Defendant moves to suppress all physical evidence which the People seek to introduce at trial. The People, in their Affirmation in Opposition, state that there was no impropriety in the search of Defendant, which was based on probable cause. Consequently, the motion to suppress physical evidence seized at the time of Defendant's arrest is granted to the extent that a pre-trial *Mapp/Dunaway* hearing is ordered to determine the propriety of that search and seizure.

**F. MOTION FOR A WADE HEARING**

Defendant moves to suppress a noticed identification procedure pursuant to CPL §710.20(3). The People, in their Affirmation in Opposition, state that there was no impropriety in conducting the noticed photo array with the complaining witness<sup>1</sup>, and consent to a hearing. Consequently, the motion to suppress a noticed identification procedure is granted to the limited extent that a *Wade* hearing is ordered to determine whether the noticed

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<sup>1</sup>The People also reference an unnoticed, single-photo identification procedure, consisting of a photograph of Defendant shown to and identified by the co-defendant the night both were arrested. The People characterize this identification as confirmatory, and Defendant has thereafter not contested that characterization.

identification procedure was so improperly suggestive as to taint any in-court identification. In the event the identification is 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.

**G. MOTION TO SEVER**

Defendant moves to sever the trial of the instant Indictment from that of his co-defendant, asserting that a joint trial would result in undue prejudice to him due to antagonistic defenses and that he might be implicated by the statement of a co-defendant who might choose not to testify at a joint trial. The crimes alleged herein are, the People argue, properly joinable because they are part of the same criminal transaction--a single robbery and theft. Defendant has failed to demonstrate that the counts are not part of the same criminal transaction.

The People are thus correct that the counts are joinable. Consequently, Defendant having failed to demonstrate that the counts were not properly joinable under CPL §200.20 and/or specify any prejudice from antagonistic defenses, the court declined to sever the trial of this defendant from that of the co-defendant.

Defendant also asserts that the People have given notice of statements made by the co-defendant which inculcate Defendant and, he argues, he would not have the right of cross-examination should the co-defendant decline to testify at trial. See generally *Bruton*

v US, 391 US 123 (1968). In response, the People assert that it is premature to seek severance where the People have not yet sought to introduce any such statements, nor, in fact, has the court ruled on their admissibility. Consequently, the motion to sever is denied with leave to renew upon the People's representation that they seek to introduce the co-defendant's statement(s) and the court's determination of their admissibility.

All other motions are denied.

Dated: White Plains, New York  
November 19, 2019



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

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