

**People v Smith**

2022 NY Slip Op 34905(U)

November 2, 2022

County Court, Westchester County

Docket Number: Indictment No. 71317-22

Judge: Robert J. Prisco

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COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

FILED 12

-against-

NOV 04 2022

DECISION & ORDER

JOHN SMITH,

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

Indictment No: 71317-22

Defendant.

ROBERT J. PRISCO, J.

Defendant JOHN SMITH is charged by Indictment Number 71317-22 with one count of Grand Larceny in the Third Degree pursuant to Penal Law [PL] § 155.35 [Count One], two counts of Grand Larceny in the Fourth Degree pursuant to PL § 155.30 (1) and (8) [Counts Two and Three, respectively], and two counts of Criminal Possession of Stolen Property in the Fourth Degree pursuant to PL § 165.45 (1) and (5) [Counts Four and Five, respectively].

Counts One through Three pertain to Defendant's alleged theft of a motor vehicle from an individual on March 21, 2022, when the value of the automobile exceeded three-thousand dollars (\$3,000.00).<sup>1</sup>

Counts Four and Five pertain to Defendant's alleged knowing possession of a stolen automobile on March 17, 2022, when the value of the automobile exceeded one thousand dollars (\$1,000.00).<sup>2</sup>

On June 10, 2022, Defendant was arraigned by this Court on the charges contained in Indictment Number 71317-22. Attached to the indictment are the People's Demand for a Notice of Alibi pursuant to CPL § 250.20, two (2) CPL § 710.30 (1) (a) Notices regarding the People's intent to offer evidence of statements allegedly made by the defendant to members of the City of Yonkers Police Department,<sup>3</sup> and a CPL § 710.30 (1) (b) Notice signifying the People's intent to

<sup>1</sup> The automobile is described as a Dodge Journey.

<sup>2</sup> The automobile is described as a Nissan Altima.

<sup>3</sup> The first CPL § 710.30 (1) (a) notice pertains to an oral statement that was allegedly made by Defendant in the vicinity of 264 Riverdale Avenue, in the City of Yonkers, at approximately 7:25 p.m., on March 21, 2022. The second CPL § 710.30 (1) (a) notice pertains to oral statements that were allegedly made by Defendant in the vicinity of Hudson Street and Riverdale Avenue, in the City of Yonkers, at approximately 3:31 p.m., on March 17, 2022.

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 a witness who has previously identified him as such.<sup>4</sup> During Defendant's arraignment, the People filed a Certificate of Compliance pursuant to CPL § 245.50 (1), with an attached "Discovery Disclosure Index" that identifies the items and materials that have reportedly been disclosed or provided to defense counsel. Within the People's Certificate of Compliance is a "Statement of Readiness," wherein the People state that they "confirm and announce their readiness for trial on all counts charged." During this Court appearance, the People also verbally confirmed their readiness for trial when inquired of by this Court, but acknowledged that the Grand Jury minutes were still outstanding.

On July 19, 2022, the People served and filed, via email, a Supplemental Certificate of Compliance, which includes a "Statement of Readiness," wherein "[t]he People confirm and announce their readiness for trial on all counts charged in this matter."<sup>5</sup> Attached to the Supplemental Certificate of Compliance is a copy of the People's Discovery Disclosure Index which identifies the additional item that has been disclosed to Defendant.<sup>6</sup>

On September 15, 2022, the Court received Defendant's Notice of Motion, an Attorney's Affirmation in Support of Omnibus Motion, and a Memorandum of Law in Support of Defendant's Omnibus Motion (hereinafter "Memorandum of Law"), seeking various forms of judicial intervention and relief.

On September 19, 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.

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

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<sup>4</sup> The CPL § 710.30 (1) (b) notice pertains to the People's intent to offer trial testimony from a witness who allegedly identified the defendant from a video on May 18, 2022, at approximately 2:00 p.m., "[i]n the Grand Jury." The Court notes that the Grand Jury presentation of this matter occurred on May 20, 2022, not May 18, 2022.

<sup>5</sup> Within the Supplemental Certificate of Compliance, the People represent that the additional item that has been provided to the defendant is the "Grand Jury Minutes."

<sup>6</sup> During an in-person Court appearance on August 26, 2022, the People again served and filed their Supplemental Certificate of Compliance. The People verbally reconfirmed their readiness for trial when inquired of by this Court.

Motion as follows:

**1. MOTION FOR INSPECTION OF GRAND JURY MINUTES AND DISMISSAL OF INDICTMENT NUMBER 71317-22 DUE TO THE LEGAL INSUFFICIENCY OF THE EVIDENCE PRESENTED.**

Citing CPL §§ 210.20 (1) (b), (1-a) and 210.30, Defendant requests that the Court inspect the minutes of the Grand Jury proceeding and dismiss Indictment Number 71317-22 or certain counts thereof “as not supported by legally sufficient evidence” (*see* Page 1, Paragraph (a), of Defendant’s Notice of Motion and Point I, Page 2, of Defendant’s Memorandum of Law). Defendant also requests “transcription and an inspection of the Grand Jury minutes” to determine if, among other things, the provided instructions were legally sufficient and proper, and whether the Grand Jury proceeding was defective (*see* Point I (a) - (t), Pages 2-5, of Defendant’s Memorandum of Law).

In their response, the People consent to an in-camera inspection of the Grand Jury minutes by the Court, oppose inspection thereof by Defendant (*see* Point A, Page 6, of the People’s Memorandum of Law), contend that the indictment is supported by legally sufficient evidence (*see* Point A, Pages 6-7, of the People’s Memorandum of Law), 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, Page 8, of the People’s Memorandum of Law).

To the extent that Defendant is requesting the Grand Jury minutes in their entirety, CPL § 245.20 (1)(b) provides for automatic discovery of “[a]ll transcripts of the *testimony* of a person who has testified before a grand jury” (emphasis added). Similarly, CPL § 210.30 (3), which addresses motions to inspect grand jury minutes, speaks only to the release of “grand jury *testimony* (emphasis added).” Accordingly, as there exists no statutory authority for the release to Defendant of those portions of the Grand Jury minutes that constitute colloquy or instructions and as the People have complied with the discovery mandate of CPL § 245.20 (1) (b) by providing the defendant with the transcript of the testimony of the three (3) witnesses who testified before the Grand Jury, the defendant’s request for the Grand Jury minutes in their entirety is denied.

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 71317-22 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 71317-22.

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 the charges contained within Indictment Number 71317-22 is denied.

## 2. MOTION TO SUPPRESS STATEMENTS.

Defendant seeks suppression of the statements noticed pursuant to CPL § 710.30 (1) (a) on the grounds that "all statements made by the defendant were involuntary, and were taken in violation of his constitutional rights pursuant to Miranda v Arizona" (see Point II, Page 6, of Defendant's Memorandum of Law).<sup>7</sup> In the alternative, Defendant requests a "pretrial hearing pursuant to People v Huntley" (see Point II, Page 7, of Defendant's Memorandum of Law).

In response, the People state that "as to the custodial interrogation and involuntariness claims under the Fifth Amendment, the People consent to a *Huntley* Hearing, after which his motion to suppress should be denied (see Point B Heading, Page 10, 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 a hearing pursuant to *People v Huntley*, 15 NY2d 72 [1965], will be conducted to determine the voluntariness and admissibility of the noticed statements.

## 3. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY.

Citing CPL Article 710 and *United States v Wade*, 338 US 218 (1967), Defendant moves to suppress "any identification of the defendant as being unreasonable and overly suggestive and in violation of defendant's Fourth, Fifth and Sixth Amendment rights as guaranteed by the United States Constitution and the New York Constitution, Article 1, Section 6" (see Page 2, Paragraph (c), of Defendant's Notice of Motion and Point III, Pages 8-9, of Defendant's Memorandum of Law). In the alternative, Defendant requests that the Court conduct a "pretrial *Wade* hearing" (see Page 2, Paragraph (c), of Defendant's Notice of Motion).

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<sup>7</sup> While Defendant references that he will also move to suppress his statements as violative of his Fourth Amendment rights (see Page 2, Paragraph (b), of Defendant's Notice of Motion), no factual allegations or arguments in support of such ground are made in his Memorandum of Law and, therefore, that contention is not addressed by the Court.

In response, the People contend that Defendant's motion should be denied because the noticed identification "did not constitute identification procedures within the meaning of CPL 710.30" (*see* Point C, Page 15, of the People's Memorandum of Law). Specifically, the People argue that "the officer was properly offering his lay opinion testimony that the person in the video was defendant" and, therefore, "there is no concern regarding suggestiveness" (*see* Point C, Page 15, of the People's Memorandum of Law).<sup>8</sup>

Defendant's motion to suppress is granted to the extent that a *Wade* hearing will be held in connection with the noticed identification. As the People contend that the officer was so familiar with Defendant so as to negate any possibility of suggestiveness (*see* Point C, Page 15, of the People's Memorandum of Law), the Court will also conduct a hearing pursuant to *People v Rodriguez*, 79 NY2d 445, 454 [1992], in connection with such identification.

#### 4. MOTION FOR SANDOVAL AND VENTIMIGLIA HEARINGS.

Relying on *People v Sandoval*, 34 NY2d 371 [1974], and *People v Ventimiglia*, 52 NY2d 350 [1981], Defendant requests pretrial hearings to determine the scope and admissibility of "so-called acts of misconduct" during cross-examination of the defendant and of "so-called uncharged crimes and/or prior similar acts... which the People intend to introduce on their direct case or case-in-chief" (*see* Point IV, Page 10, of Defendant's Memorandum of Law). Citing repealed CPL § 240.43, Defendant also requests timely notification of the acts of misconduct or criminality which the People intend to use for such purposes (*see* Point IV, Page 11, of Defendant's Memorandum of Law).<sup>9</sup>

In response, the People acknowledge their *Sandoval* and *Ventimiglia* obligations and consent to hearings on same if such disclosure is made (*see* Point D, Page 16, of the People's Memorandum of Law).

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<sup>8</sup> 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.

<sup>9</sup> This portion of Defendant's motion is interpreted as having been made pursuant to CPL Article 245, which replaced CPL Article 240, effective January 1, 2020.

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, nor designated their 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.

#### **5. RESERVATION OF RIGHTS TO MAKE ADDITIONAL PRE-TRIAL MOTIONS.**

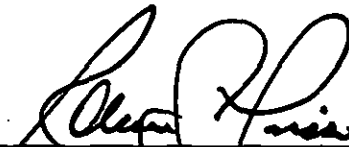
Defendant’s request to make additional pre-trial motions (*see* Page 2 of Defendant’s Notice of Motion and Page 11 of Defendant’s Memorandum of Law) is granted to the extent that, if sought, he will be required to serve and file an Order to Show Cause detailing the reason(s) why said motions were not 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  
November 2, 2022

  
HONORABLE ROBERT J. PRISCO  
County Court Judge

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