

**People v Leslie**

2020 NY Slip Op 35464(U)

March 6, 2020

County Court, Westchester County

Docket Number: Indictment No. 19-0918

Judge: George E. Fufidio

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This opinion is uncorrected and not selected for official publication.

COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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

-against-

MARKEL LESLIE,

Defendant.

-----X  
FUFIDIO, J.

DECISION & ORDER  
Indictment No.: 19-0918

**FILED** ↗

MAR 10 2020

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

Defendant, MARKEL LESLIE, having been indicted on or about November 25, 2019, for four counts of identity theft in the first degree (Penal Law § 190.80[1] and [3]), two counts of grand larceny in the third degree (Penal Law § 155.35); and two counts of unlawful possession of personal identification information in the third degree (Penal Law § 190.81) has filed an omnibus motion which consists of a Notice of Motion, an Affirmation in Support and a Memorandum of Law. In response, 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 this Court disposes of this motion as follows:

A. MOTION FOR DISCOVERY, DISCLOSURE AND INSPECTION

Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 245 and/or already provided by the People. If any items set forth in CPL Article 245 have not already been provided to Defendant pursuant to that Article, said items are to be provided forthwith. Any party is granted leave, if required, to apply for a Protective Order in compliance with CPL Article 245, upon notice to the opposing party and any party affected by said Protective Order. The People are directed to file a Certificate of Compliance with CPL Article 245 and the instant Order upon completion of their obligations thereunder, if they have not already done so. Any cross-motion for reciprocal discovery is likewise granted to the extent provided for in Criminal Procedure Law Article 245, and/or already provided to the People. Further, the bill of particulars set forth in the voluntary disclosure form provided to Defendant has adequately informed Defendant of the substance of alleged conduct and in all respects complies with CPL Article 245 and §200.95.

Furthermore, with respect to defense counsel's contention that upon his information and belief the Pelham Police Department has refused to comply with answering the so called "(1)(k) questionnaire". He has not cited a source for his information and belief. The People have certified that no such impeachment material exists in their Discovery Disclosure form filed on January 7, 2020, they have by their Certificate of Compliance, certified their compliance with the discovery provisions of CPL 245 and have affirmed in their Affirmation of Opposition, that not only is the Defendant mistaken about his information and belief, but the Pelham Police did comply with the People's request embodied in the so called "(1)(k) questionnaire" and that there is no impeachment material. Although the People did not outright say that the Officer in question answered the (1)(k) questionnaire wholly in the negative the Court will assume for

purposes of this motion, that based on the People's representations, he did. The Court finds that the "(1)(k) questionnaire" is sufficient to discharge the People's initial obligation under CPL 245(1)(k)(iv) (*Matter of Certain Police Officers*, 2020 NY Slip Op 20052 [Westchester County Court, Blackwood, J. 2020]). Moreover, if the Officer or whomever is in charge of answering the questionnaire answers the questions, for our purposes Question 6, in the negative, then the People have discharged their duty and may certify compliance (*id.*). Clearly, though, if the Police answered affirmatively to any of the questions then the obligation is on the People to, "decide how to proceed with obtaining the specific information underlying the witness' answer and disclosing that information to the defense...under CPL 245.20(1)(k)(iv) (*id.*). The People are hereby ordered to disclose whether the Officer answered affirmatively or negatively any question in the "(1)(k) questionnaire"

The Defendant's motion for a bill or particulars is denied as untimely (CPL 200.95(3)) and in any event, the Defendant has received more than enough information by which to begin to prepare his defense (CPL 200.95(5)).

As to the defendant's demand for exculpatory material, the People have acknowledged their continuing duty to disclose exculpatory material at the earliest possible date upon its discovery (*see, Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]). In the event that the People are, or become, aware of any material which is arguably exculpatory and they are not willing to consent to its disclosure to the defendant, they are directed to immediately disclose such material to the court to permit an *in camera* inspection and determination as to whether the material must be disclosed to the defendant.

#### B. MOTION TO INSPECT AND 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. 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. The Court of Appeals has not construed the identity theft statute as narrowly as the Defendant

argues here and has found that the crime may be committed by a defendant evincing intent to defraud by assuming the identity of another, which may be accomplished by using another person's personal identifying information (*People v Roberts*, 31 NY3d 406 [2018]). The two checks that the Defendant used to perpetrate his alleged fraud had the victim's name, address and bank account number on them. The Court finds that a sufficient assumption of someone else's identity, despite being real checks actually made out to the Defendant (*id.*).

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 such portions of the Grand Jury minutes as have not already been disclosed pursuant to CPL Article 245 to the parties was necessary to assist the Court.

#### C. MOTION TO STRIKE IDENTIFICATION NOTICES AND SUPPRESS IDENTIFICATION TESTIMONY

The motion to strike is denied. Said notices are in conformity with the statutory requirements of CPL 710.30 in that they set forth the date, manner, location of the identification procedures employed (*People v Sumter*, 68 AD3d 1701 [4<sup>th</sup> Dept. 2009]) and were served in the proper time frame (CPL 710.30). Finally, because the Defendant has filed a suppression motion based upon the notices that were served, he has waived his right to be heard on the sufficiency of the notices (*People v Kirkland*, 89 NY2d 903 [1996]).

Concerning the identifications noticed to the Defendant pursuant to CPL 710.30 which were made in the District Attorney's Office the day of the grand jury presentation and again during the grand jury presentation, the Court agrees with the People's argument that these were ratifications in which the witnesses were shown video in which they and the Defendant were participants in the events depicted and hence outside the ambit of CPL 710.30 (*People v Gee*, 99 NY2d 158 [2002]). Accordingly no hearing is necessary and none is ordered.

#### D. MOTION FOR SANDOVAL/VENTIMIGLIA/MOLINEUX HEARING

Granted, solely to the extent that *Sandoval/Ventimiglia/Molineux* hearings, as the case may be, shall be held immediately prior to trial, as follows:

I. Pursuant to CPL §245.20, the People must notify the Defendant, not less than fifteen days prior to the first scheduled date for trial, of all specific instances of Defendant's uncharged misconduct and criminal acts of which the People have knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the Defendant, or as substantive proof of any material issue in the case, designating, as the case may be for each act or acts, the intended use (impeachment or substantive proof) for which the act or acts will be offered; and

II. Defendant, at the ordered hearing, 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 AD2d 266 [2<sup>nd</sup> Dept. 1985]).

E. MOTION TO STRIKE ALIBI NOTICE

The Defendant's motion to strike the alibi notice is denied. Contrary to the Defendant's contentions, it is well-settled that CPL 250.00 is indeed in compliance with the constitutional requirements (*see People v. Dawson*, 185 AD2d 854 [2d Dept 1992]; *People v Cruz*, 176 AD2d 751 [2d Dept 1991]; *People v Gill*, 164 AD2d 867 [2d Dept 1990]) and provides equality in the required disclosure (*People v Peterson*, 96 AD2d 871 [2d Dept 1983]; *see generally Wardius v Oregon*, 412 US 470 [1973]).

F. MOTION TO STRIKE PREJUDICIAL LANGUAGE

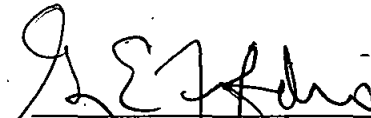
The defendant moves to strike certain language from the indictment on the grounds that it is surplusage, irrelevant or prejudicial. The language concluding the indictment merely identifies the defendant's acts as public, rather than private wrongs and such language should not be stricken as prejudicial. This motion is denied (*see, People v Gill*, 164 AD2d 867 [2d Dept 1990]; *People v Winters*, 194 AD2d 703 [2d Dept 1993]; *People v Garcia*, 170 Misc. 2d 543 [Westchester Co. Ct. 1996]).

G. MOTION RESERVING THE RIGHT TO FILE ADDITIONAL MOTIONS

Defendant's motion reserving the right to file additional motions is denied. Should the Defendant file any other motions that were not raised in his *Omnibus* motion, then they will need to be in compliance with CPL 255.20.

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York  
March 6, 2020

  
\_\_\_\_\_  
Honorable George E. Fufidio  
Westchester County Court Justice

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