

**People v Johnson**

2020 NY Slip Op 34773(U)

February 11, 2020

County Court, Westchester County

Docket Number: Ind No. 19-1037

Judge: Anne E. Minihan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

FILED  
AND ENTERED  
ON 2-13 2020  
WESTCHESTER

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

-against-

**FILED** *re*

FEB 14 2020

DECISION & ORDER  
Ind No.: 19-1037

JAMAL JOHNSON,

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER  
Defendant.

-----X  
MINIHAN, J.

Defendant, charged by Westchester County Indictment No. 19-1037 with Criminal Possession of a Forged Instrument in the Second Degree (Penal Law § 170.25) (five counts) and Attempted Petit Larceny (Penal Law § § 110/155.25). In response thereto, 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, the court disposes of the motion as follows:

I.

MOTION to INSPECT and DISMISS  
CPL ARTICLE 190

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, the indictment was facially insufficient, and that the Grand Jury proceeding was defective within the meaning of CPL 210.35. The court has reviewed the minutes of the proceedings before the Grand Jury.

Contrary to defendant's claim, a review of the Grand Jury minutes reveals that the evidence presented, if accepted as true, is legally sufficient to establish every element of each offense charged (CPL 210.30[2]); thus, defendant's motion to dismiss on this basis is denied. Pursuant to CPL 190.65(1), an indictment must be supported by legally sufficient evidence which establishes that the defendant committed the offenses charged. "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]).

The indictment contains a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant’s commission thereof with sufficient precision as to clearly apprise the defendant of the conduct which is the subject of the indictment (CPL 200.50). The indictment charges each and every element of the crimes, and alleges that the defendant committed the acts which constitute the crimes at a specified place during a specified time period and, therefore, is sufficient on its face (*People v Cohen*, 52 NY2d 584 [1981]; *People v Iannone*, 45 NY2d 589 [1978]).

With regard to defendant’s specific claim, the indictment was facially sufficient as to count 1; the term “uttered” (meaning to put into circulation [see *People v Roberts*, 31 NY3d 406, 424 [2018]]) comes directly from the definition of criminal possession of a forged instrument in the second degree (see Penal Law § 170.25).

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 reveal that a quorum of the grand jurors was present during the presentation of evidence, and 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 (see *People v Collier*, 72 NY2d 298 [1988]; *People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]).

In making this determination, the Court does not find it necessary to release to the parties portions of the Grand Jury minutes as are not subject to automatic discovery pursuant to CPL Article 245.

II.

#### MOTION to PRECLUDE UNNOTICED STATEMENTS & IDENTIFICATIONS

This branch of the motion, to preclude the People from introducing unnoticed statements and/or identifications is denied as premature. The People acknowledge the statutory requirements of CPL 710.30.

III.

#### MOTION to SUPPRESS PHYSICAL EVIDENCE

Defendant moves to suppress all physical evidence on the basis that his arrest was unlawful. Alternatively, defendant moves for a *Mapp/Dunaway* hearing. Defendant's motion to

suppress physical evidence is granted solely to the extent of ordering a pre-trial *Mapp* hearing to determine the propriety of any search which resulted in the seizure of property (*see Mapp v Ohio*, 367 US 643 [1961]). The hearing will also address whether any evidence was obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

IV.

MOTION to PRECLUDE STATEMENT TESTIMONY  
CPL 710

The People served CPL 710.30(1)(a) notice of a statement allegedly made by defendant on June 13, 2019 at approximately 6:20 p.m. at Nieman Marcus, 1 Paulding Street, White Plains, NY, to a City of White Plains Police Officer. The motion to suppress is granted, on the consent of the People, to the extent of ordering a pretrial *Huntley* hearing to determine whether the statement was involuntarily made by defendant within the meaning of CPL 60.45 (*see* CPL 710.20(3); CPL 710.60[3][b]; *People v Weaver*, 49 NY2d 1012 [1980]). The hearing will also address whether the alleged statement was obtained in violation of defendant's Sixth Amendment right to counsel and/or obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

V.

MOTION to PRECLUDE IDENTIFICATION TESTIMONY  
CPL 710

The People served CPL 710.30(1)(b) notice of two video identifications of defendant on November 1, 2019, one at 10:00 a.m. at the Westchester County District Attorney's Office and one at 2:30 p.m. before the grand jury. Defendant's motion to suppress identification testimony is granted to the limited extent of ordering a pre-trial *Wade* hearing (*see United States v Wade*, 388 US 218 [1967]). At the hearing, the People bear the initial burden of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness (*see People v Chipp*, 75 NY2d 327, 335 [1990] *cert. denied* 498 US 833 [1990]; *People v Berrios*, 28 NY2d 361 [1971]). Once that burden is met, the defendant bears the ultimate burden of proving that the procedure was unduly suggestive. Where suggestiveness is shown, the People must show the existence of an independent source by clear and convincing evidence.

VI.

MOTION to CONDUCT PRE-TRIAL HEARINGS  
TWO WEEKS in ADVANCE of TRIAL

To the extent that defendant's motion seeks to schedule pre-trial hearings two weeks in advance of trial, that branch of the motion is denied. The hearings will be scheduled at a time that is convenient to the Court, upon due consideration of all of its other cases and obligations.

VII.

MOTION for DISCOVERY, DISCLOSURE and INSPECTION  
CPL Article 245

To whatever extent material that is discoverable under Criminal Procedure Law Article 245 has not already been provided to the defense by the People, the defendant's motion is granted and such discovery, including both *Brady* material<sup>1</sup> and *Rosario* material, shall be provided forthwith. Leave is granted for either party to seek a protective order (CPL Article 245). If the defense has a particularized reason to believe that there remains outstanding discovery with which he has not been provided, he is directed to contact the assigned Assistant District Attorney upon receipt of this order. If the issue remains unresolved within two days of receipt of this order, counsel for the defendant shall contact the court to request an immediate compliance conference.

If the People have fulfilled their discovery obligations but have not yet filed a Certificate of Compliance, they are directed to do so forthwith and they are reminded of their continuing obligation to remain in compliance with the discovery mandates set forth in CPL Article 245 and to file supplemental Certificates of Compliance as the need arises.

To the extent the People cross-move for reciprocal discovery, it is likewise granted to the extent provided for in CPL Article 245. Further, the Bill of Particulars set forth in the voluntary disclosure form provided to defendant has adequately informed defendant of the substance of the alleged conduct and in all respects complies with CPL Article 245 and Section 200.95.

The People recognize their continuing duty to disclose the terms of any deal or agreement made between the People and any prosecution witness at the earliest possible date (*see People v Steadman*, 82 NY2d 1 [1993]; *Giglio v United States*, 405 US 150 [1972]; *Brady v Maryland*, 373 US 83 [1963]; *People v Wooley*, 200 AD2d 644 [2d Dept 1994]).

VIII.

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,

---

<sup>1</sup> The People acknowledge their continuing duty to disclose exculpatory material (*Brady v Maryland*, 373 US 83 [1963]; *see Giglio v United States*, 405 US 150 [1971]). If the People are or become aware of any such material which is arguably subject to disclosure under *Brady* and its progeny and Criminal Procedure Law Article 245 which they are unwilling to consent to disclose, they are directed to bring it to the immediate attention of the court and to submit it for the court's in camera inspection and determination as to whether it constitutes *Brady* material discoverable by the defendant.

prior uncharged criminal, vicious or immoral conduct. On the People's consent, the court orders a pre-trial hearing pursuant to *People v Sandoval* (34 NY2d 371[1974]). At said hearing, the People shall notify the defendant, *in compliance with CPL Article 245, and in any event not less than 15 days prior to the first scheduled trial date*, of all specific instances of defendant's criminal, prior uncharged criminal, vicious or immoral conduct of which they have knowledge and which they intend to use to impeach defendant's credibility if he elects to testify at trial.

At the hearing, the defendant shall 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 ability to testify as a witness on his own behalf (*see People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

On the People's consent, if the People determine that they will seek to introduce as part of their case-in-chief evidence of any prior uncharged misconduct and criminal acts of defendant, the People shall notify the court and defense counsel, *in compliance with CPL Article 245, and in any event not less than 15 days prior to the first scheduled trial date*, and a *Ventimiglia/Molineux* hearing (*see People v Ventimiglia*, 52 NY2d 350 [1981]; *People v Molineux*, 168 NY 264 [1901]) shall be held immediately before trial to determine if the People may use any such evidence 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 any other hearings ordered herein.

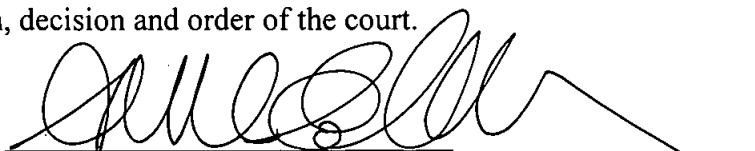
IX.

MOTION for LEAVE to FILE FUTURE MOTIONS

This motion is denied. Any future motion must be brought by way of order to show cause setting forth reasons as to why said motion was not brought in conformity with CPL 255.20.

The foregoing constitutes the opinion, decision and order of the court.

Dated: White Plains, New York  
February // , 2020

  
Honorable Anne E. Minihan  
Acting Supreme Court Justice

To: HON. ANTHONY A. SCARPINO, Jr.  
District Attorney, Westchester County  
111 Dr. Martin Luther King, Jr., Blvd.  
White Plains, NY 10601  
Attn: A.D.A. Virginia A. Marciano

LAW OFFICES OF DOUGLAS G. RANKIN, P.C.  
26 Court Street  
Brooklyn, NY 11242  
Attn: Douglas G. Rankin, Esq.  
*Attorneys for defendant, Jamal Johnson*