

People v Funchess

2022 NY Slip Op 34903(U)

October 18, 2022

County Court, Westchester County

Docket Number: Indictment No. 71440-22

Judge: Robert J. Prisco

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OCT 24 2022

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

-against-

DECISION & ORDER

ROBERT FUNCHESS,

Indictment No: 71440-22

Defendant.

-----X
ROBERT J. PRISCO, J.

Defendant **ROBERT FUNCHESS** is charged by Indictment Number 71440-22 with one count of Criminal Possession of a Weapon in the Second Degree pursuant to Penal Law [PL] § 265.03 (03) [Count One] and one count of Criminal Possession of a Weapon in the Third Degree pursuant to PL § 265.02 (1) [Count Two]. The charges pertain to Defendant's alleged possession of a loaded 9 mm semi-automatic pistol. The above offenses are alleged to have been committed by Defendant, who has a purported previous conviction for Attempted Criminal Possession of a Weapon in the Second Degree, in the vicinity of 140 Altonwood Place, City of Yonkers, at approximately 10:27 p.m., on February 8, 2022.

On July 1, 2022, Defendant was arraigned by this Court on the charges contained in Indictment Number 71440-22. Attached to the indictment is the People's Demand for a Notice of Alibi pursuant to CPL § 250.20 and an Information accusing Defendant of having previously been convicted of Attempted Criminal Possession of a Weapon in the Second Degree in the County of Westchester on or about February 11, 2009.

On July 13, 2022, the People served and filed, via email, three (3) Criminal Procedure Law [CPL] § 710.30 (1) (a) Notices¹ regarding the People's intent to offer evidence of statements allegedly made by the defendant to members of the Yonkers Police Department, and an additional copy of their Demand for a Notice of Alibi.

¹ The first and third CPL § 710.30 (1) (a) Notices pertain to oral statements that were allegedly recorded electronically and made by Defendant at the Detective Division of the Yonkers Police Department at approximately 2:37 a.m. and 3:19 a.m., on February 9, 2022. The second CPL § 710.30 (1) (a) Notice pertains to oral statements that were allegedly recorded electronically and made by Defendant in the vicinity of Altonwood Place in the City of Yonkers at approximately 10:24 p.m., on February 8, 2022.

On August 5, 2022, during an in-person Court appearance, the People served and filed a Certificate of Compliance pursuant to CPL § 245.50(1), and included therein is a “Statement of Readiness,” wherein “[t]he People confirm and announce their readiness for trial on all counts charged.” The People also verbally confirmed their readiness for trial when inquired of by this Court. Attached to the Certificate of Compliance is a Discovery Disclosure Index pursuant to CPL §§ 245.20 and 245.50, and Discovery Package Transmittal Notices from the Westchester County District Attorney’s Office, which identify the items and information that have been disclosed to Defendant and delineate the dates and methods of such disclosure.

Thereafter, the Court received Defendant’s Notice of Motion and Affirmation, both dated August 26, 2022, seeking various forms of judicial intervention and relief.²

On September 9, 2022, this Court received the People’s Affirmation in Opposition and Memorandum of Law in response to Defendant’s motion for omnibus relief.

The Court is also in receipt of an unredacted certified copy of the stenographic transcript of the May 20, 2022 Grand Jury proceeding, along with copies of the Grand Jury exhibits that were received in evidence.

On September 20, 2022, the People served and filed, via email, a Supplemental Certificate of Compliance pursuant to CPL § 245.50(1), and included therein is a “Statement of Readiness,” wherein “[t]he People re-confirm and continue [to] announce their readiness for trial on all counts charged.” Attached to the Supplemental Certificate of Compliance is a Discovery Disclosure Index pursuant to CPL §§ 245.20 and 245.50, which identifies the additional items and information that have been disclosed to Defendant and delineates the dates and methods of such disclosure.³

After consideration of the above referenced submissions and the unredacted certified stenographic transcript of the May 20, 2022 Grand Jury proceeding, the Court decides Defendant’s Motion as follows:

² The Court received a courtesy copy of Defendant’s omnibus motion via email on October 11, 2022.

³ The People also served and filed, via email, a Notice of Motion for Buccal Swab, an Affirmation in Support of the Taking of Buccal Cell Samples, and a Memorandum of Law in connection therewith. On October 11, 2022, the Court received an email notification from Defendant’s counsel that Defendant is consenting to the taking of a buccal sample.

1. MOTION FOR INSPECTION OF THE GRAND JURY MINUTES AND DISMISSAL OR REDUCTION OF THE CHARGES CONTAINED IN INDICTMENT NUMBER 71440-22 DUE TO THE LEGAL INSUFFICIENCY OF THE EVIDENCE PRESENTED AND THE DEFECTIVENESS OF THE PROCEEDING.

Defendant “requests that the Court inspect the Grand Jury minutes and dismiss/reduce the counts of the indictment to the extent they are unsupported by legally sufficient evidence or were obtained through a flawed presentation” (see Point I Heading and Page 5, Paragraphs 9-10, of Defendant’s Affirmation).

In their response, the People consent to an in-camera inspection of the Grand Jury minutes by the Court, contend that the indictment is supported by legally sufficient evidence, and assert that “Defendant has failed to meet his high burden of showing the existence of any error in the grand jury proceeding which rendered it defective” (see Point A, Pages 1-4, of the People’s Memorandum of Law).

The Court has conducted an in-camera review of the entirety of the Grand Jury proceeding, having examined an unredacted certified copy of the stenographic transcript of the May 20, 2022 presentation.

On May 20, 2022, prior to the commencement of the given sworn testimony, the People specifically inquired of and confirmed with the foreperson that twenty (20) grand jurors were present. Prior to instructing the grand jurors on the applicable law, the People confirmed with the foreperson that twenty (20) grand jurors were present throughout the presentation of the case. These measures by the People satisfy this Court that the twenty (20) grand jurors who deliberated and voted on the charges contained in Indictment Number 71440-22 were present throughout the one-day presentation of the case.

“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 [2003], quoting *People v Carroll*, 93 NY2d 564, 568 [1999]; see *People v Bello*, 92 NY2d 523, 525 [1998]; *People v Jensen*, 86 NY2d 248, 251 [1995]; *People v Jennings*, 69 NY2d 103, 114 [1986]; *People v Booker*, 164 AD3d 819, 820 [2d Dept 2018]; *People v Hulsen*, 150 AD3d 1261, 1262 [2d Dept 2017], *lv. denied* 30 NY3d 950 [2017]; *People v Flowers*, 138 AD3d 1138, 1139 [2d Dept 2016]). Legally sufficient evidence is “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 Mills*, 1 NY3d at 274; *People v Franov*, 146 AD3d 978, 979 [2d Dept 2017]; *People v Wisey*, 133 AD3d 799, 800 [2d Dept 2015]; *People v Ryan* 125 AD3d 695, 696 [2d Dept 2015], *lv. denied* 25 NY3d 1077 [2015]). "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], quoting *People v Bello*, 92 NY2d at 526; *see People v Ryan*, 125 AD3d at 696; *People v Woodson*, 105 AD3d 782, 783 [2d Dept 2013]). This 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'" (*People v Bello*, 92 NY2d at 526, quoting *People v Deegan*, 69 NY2d 976, 979 [1987]; *see People v Pino*, 162 AD3d 910, 911 [2d Dept 2018]).

Here, the evidence presented to the Grand Jury, when viewed in the light most favorable to the People, was legally sufficient to establish and support the charges contained in Indictment Number 71440-22.

A Grand Jury proceeding is "defective," warranting dismissal of the indictment, only where the "proceeding . . . fails to conform to the requirements of CPL Article 190 to such degree that the integrity thereof is impaired and prejudice to the defendant may result" (CPL § 210.35 (5); *see People v Arevalo*, 172 AD3d 891, 892 [2d Dept 2019]; *People v Williams*, 171 AD3d 804, 805 [2d Dept 2019]). Dismissal of an indictment under CPL § 210.35 (5) is an "exceptional remedy" that "should . . . be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury" (*People v Huston*, 88 NY2d 400, 409 [1996]; *see People v Williams*, 171 AD3d at 805; *People v Burch*, 108 AD3d 679, 680 [2d Dept 2013], *lv. denied* 22 NY3d 1087 [2014]; *People v Thompson*, 81 AD3d 670, 671 [2d Dept 2011], *aff'd* 22 NY3d 687 [2014]). Here, the Court finds that no such wrongdoing, conduct or errors occurred.

Further, while a prosecutor is required to instruct the grand jury on the law with respect to matters before it (*People v Valles*, 62 NY2d 36, 38 [1984]; *People v Tunit*, 149 AD3d 1110, 1110 [2d Dept 2017]; *People v Samuels*, 12 AD3d 695, 698 [2d Dept 2004]; *see* CPL § 190.25 (6)), "a Grand Jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law" (*People v Calbud, Inc.*, 49 NY2d 389, 394 [1980]; *see People v*

Caracciola, 78 NY2d 1021, 1022 [1991]; *People v Batashure*, 75 NY2d 306, 311 [1990]; *People v Goetz*, 68 NY2d 96, 115 [1986]; *People v Valles* 62 NY2d 36, 38 [1984]; *People v Tunit*, 149 AD3d at 1110; *People v Castaldo*, 146 AD3d 797, 798 [2d Dept 2017]; *People v Burch*, 108 AD3d at 680; *People v Malan-Pomaeyna*, 72 AD3d 988 [2d Dept 2010]). It is well settled that such instructions are sufficient so long as they provide “enough information to enable [the grand jury] intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime” (*People v Calbud, Inc.*, 49 NY2d at 394-395; see *People v Valles* 62 NY2d at 38; *People v Tunit*, 149 AD3d at 1110-1111; *People v Patterson*, 73 AD3d 1215, 1215 [2d Dept 2010], *lv. denied* 15 NY3d 776 [2010]; *People v Malan-Pomaeyna*, 72 AD3d at 988).

After an in-camera review of the unredacted certified copy of the stenographic transcript of the Grand Jury presentation on May 20, 2022, this Court determines that the Grand Jury proceeding was not defective and that the instructions given during the presentation were legally sufficient and proper.

Accordingly, for the reasons set forth above, Defendant’s motion to dismiss or reduce the charges contained within Indictment Number 71440-22 is denied.

2. MOTION FOR PRECLUSION OF EVIDENCE.

Citing CPL Article 710, Defendant moves to suppress “any physical evidence, including an alleged firearm, as obtained in violation of his rights derived from the New York State and Federal Constitutions” (see Point II, Page 5, Paragraph 11, of Defendant’s Affirmation). Specifically, Defendant argues that “[a]ll evidence the police obtained was a direct result of their unlawful seizure of him...and constitutes evidence that was obtained through unlawful police conduct and the fruits thereof” (see Point II, Page 7, Paragraph 15, of Defendant’s Affirmation). In the alternative, Defendant requests that the Court conduct pretrial *Dunaway* and *Mapp* hearings (see Point II, Page 8, Paragraph 16, of Defendant’s Affirmation).

In response, the People assert that Defendant’s motion should be denied as “defendant does not dispute the factual allegations, only claiming that the defendant had not committed any crimes” and that Defendant “does not have standing to contest the search of any items he abandoned or any

other area where he did not have a legitimate expectation of privacy” (see Point B, Pages 5 and 7, of the People’s Memorandum of Law). Specifically, the People contend that “defendant had no personal expectation of privacy on the sidewalk” and that “[i]n the presence of two officers, defendant reached into his waistband and threw a black firearm onto the sidewalk, visible to both officers; therefore, defendant made an independent, calculated decision to rid himself of the evidence, and that decision was not [precipitated] by any unlawful police conduct” (see Point B, Page 8, of the People’s Memorandum of Law).

“A defendant abandons property when he voluntarily relinquishes possession in a calculated decision in response to police conduct” (*People v Whitfield*, 186 AD3d 1414, 1415 [2d Dept 2020], *lv denied* 36 NY3d 977 [2020]), quoting *People v Oliver*, 39 AD3d 880, 880 [2d Dept 2007], *lv dismissed* 9 NY3d 868 [2007]; see *People v Ramirez-Portoreal*, 88 NY2d 99, 110 [1996], and “[w]here a defendant abandons property, there is no search or seizure” (*People v Whitfield*, 186 AD3d at 1415, quoting *People v Burkett*, 98 AD3d 746, 747 [2d Dept 2012], *lv denied* 20 NY3d 985 [2012]; see *People v Kluge*, 180 AD3d 705, 707 [2d Dept 2020]; *People v Hogya*, 80 AD2d 621, 621 [2d Dept 1981], *appeal dismissed* 56 NY2d 602 [1982]). However, “if the abandonment is coerced or precipitated by unlawful police activity, then the seized property may be suppressed because it constitutes fruit of the poisonous tree” (*People v Rice*, 204 AD3d 834, 837 [2d Dept 2022], quoting *People v Ramirez-Portoreal*, 88 NY2d at 110; see *Matter of Francis O.*, 208 AD3d 51, 57 [1st Dept 2022]; *People v Kluge*, 180 AD3d at 707).

Accordingly, upon the issues raised in Defendant’s and the People’s papers, Defendant’s motion for suppression of physical evidence is granted to the extent that hearings pursuant to *Mapp v Ohio*, 367 US 643 [1961], and *Dunaway v New York*, 442 US 200 [1979], will be conducted to determine the legality of the evidence’s recovery/seizure and its admissibility at trial.

Defendant further moves for suppression of the noticed statements on the grounds that such statements were “involuntarily obtained and the product of unmirandized custodial interrogation” (see Point II, Page 8, Paragraph 16, of Defendant’s Affirmation). In the alternative, Defendant requests the Court conduct pretrial *Dunaway* and *Huntley* hearings (see Point II, Page 8, Paragraph 16, of Defendant’s Affirmation).

In response, the People conclude their counter arguments by stating that, “[a]s no conduct requiring suppression occurred prior to or during defendant’s statement[s] and his statements were entirely voluntary, after a *Huntley* hearing limited to the issue of voluntariness, defendant’s motion

to suppress his statements should be denied” (see Point C, Page 14, of the People’s Memorandum of Law).

As the People have impliedly consented to a hearing to address Defendant’s claims, Defendant’s motion to suppress statements is granted to the extent that hearings pursuant to *People v Huntley*, 15 NY2d 72 [1965], and *Dunaway v New York*, 442 US 200 [1979], will be conducted to determine the voluntariness and admissibility of the noticed statements.

3. MOTION FOR PRECLUSION OF DEFENDANT’S PRIOR CRIMES OR BAD ACTS; ASSOCIATED SANDOVAL HEARING.

Relying on *People v Sandoval*, 34 NY2d 371 [1974], Defendant moves for the Court to direct the People “to provide the Defendant with a list of bad and immoral acts and criminal convictions they intend to impeach his credibility with should he decide to take the stand and testify in his own defense” (see Point III, Pages 8-9, of Defendant’s Affirmation).

In response, the People acknowledge their *Sandoval* and *Ventimiglia* obligations and consent to hearings on same if such disclosure is made. The People also indicate that should they “seek to introduce defendant’s prior bad acts on their direct case [pursuant to *People v Molineux*, 168 NY 264 [1901]], the People will inform defense counsel and the Court and request a hearing before introducing such *Molineux* evidence” (see Point D, Page 15, of the People’s Memorandum of Law).

CPL § 245.20 (3) (a) provides, in substance and pertinent part, that “[t]he prosecution shall disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, which the prosecution intends to use at trial for purposes of impeaching the credibility of the defendant.” To the extent that the People seek to use any of Defendant’s prior acts of misconduct or criminality on their direct case as substantive proof of any material issue in the case, CPL § 245.20 (3) (b) likewise obligates “[t]he prosecution [to] disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, which the prosecution intends to use at trial [for such purpose].” Lastly, CPL § 245.20 (3) further requires that “the prosecution shall designate whether it intends to use each listed act for impeachment and/or as substantive proof.”

As the People have concededly not yet disclosed to the defendant a list of his acts of misconduct and criminality which the prosecution intends to use at trial for impeaching his

credibility or as substantive proof of any material issue in the case, or designated the intended use thereof, this Court will not order the requested *Sandoval* and *Ventimiglia* hearings at the present time. Should the People seek to use at trial any prior acts of misconduct or criminality of the defendant for CPL § 245.20 (3) (a) or (b) purposes, they are directed to disclose to Defendant a list of all such acts of misconduct and criminality and to designate the intended purpose of each listed act. Pursuant to CPL § 245.10 (1) (b), the People “shall perform [these] supplemental discovery obligations *as soon as practicable* but not later than fifteen (15) calendar days prior to the first scheduled trial date” (emphasis added). If the People do so, Defendant may renew his application to preclude the People’s use of such acts of misconduct or criminality at trial or, in the alternative, request a hearing thereon to determine the admissibility thereof. If the People fail to do so, no use of such acts will be permitted at trial.

4. MOTION FOR DISCOVERY.

Pursuant to CPL Article 245, Defendant requests that the People “provide the Defendant with discovery...[and] turn over to the defense any materials that may be favorable to the Defendant under the authority of Brady v Maryland, 373 US 83 (1963) and Giglio v United States, 405 US 150 (1971)” (see Point IV, Pages 9-16, of Defendant’s Affirmation). Defendant further requests that the People “provide the Defendant with a list of witnesses and all pertinent information related to those witnesses” (see Point VI, Page 17, Paragraph 56, of Defendant’s Affirmation).

In response, the People contend that “Defendant’s motion should be summarily denied” as they “are in compliance with their obligations” and, therefore, the defendant’s “motion for court intervention is unnecessary and without support.” To the extent that Defendant moves for *Rosario* material and other discovery, the People aver that Defendant’s motion exceeds CPL Article 245, and therefore “should be denied as unauthorized” (see Point E, Pages 16-17, of the People’s Memorandum of Law). The People further contend that “Defendant’s motion for a further list of witnesses and all pertinent information related to those witnesses should be denied as moot” since such information is contained within the Discovery Disclosure Index attached to the People’s Certificate of Compliance (see Point I, Page 21, of the People’s Memorandum of Law).

Finally, the People aver that they “recognize their continuing obligation to disclose exculpatory evidence that is within their possession pursuant to *Brady v Maryland* (373 US 83

[1963]) and *People v Fein* (18 NY2d 162 [1966]),” state that “[t]o the extent that such material becomes known and is in possession of the People, it will be provided to the defendant..., [and represent that] the People have and will comply with their obligations under CPL 245.20 (1) (k), (l), and (p)” (see Point G, Page 19, of the People’s Memorandum of Law).⁴

Pursuant to CPL § 245.20 (1), the People must automatically disclose to defendant “all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution’s direction or control” (see *People v Moss*, 2022 NY Slip Op. 22189 [Crim Ct, NY County 2022]; *People v Martinez*, 75 Misc3d 1212(A), 2022 NY Slip Op. 50476(U), [Crim Ct, NY County 2022]; *People v Darren*, 75 Misc3d 1208(A), 2022 NY Slip Op. 50415(U), [Crim Ct, NY County 2022]; *People v Aquino*, 74 Misc3d 1147, 1152 [Sup Ct, NY County 2022]; *People v Rodriguez*, 73 Misc3d 411, 413 [Sup Ct, Queens County 2021]) and the statute sets forth a non-exhaustive list of items and information that must be disclosed to the defendant as part of the People’s initial discovery obligation (see *People v Deas*, 75 Misc3d 190, 193 [Sup Ct, Westchester County 2022]; *People v Rodriguez*, 73 Misc3d at 413; *People v Perez*, 73 Misc3d 171, 173 [Sup Ct, Queens County 2021]; *People v Soto*, 72 Misc3d 1153, 1155 [Crim Ct, NY County 2021]). CPL § 245.20 (2) further requires the People to “make a diligent, good faith effort to ascertain the existence of [such] material or information,” and where it exists, to make it available for discovery, even if the material is not within their possession, custody, or control (see *People v Martinez*, 75 Misc3d 1212(A), 2022 NY Slip Op. 50476(U); *People v Darren*, 75 Misc3d 1208(A), 2022 NY Slip Op. 50415(U); *People v Cajilima*, 75 Misc3d 438, 440 [Sup Ct, Nassau County 2022]; *People v Williams*, 73 Misc3d 1091, 1103-1104 [Sup Ct, Kings County 2021]; *People v Perez*, 73 Misc3d at 174).

In the case at bar, pursuant to CPL Article 245, on August 5, 2022, the People served and filed a Certificate of Compliance certifying that, after exercising due diligence and making reasonable inquiry to ascertain the existence of material and information subject to discovery, they have disclosed and made available to Defendant all known material and information subject to discovery. In addition, the People served and filed a Discovery Disclosure Index and Discovery Package Transmittal Notices identifying the material and information that was provided and made

⁴ The People also acknowledge their obligation “to disclose the terms of any deal or agreement between the government and any prosecution witness under the guidelines set forth in *Giglio v United States* (405 US 150 [1972])” (see Page 19, Footnote 3 and Point H, Page 20, of the People’s Memorandum of Law).

available to Defendant.⁵ Thereafter, on September 20, 2022, the People served and filed a Supplemental Certificate of Compliance identifying the additional items and information that have been disclosed, and delineating the dates, times and methods of such disclosure.

Accordingly, as the People have presumably satisfied the requirements of CPL § 245.50 (1) by providing the discovery required by CPL § 245.20 (1), serving upon the defendant and filing with the Court a Certificate of Compliance and a Supplemental Certificate of Compliance, and by specifically identifying the material and information provided, Defendant's request for discovery and production is denied as moot. To the extent that the People's Discovery Disclosure Index attached to the Certificate of Compliance provides information pertaining to the names and adequate contact information for non-law enforcement witnesses, the name and work affiliation of law enforcement personnel, and the names of the individuals who may provide expert opinion evidence in compliance with CPL § 245.20 (1) (c), (d), and (f), Defendant's request for such information is also denied as moot.

If Defendant has specific challenges or questions related to the Certificate of Compliance or Supplemental Certificate of Compliance that were served and filed by the People in this matter, such challenges or questions must be addressed by motion as soon as practicable (CPL § 245.50 (4)). If there are no specific challenges or questions regarding the Certificate of Compliance or Supplemental Certificate of Compliance, Defendant should have performed his reciprocal discovery obligations, subject to constitutional limitations, no later than thirty (30) calendar days after being served with the Supplemental Certificate of Compliance (CPL § 245.20 (4)).

Notwithstanding the above, CPL § 245.20 (2) directs the prosecutor to make a diligent, good faith effort to ascertain the existence of material and information discoverable under CPL § 245.20 (1) and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control. If the People subsequently learn of additional discoverable material or information, they must expeditiously

⁵ The Discovery Disclosure Index attached to the Certificate of Compliance indicates that "ALL STATEMENTS OF WITNESSES/ OR PERSONS WITH RELEVANT INFORMATION, WRITTEN OR RECORDED, INCLUDING POLICE REPORTS," pursuant to CPL § 245.20 (1) (e) have been provided to defense counsel. The disclosure thereof would also satisfy the People's *Rosario* obligations.

notify and disclose such material and information to the defense, including material or information that became relevant to the case or discoverable based on reciprocal discovery received from the defendant (*see* CPL § 245.60). In such case, they are also required to serve upon Defendant and file with the Court a Supplemental Certificate of Compliance identifying the additional material and information provided (CPL § 245.50 (1)).

If it is determined that discoverable material or information does exist but is disclosed belatedly, or did exist and is now missing or destroyed, this Court will determine whether a sanction should be imposed and, if so, the appropriate remedy or sanction under the circumstances (*see People v Deas*, 75 Misc3d 190, 194 [Sup Ct, Westchester County 2022]; *People v Henry*, 74 Misc3d 1230(A), 2022 NY Slip Op. 50265(U) [Sup Ct, Richmond County 2022]; *People v Florez*, 74 Misc3d 1222(A), 2022 NY Slip Op. 50202(U), [Sup Ct, Nassau County 2022]; CPL § 245.80 (1) (a)).

Regarding Defendant's request for *Brady* and *Giglio* material, the People are respectfully reminded to remain cognizant of their discovery obligations not only as required by *Brady*, *Giglio*, *People v Geaslen*, 54 NY2d 510 [1981], and their respective progeny, but also as mandated by CPL Article 245. Specifically, CPL § 245.20 (1) (k) requires that the prosecutor disclose “[a]ll evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in this case, that tends to: (i) negate the defendant's guilt as to a charged offense; (ii) reduce the degree of or mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) impeach the credibility of a testifying prosecution witness; (v) undermine evidence of the defendant's identity as a perpetrator of a charged offense; (vi) provide a basis for a motion to suppress evidence; or (vii) mitigate punishment” and such disclosure must occur expeditiously upon its receipt, “whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information.”

Pursuant to CPL § 245.20 (1) (l), the People must also disclose “a summary of all promises, rewards and inducements made to, or in favor of, persons who may be called as witnesses, as well as requests for consideration by persons who may be called as witnesses and copies of all documents relevant to a promise, reward or inducement.”

To the extent that such evidence and information is known but has not yet been disclosed, the People are directed to do so expeditiously. Further, should the People ascertain the existence

of *Brady*, *Geaslen*, or *Giglio* material, or of any of the materials and information itemized in CPL § 245.20 (1) (k) and (l), through their mandated diligent, good faith effort to do so or otherwise, they are directed to expeditiously disclose the same upon its receipt.

5. MOTION FOR A BILL OF PARTICULARS.

Pursuant to CPL § 200.95, Defendant “requests an order . . . , requiring the District Attorney to file a Bill of Particulars with the Court and to serve a copy thereof upon the Defendant” (*see* Point V Heading, Page 16, of Defendant’s Affirmation). In furtherance thereof, Defendant sets forth a requested list of “particulars” (*see* Point V, Pages 16-17, Paragraphs 53-55, of Defendant’s Affirmation).

In their response, the People argue that Defendant’s request for a Bill of Particulars should be denied as untimely and unnecessary (*see* Point F, Page 18, of the People’s Memorandum of Law).

CPL § 200.95 (2) requires that “[u]pon a timely request for a bill of particulars . . . the prosecutor shall within fifteen days of the service of the request [for such] or as soon thereafter as is practicable, serve upon the defendant or his/her attorney, and file with the court, the bill of particulars.” Pursuant to CPL § 200.95 (3), “[a] request for a bill of particulars shall be timely if made within thirty days after arraignment and before the commencement of trial” and “the court may direct compliance with a request for a bill of particulars that, for good cause shown, could not have been made within the time specified.”

To the extent that Defendant’s demand for a bill of particulars is being made for the first time through his Omnibus Motion, because good cause has not been shown as to why such request could not have been made within thirty days after his arraignment, it is untimely.

Moreover, notwithstanding the untimeliness of the request, the “relevant facts,” as set forth on Pages 2-4 of the People’s Affirmation in Opposition, and the discovery provided to Defendant, including the Grand Jury minutes, provide sufficient factual information to amplify the respective counts pending against Defendant.

Because a criminal bill of particulars is not a discovery device but merely serves to clarify the indictment, and it need not set forth the evidence that the People intend to introduce at trial (*see People v Davis*, 41 NY2d 678, 680 [1977]; *People v Perillo*, 144 AD3d 1399, 1403-1404 [3d Dept 2016], *lv. denied* 29 NY3d 951 [2017]; *People v Ramlall*, 99 AD3d 815, 816 [2d Dept 2012];

People v Zurita, 64 AD3d 800, 801 [2d Dept 2009], *lv. denied* 13 NY3d 840 [2009]; *People v Earel*, 220 A.D.2d 899 [3d Dept 1995], *aff'd* 89 NY2d 960 [1997]; CPL § 200.95 (1) (a)), this Court finds that the information provided in the People's Affirmation in Opposition and in the materials disclosed pursuant to CPL § 245.10 (1), satisfy "[t]he sole function of a bill of particulars, [which] is to define more specifically the crime or crimes charged in the indictment" (*People v Davis*, 41 NY2d at 679 [1977]; *People v Elliot*, 299 AD2d 731, 732 [3d Dept 2002]; *Matter of Cosgrove v Doyle*, 73 AD2d 808, 809 [4th Dept 1979]; *People v Raymond G.*, 54 AD2d 596, 596 [3d Dept 1976]). Accordingly, Defendant's motion is denied.


6. RESERVATION OF RIGHT TO MAKE ADDITIONAL PRE-TRIAL MOTIONS.

Defendant's request to "file further motions" (*see* Page 4, Paragraph 8, of Defendant's Affirmation) is granted to the extent that, if sought, he will be required to serve and file an Order to Show Cause detailing the reason(s) why said motions were not brought in conformity with the time provisions and motions practice set forth in CPL § 255.20 (1) and (2), respectively.

However, notwithstanding the provisions of CPL § 255.20 (1) and (2), this Court will "entertain and decide on its merits, at any time before the end of the trial, any appropriate pre-trial motion based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised within the period specified in [CPL § 255.20 (1)] or included within the single set of motion papers as required by [CPL § 255.20 (2)]" (CPL § 255.20 (3); *see People v Wisdom*, 23 NY3d 970, 972 [2014]; *People v Marte*, 197 AD3d 411, 413 [1st Dept 2021]; *People v Burke*, 174 AD3d 915, 915 [2d Dept 2019]; *People v Milman*, 164 AD3d 609, 610 [2d Dept 2018]).

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
October 18, 2022



HONORABLE ROBERT J. PRISCO
County Court Judge

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