

People v Wilson

2022 NY Slip Op 34904(U)

August 4, 2022

County Court, Westchester County

Docket Number: Indictment No. 70495-21

Judge: Robert J. Prisco

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

-against-

DECISION & ORDER

JEROME WILSON,

Indictment No: 70495-21

Defendant.

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

Defendant **JEROME WILSON** is charged by Indictment Number 70495-21 with one count of Murder in the Second Degree pursuant to Penal Law [PL] § 125.25 (1) [Count One], one count of Manslaughter in the First Degree pursuant to PL § 125.20 (1) [Count Two], and two counts of Criminal Possession of a Weapon in the Second Degree pursuant to PL § 265.03 (1) (b) and 265.03 (3) [Counts Three and Four], respectively. In sum and substance, the charges pertain to Defendant's alleged intentional shooting of an individual named Chazz Mitchell with a loaded firearm and Mr. Mitchell's death as a result thereof. The above offenses are alleged to have occurred in the vicinity of 63 Oak Street, in the City of Yonkers, at approximately 3:57 p.m. on August 25, 2020.

On April 7, 2022, Defendant was arraigned by the Honorable Susan Cacace on the charges contained in Indictment Number 70495-21. Attached to the indictment are five (5) Criminal Procedure Law [CPL] § 710.30 (1) (b) Notices signifying the People's intent to offer testimony of observations of the defendant either at the time or place of the commission of the offenses or upon some other relevant occasion by witnesses who have previously identified him as such,¹ and the People's Demand for a Notice of Alibi pursuant to CPL § 250.20.

On April 21, 2022, the People filed a Certificate of Compliance pursuant to CPL § 245.50 (1) which includes a "Statement of Readiness," wherein "[t]he People confirm and announce their readiness for trial on all counts charged." Attached to the Certificate of Compliance is a copy of the People's Discovery Disclosure Index pursuant to CPL §§ 245.20 and 245.50, which includes

¹ Each CPL § 710.30 (1) (b) notice reflects an identification from a single photograph and from a video, for a total of ten (10) separate identification procedures. The identification procedures are alleged to have occurred in the District Attorney's Office and the Grand Jury room in the City of White Plains.

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COUNTY OF WESTCHESTER

but is not limited to, disclosures pertaining to Grand Jury testimony, tapes and electronic recordings, photographs and drawings, and Judgments of Conviction for defendants and witnesses excluding law enforcement and expert witnesses. Also attached to the Certificate of Compliance are Discovery Package Transmittal Notices from the Westchester County District Attorney's Office regarding the date, time and method of disclosure pursuant to CPL Article 245.

On June 7, 2022, the Court received Defendant's Notice of Motion and attached Affidavit, both dated June 6, 2022, seeking various forms of judicial intervention and relief.

On June 17, 2022, the People filed an Affirmation in Opposition and a Memorandum of Law.

On June 29, 2022, the Court received Defendant's Reply, in which he reiterates that the People were required to instruct the Grand Jury on "Justification" and that he is entitled to "*Wade/Rodriguez*" hearings regarding the noticed identifications.

The People have also provided the Court with unredacted certified copies of the stenographic transcripts of the May 5 and May 7, 2021 Grand Jury proceedings, along with a thumb drive containing copies of the Grand Jury exhibits that were received into evidence.

After consideration of the above referenced submissions, the unredacted certified stenographic transcripts of the May 5 and May 7, 2021 Grand Jury proceedings, and the Grand Jury exhibits that were received into evidence, the Court decides Defendant's Motion as follows:

1. MOTION FOR DISMISSAL OF INDICTMENT NUMBER 70495-21 DUE TO THE FAILURE OF THE PEOPLE TO CHARGE JUSTIFICATION AND TEMPORARY LAWFUL POSSESSION IN THE GRAND JURY.

Defendant contends that, "given the facts and evidence presented to the grand jury..., the People's evidence established a 'potential defense of justification' and...the prosecutor's failure to provide that legal instruction impaired the integrity of the grand jury 'to such a degree that the defendant may have been prejudiced by an unwarranted prosecution'" (*see* Point II, Page 8, Paragraph 14, of Defendant's Affidavit). Defendant further contends that, when "viewed in the light most favorable to the defendant, the evidence adduced at the grand jury was sufficient to justify a temporary lawful possession instruction" (*see* Point II, Page 9, Paragraph 16, of Defendant's Affidavit).

In their response, the People contend that Defendant's motion to dismiss should be denied as the indictment is supported by legally sufficient evidence (*see* Point I, Pages 1-3, of the People's Memorandum of Law), and assert that "[t]here was...no basis upon which the People could or should have charged the defenses of justification or temporary lawful possession of a firearm [because] [s]uch defenses only need be charged when there is some evidence to support them" (*see* Point I, Pages 5-6, of the People's Memorandum of Law).

The Court has conducted an in-camera review of the entirety of the Grand Jury proceedings, having examined unredacted certified copies of the stenographic transcripts of the May 5 and May 7, 2021 presentations, and the contents of the thumb drive containing copies of the Grand Jury exhibits that were received into evidence.

"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]; *People v Arcila*, 152 AD3d 783, 784 [2d Dept 2017], *lv. denied* 30 NY3d 978 [2017]).

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 70495-21.

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]). In the case at bar, the Court finds that no such wrongdoing, conduct or errors occurred and Defendant’s argument that the People’s failure to provide justification and temporary lawful possession charges to the Grand Jury necessitates dismissal of the indictment is without merit.

While “the People maintain broad discretion in presenting their case to the grand jury and need not . . . present all of their evidence tending to exculpate the accused” (*People v Mitchell*, 82 NY2d 509, 515 [1993], citing *People v Lancaster*, 69 NY2d 20, 25–26 [1986], *cert. denied* 480 US 922 [1987]; *see People v Moses*, 197 AD3d 951, 952-953 [4th Dept 2021], *lv. denied* 37 NY3d 1097 [2021]; *People v Morel*, 131 AD3d 855, 859-860 [1st Dept 2015], *lv. denied* 26 NY3d 1147 [2016]; *People v Goldston*, 126 AD3d 1175, 1177 [3d Dept 2015], *lv. denied* 25 NY3d 1201 [2015]; *People v Pickens*, 60 AD3d 699, 703 [2d Dept 2009], *lv. denied* 12 NY3d 928 [2009]), “a prosecutor should instruct the Grand Jury on any complete defense supported by the evidence which has the potential for eliminating a needless or unfounded prosecution” (*People v Grant*, 113 AD3d 875, 876 [2d Dept 2014], quoting *People v Wilson*, 228 AD2d 708, 709 [2d Dept 1996]; *see People v Jimenez*, 189 AD3d 882, 884 [2d Dept 2020]; *People v Tunit*, 149 AD3d 1110, 1111 [2d Dept 2017]). If the prosecutor fails to do so, the proceeding is defective, mandating dismissal of the indictment (*People v Ball*, 175 AD3d 987, 988-989 [4th Dept 2019], *aff’d* 35 NY3d 1009 [2020]; *see People v Mitchell*, 82 NY2d 509, 514-515 [1993]; *People v Lancaster*, 69 NY2d at 27; *People v Valles*, 62 NY2d 36, 38-39 [1984]; *People v Tunit*, 149 AD3d at 1111; *People v Samuels*,

12 AD3d 695, 698 [2d Dept 2004]). In determining whether the evidence supports such a defense, the record must be viewed in the light most favorable to the defendant (*see People v Enoksen*, 175 AD3d 624, 625 [2d Dept 2019], *lv. denied* 34 NY3d 1016 [2019]; *People v LaRoche*, 162 AD3d 684, 685 [2d Dept 2018]; *People v Tunit*, 149 AD3d at 1111; *People v Samuels*, 12 AD3d at 698), however dismissal of the indictment is warranted only “when the defense is supported by a reasonable view of the evidence” (*People v Jimenez*, 189 AD3d at 884; *see People v Forde*, 140 AD3d 1085, 1087 [2d Dept 2016], *lv. denied* 28 NY3d 929 [2016]; *People v Torres*, 252 AD2d 60, 65 [1st Dept 1999], *lv. denied* 93 NY2d 1028 [1999]; *People v Hosein*, 221 AD2d 563, 563 [2d Dept 1995]) and not just a “mere allegation” from a defendant (*People v Mitchell*, 82 NY2d at 514-515; *see People v Edwards*, 32 AD3d 281, 282 [1st Dept 2006], *lv. denied* 7 NY3d 901 [2006]; *People v Brunson*, 226 AD2d 1093, 1094 [4th Dept 1996], *lv. dismissed* 88 NY2d 981 [1996]; *People v Flores*, 219 AD2d 40, 45-46 [1st Dept 1996]). Viewing the grand jury evidence in the light most favorable to Defendant in the case at bar, this Court finds that there was no reasonable view of such evidence to support a justification or temporary innocent possession charge.

Specifically, there was no testimony presented or physical evidence introduced that supports Defendant’s contention that the alleged victim was the initial possessor of the firearm and that the defendant “wrested” the gun away from him (*see* Pages 6-7, Paragraph 10, of Defendant’s Affidavit). Unlike the defendant in *People v Samuels*, 12 AD3d 695 [2d Dept 2004], who provided testimonial evidence before the Grand Jury supporting her justification defense, the Grand Jury in this case did not hear any testimony that would have supported a charge on justification or temporary lawful possession. Not only were there no witnesses with direct knowledge of the incident who testified in support of Defendant’s contention, but the defendant himself, who clearly had such knowledge of the incident and of any circumstances that might have warranted such instructions, chose not to exercise his right to testify before the Grand Jury (*see People v Mitchell*, 82 NY2d at 515, citing *People v Lancaster*, 69 NY2d at 26; *People v Morel*, 131 AD3d at 860).

Moreover, the videos (Grand Jury Exhibits 1 and 2) and the still photographs (Grand Jury Exhibits 3-6) that were received into evidence likewise fail to support Defendant’s position. Grand Jury Exhibit 1, which is the 63 Oak Street surveillance video, captures the physical altercation between the defendant and Chazz Mitchell after it has already begun and the shooting of Mitchell by the defendant occurs within seconds thereof. At no time does Grand Jury Exhibit 1 show Mitchell in possession of the handgun at issue and the still photographs taken from that exhibit

and received into evidence as Grand Jury Exhibits 3-6, show Defendant in sole possession thereof. While the Camera 6 angle of Grand Jury Exhibit 2, which is a portion of the 150 Elm Street surveillance video, does depict Chazz Mitchell walking on a sidewalk towards where the defendant is standing against a wall with others in the area, it also shows Mitchell walking with his arms down by his side before Defendant approaches him and the struggle and shooting occur. There is no portion of that video that depicts Mitchell in initial possession of the handgun or as the initial aggressor before he is shot.

It is also clear from Defendant's flight from the area after the shooting, as depicted in Grand Jury Exhibits 1 and 2; and from Detective Califano's testimony that the gun was never recovered (see Page 83, lines 16-19, of the May 7, 2021 Grand Jury transcript), that the defendant did not relinquish the firearm to the authorities. While "mere possession of a weapon is not criminal in every instance, retaining a gun beyond opportunities to hand it over to the authorities is utterly at odds with any claim of innocent possession" (*People v Hawkins*, 258 AD2d 472, 472 [2d Dept 1999], *lv. denied* 93 NY2d 925 [1999]; see *People v Frazier*, 152 AD3d 791, 792 [2d Dept 2017]; *People v DeJesus*, 118 AD3d 1340, 1341 [4th Dept 2014], *lv. denied* 23 NY3d 1061 [2014]; *People v Ortiz*, 172 AD2d 696, 696 [2d Dept 1991], *lv. denied* 78 NY2d 957 [1991]).

Thus, there was no reasonable view of the evidence presented in the Grand Jury warranting instructions on justification or temporary lawful possession and the integrity of the Grand Jury was not impaired by the People's failure to so instruct.

In addition, 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).

Here, after an in-camera review of the unredacted certified copies of the stenographic transcripts of the Grand Jury presentations on May 5 and May 7, 2021, this Court concludes 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 Indictment Number 70495-21 is denied.

2. MOTION FOR A WADE/RODRIGUEZ HEARING.

Citing CPL § 710.60 and *People v Rodriguez*, 79 NY2d 445 [1992], Defendant submits that he is "entitled to a *Wade/Rodriguez* hearing to determine the identifying witnesses' alleged familiarity with him, and whether there is sufficient basis to allow an in-court identification" (see Point IV, Pages 10-11, Paragraphs 19-22, of Defendant's Affidavit).

In response, the People contend that Defendant's motion should be denied because the identifications "do not constitute 'identification procedures' within the meaning of CPL 710.30 given the [identifying] witnesses' prior familiarity with defendant" (see Point II, Page 9, of the People's Memorandum of Law). Specifically, the People argue that "these witnesses were properly offering lay opinion testimony that the person in the videos and photographs was defendant" (see Point II, Page 9, of the People's Memorandum of Law)² and, therefore, "there is no concern regarding suggestiveness" (see Point II, Page 10, of the People's Memorandum of Law).

"The purpose of the [CPL § 710.30 (1) (b)] notice requirement is twofold: it provides the defense with 'an opportunity, prior to trial, to investigate the circumstances of the [evidence procured by the state] and prepare the defense accordingly' and [it] 'permits an orderly hearing and determination of the issue of the fact...thereby preventing the interruption of trial to challenge initially the admission into evidence of the [identification]'" (*People v Pacquette*, 25 NY3d 575,

² In the case of *People v Ray*, 100 AD3d 933 [2d Dept 2012], cited by the People in support of this argument, the Court permitted a detective "who had encountered the defendant on numerous occasions over more than 15 years" (*id.* at 933) to offer opinion testimony that the person depicted in a surveillance video was the defendant.

579 [2015] quoting *People v. Briggs*, 38 NY2d 319, 323 [1975]; see *People v Davis*, 159 AD3d 1531, 1533 [4th Dept 2018]). In fact, CPL § 710.30 was specifically codified in “response to the problem of suggestive and misleading pretrial identification procedures” (*People v Gissendanner*, 48 NY2d at 552; see *People v Marshall*, 26 NY3d 495, 503 [2015]; *People v Pacquette*, 25 NY3d at 579; *People v White*, 73 NY2d 468, 479 [1989]) and “in recognition of the importance of testing the reliability of identification testimony before trial” (*People v Rodriguez*, 79 NY2d 445, 449 [1992]; see *People v Marshall*, 26 NY3d at 503; *People v Boyer*, 6 NY3d 427, 431 [2006]).

While the Court recognizes that CPL § 710.30 is not applicable in situations where “the defendant’s identity is not in issue, or those in which the protagonists are known to one another” (*People v Gissendanner*, 48 NY2d at 552; see *People v Rodriguez*, 79 NY2d at 449; *People v Newball*, 76 NY2d 587, 591; *People v Collins*, 60 NY2d 214 [1983]; *People v Archie*, 200 AD2d 676 [2d Dept 1994], *lv. denied* 83 NY2d 963 [1994]), whether to apply the “known to one another- confirmatory identification exception” (*People v Rodriguez*, 79 NY2d at 450; see *People v Gissendanner*, 48 NY2d at 552) “depends on the extent of the prior relationship [between the witness and the defendant], which is ‘necessarily a question of degree’” (*People v Rodriguez*, 79 NY2d at 450, quoting *People v Collins*, 60 NY2d at 219). “The confirmatory identification exception requires a case-by-case analysis which rests on the length and quality of prior contacts between the witness and the defendant, but always requires a relationship which is more than fleeting or distant” (*People v Coleman*, 73 AD3d 1200, 1202 [2d Dept 2010]; see *People v Mato*, 83 NY2d 406, 411 [1994]; *People v Newball*, 76 NY2d at 591; *People v Collins*, 60 NY2d at 219; *People v Waring*, 183 AD2d 271, 273-274 [2d Dept 1992]). Because “[a] court’s invocation of the confirmatory identification exception is...tantamount to a conclusion that, as a matter of law, the witness is so familiar with the defendant that there is little or no risk that...suggestion could lead to a misidentification” (*People v Rodriguez*, 79 NY2d at 450), the exception must “be narrowly confined to situations where suggestiveness is not a concern” (*People v Rodriguez*, 79 NY2d at 452; see *People v Dixon*, 85 NY2d 218, 223-224 [1995]; *People v Gissendanner*, 48 NY2d at 552) and “[t]he People bear the burden in any instance they claim that [the] identification procedure was ‘merely confirmatory’” (*People v Rodriguez*, 79 NY2d at 452; see *People v Thomas*, 225 AD2d 641, 641 [2d Dept 1996], *lv. denied* 92 NY2d 861 [1998]).

The Courts have long recognized that “[t]he mere labelling of an identification as ‘confirmatory’ will not obviate the need for [identification] hearings” (*People v Mato*, 83 NY2d

at 410-411, citing *People v Wharton*, 74 NY2d 921 [1989]; see *People v Boyer*, 6 NY3d at 432; *People v Reeves*, 140 AD3d 1584, 1586 [4th Dept 2016]). In determining whether an identification procedure is confirmatory, “[c]omprehensive analysis, not superficial categorization, ultimately governs” (*People v Gordon*, 76 NY2d 595, 601 [1990]; *People v Boyer*, 6 NY3d at 433; *People v Mato*, 83 NY2d at 411; *People v Davis*, 174 AD3d 1538, 1539 [4th Dept 2019], *lv. denied* 34 NY3d 980 [2019]; *People v Reeves*, 140 AD3d at 1586). Here, without further information, it is impossible to conclude that, as a matter of law, the identifying witnesses’ familiarity with the defendant is sufficient enough for this Court to invoke the “confirmatory identification exception.”

As there is currently insufficient information for this Court to conclude that “the [identifying] witnesses know defendant so well as to be impervious to...suggestion” (*People v Rodriguez*, 79 NY2d at 454; see *People v Coleman*, 73 AD3d at 1202; *People v Morrison*, 59 AD3d 569 [2d Dept 2009], *lv. denied* 12 NY3d 918 [2009]; *People v Tomlin*, 41 AD3d 620 [2d Dept 2007], *lv. denied* 10 NY3d 817 [2008]), and because “prior familiarity should not be resolved at trial in the first instance” (*People v Rodriguez*, 79 NY2d at 452; see *People v Carmona*, 185 AD3d 600, 605 [2d Dept 2020], *aff’d as modified* 37 NY3d 1016 [2021]), pre-trial *Rodriguez* hearings must be conducted to determine the nature and extent of the alleged familiarity between the witnesses at issue and Defendant.

Accordingly, Defendant’s motion to suppress is granted to the extent that hearings pursuant to *United States v Wade*, 388 US 218 [1967], and *People v Rodriguez*, 79 NY2d 445 [1992], will be held in connection with the noticed identifications.

3. MOTION FOR PRECLUSION OF DEFENDANT’S PRIOR BAD ACTS, ARRESTS AND CONVICTIONS; ASSOCIATED SANDOVAL, VENTIMIGLIA AND MOLINEUX HEARINGS.

Defendant requests “*Sandoval/Ventimiglia/Molineux hearings*” to determine the admissibility of any previous bad acts, arrests and/or convictions which the People seek to use during their case in chief or to impeach the defendant’s credibility should he testify (see Point V, Page 11, Paragraphs 23 and 24, of Defendant’s Affidavit).

In response, the People acknowledge their supplementary disclosure obligations under CPL §§ 245.10 (1) and 245.20 (3), and consent to hearings pursuant to *People v Sandoval*, 34

NY2d 371 [1974], and *People v Ventimiglia*, 52 NY2d 350 [1981], if disclosure of such bad acts, arrests and/or convictions is made (*see* Point III, Page 11, of the People’s Memorandum of Law).³ The People also indicate that should they “seek to introduce defendant’s prior bad acts on their direct case, the People will inform defense counsel and the Court and request a hearing [pursuant to *People v Molineux*, 168 NY 264 [1901]], before introducing such...evidence” (*see* Point III, Page 11, 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 purposes of impeaching his credibility or as substantive proof of any material issue in the case, *and* designated their intended use thereof, this Court will not order the requested *Sandoval*, *Ventimiglia* and *Molineux* 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

³ Item P of the Discovery Disclosure Index, referring to “Judgments of Conviction for Defendants and Witnesses Excluding Law Enforcement and Expert Witnesses,” indicates that “[c]omplete records of judgments of conviction have been provided [on] 4/11/2022, 4/12/2022, 4/18/2022 [and] 4/20/2022 [via the] “WCDA Discovery Portal.”

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.

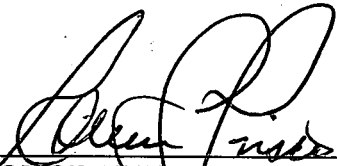
4. RESERVATION OF RIGHTS TO MAKE ADDITIONAL PRE-TRIAL MOTIONS.

Defendant's request to make additional pre-trial motions (*see* Page 12, Paragraph 25, of Defendant's Affidavit) 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
August 4, 2022


HONORABLE ROBERT J. PRISCO
County Court Judge

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