COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

OMAR GREEN
Defendant.

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DECISION & ORDER
Indictment No. 22-71743

MINIHAN, J.

Defendant, Omar Green, charged by Westchester County Indictment Number 22-71743 with Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[3]) and Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (Vehicle and Traffic Law § 511[1][a]), has filed an omnibus motion consisting of a Notice of Motion, an Affirmation in Support, a Memorandum of Law, and an attached exhibit. In response, the People filed an Affirmation in Opposition together with a Memorandum of Law. Since defendant's motion included a constitutional challenge to a New York statute, defendant served the New York State Attorney General's Office with his motion in accordance with New York Executive Law § 71.[1] The Attorney General's Office opted not to intervene and did not submit an answer in the matter.

I.

MOTION to INSPECT, DISMISS, and/or REDUCE
CPL ARTICLE 190

Defendant moves pursuant to CPL 210.20 to dismiss the indictment, or reduce the counts charged against him, on the grounds that the evidence before the Grand Jury was legally insufficient and the Grand Jury proceeding was defective within the meaning of CPL 210.35. On consent of the People, the Court has reviewed the minutes of the proceedings before the Grand Jury.

The Court denies defendant's motion to dismiss or reduce the counts in the indictment for legally insufficient evidence because 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]). Pursuant to CPL 190.65(1), an indictment must be supported by legally sufficient evidence which establishes that the defendant committed the offenses charged. "Courts assessing the sufficiency of the evidence before a grand jury must evaluate whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted--and deferring all questions as to the weight or quality of the evidence--would warrant conviction" (*People v Mills*, 1 NY3d 269, 274-275 [2002]). Legally sufficient evidence means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof (CPL 70.10[1]; *see People v Flowers*, 138 AD3d 1138, 1139 [2d Dept 2016]). "In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond

[1] The People claim that defendant did not serve the Attorney General's Office, but proof of service of defendant's motion was filed with this Court and the Attorney General's Office sent a letter to the Court advising they would not intervene. Clearly the Attorney General's Office was indeed served with defendant's motion.

a reasonable doubt" (*People v Jessup*, 90 AD3d 782, 783 [2d Dept 2011]). "The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference. That other, innocent inferences could possibly be drawn from those facts is irrelevant to the sufficiency inquiry as long as the Grand Jury could rationally have drawn the guilty inference" (*People v Bello*, 92 NY2d 523, 526 [1998]). Here, the evidence presented, if accepted as true, is legally sufficient to establish every element of the offenses charged (CPL 210.30[2]).

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 reveals that a quorum of the grand jurors was present during the presentation of evidence and that the Assistant District Attorney properly and clearly instructed the Grand Jury on the law and only permitted those grand jurors who heard all the evidence to vote the matter (*see People v Collier*, 72 NY2d 298 [1988]; *People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]).

To the extent that defendant's motion seeks disclosure of portions of the Grand Jury minutes beyond the disclosure directed by CPL Article 245, such as the prosecutor's instructions and/or colloquies, the court denies that branch of the motion.

II.

MOTION to SUPPRESS NOTICED STATEMENT

The People, pursuant to CPL 710.30(1)(a), noticed a statement allegedly made by defendant to members of the Yonkers Police Department on October 22, 2021. Defendant moves to suppress this statement as involuntary, the product of an unlawful stop and arrest, and made without *Miranda* warnings. Defendant's motion to suppress is granted to the extent that a pre-trial *Huntley* hearing shall be held, on consent of the People, to determine whether the alleged statement was involuntarily made within the meaning of CPL 60.45 (*see* CPL 710.20[3]; CPL 710.60[3][b]; *People v Weaver*, 49 NY2d 1012 [1980]). The hearing will also address whether the alleged statement was obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

III.

MOTION to SUPPRESS PHYSICAL EVIDENCE

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

IV.

MOTION to DISMISS on CONSTITUTIONAL GROUNDS

Defendant moves to dismiss count one of the indictment, Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[3]), arguing that New York's firearm licensing scheme

was deemed unconstitutional by the United States Supreme Court in *New York State Rifle & Pistol Association, Inc. v Bruen*, 597 US ___, 142 S Ct 2111, 213 L Ed 2d 387 (2022), and therefore prosecuting him for the unlicensed possession of a handgun violated his rights under the Second Amendment. Defendant argues that he was charged with Criminal Possession of a Weapon in the Second Degree "for no other reason than he allegedly possessed a firearm without a license to carry such firearm under an unconstitutional licensing scheme."

In *Bruen*, the Supreme Court ruled that the Second Amendment protects the right to carry a weapon in public for self-defense, which may not be conditioned on "demonstrating to government officers some special need" to do so (142 S Ct at 2156). Thus, the Court held that "New York's proper-cause requirement violate[d] the Fourteenth Amendment [since] it prevent[ed] law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms" (*Id.*). Significantly, the Court did not disturb any other aspect of New York's firearm licensing scheme, including its character and fitness requirement. As such, a Court, acting as a licensing officer, may still consider whether an applicant has "good moral character" when deciding whether to approve an unrestricted license to carry a firearm (*see* Penal Law § 400.00[1][b]). The Supreme Court made clear that individuals with prior felony convictions or a history of mental illness, among other examples, may be denied the right to possess a gun. Justice Alito, concurring in *Bruen*, indicated that "restrictions ... may be imposed on the possession or carrying of guns" (142 S Ct at 2157 [Alito, J., concurring]). Justice Alito added that the *Bruen* holding "decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun" (*Id.*). The Supreme Court merely held that a law-abiding citizen applying for a concealed carry permit cannot be required to show "proper cause" – that is, an "atypical need for armed self-defense" (*Bruen*, 142 S Ct at 2138, fn 9). Under the *Bruen* holding, New York may continue to require that a person obtain a license to purchase or possess a firearm, and it may continue to require that a person obtain a concealed carry permit in order to carry a handgun in public.

Defendant misreads the holding in *Bruen* which did not hold that citizens have an unfettered right to carry concealed weapons in public nor did it invalidate New York's laws criminalizing the unlicensed possession of firearms. The *Bruen* decision has no bearing on the constitutionality of the statutes criminalizing possession of a firearm because, as expressly stated in *Bruen*, states maintain the right under the United States Constitution to require gun licenses for lawful possession and may instill certain requirements as part of the application process, such as undergoing a background check or passing a firearms safety course (*Id.*). Defendant misconstrues both *Bruen* and the Second Amendment as conferring an unqualified entitlement to possess a deadly weapon in public places without restriction. Since *Bruen* was decided, no trial court confronted with a similar claim has ruled that *Bruen* prohibits as unconstitutional a criminal prosecution of a defendant for the unlicensed possession of a firearm under the Penal Law. In fact, decisions have uniformly concluded that *Bruen* in fact allows states to have gun licensing schemes and to criminalize the unlicensed possession of handguns (*see e.g. People v Caldwell*, 76 Misc 3d 997, 1003 [Sup Ct, Queens County 2022]).

Moreover, defendant lacks standing to challenge the application of New York's firearm licensing laws to him since he has not shown that he actually applied for, and was denied, a pistol license in New York (*see People v Williams*, 76 Misc 3d 925, 929 [Sup Ct, Kings County 2022]). Although he alleges he attempted to obtain a gun lawfully, he does not supply proof that he applied for a license to possess a handgun. In his motion, defendant stated that "his purchase was delayed

pending a background check and license application [and] [t]hat application was summarily denied for no Constitutional reason." In support of his claim that he purchased a gun, he attached to his motion a reprinted purchase receipt from the RT Smoke N Gun Shop located in Mount Vernon, New York. However, the receipt, dated June 11, 2021, does not specify what item was purchased and only indicates that a $300.00 deposit was taken and that a balance of $25.11 was outstanding. Although he alleges that he applied for and was denied a gun license as a result of New York's unconstitutional licensing scheme, defendant fails to provide a copy of an application or any substantive proof that such application existed. In short, because defendant failed to seek a license and did not submit to the licensing process, he does not have standing to bring any challenge to the licensing scheme (*see e.g. United States v Decastro*, 682 F 3d 160, 164 [2d Cir 2012]; *see People v Rodriguez*, 76 Misc 3d 494, 496 [Sup Ct, New York County [2022]). In any event, defendant is not actually challenging New York's former licensing scheme; rather, defendant challenges the statutes criminalizing unlicensed possession, arguing that the right to bear arms confers an absolute entitlement to possess concealed firearms in public. However, *Bruen* did not hold that the State is powerless to criminalize the unlicensed possession of firearms. Like other constitutionally protected rights, the right to bear arms, as the Supreme Court recognized in *Bruen*, is "subject to certain reasonable, well-defined restrictions," including licensing requirements (142 S Ct at 2156).

Based upon the foregoing, defendant's motion to dismiss count one of the indictment, Criminal Possession of a Weapon in the Second Degree, is denied.

V.

MOTION for *SANDOVAL* and *VENTIMIGLIA* HEARINGS

Defendant has moved for a pre-trial hearing to permit the trial court to determine the extent, if at all, to which the People may inquire into defendant's prior criminal convictions or prior uncharged criminal, vicious, or immoral conduct. On the People's consent, the Court orders a pre-trial *Sandoval* hearing (*see People v Sandoval*, 34 NY2d 371[1974]). At said hearing, the People shall notify defendant, *in compliance with CPL Article 245*, of all specific instances of his criminal, prior uncharged criminal, vicious, or immoral conduct of which they have knowledge and which they intend to use in an attempt to impeach defendant's credibility if he elects to testify at trial, *and, in any event, not less than 15 days prior to the first scheduled trial date.* Defendant shall bear the burden of identifying any instances of his prior misconduct that he submits the People should not be permitted to use to impeach his credibility. Defendant shall be required to identify the basis of his belief that each event or incident may be unduly prejudicial to his ability to testify as a witness on his own behalf (*see People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

If the People determine that they will seek to introduce evidence at trial of any prior uncharged misconduct and criminal acts of defendant, including acts sought to be used in their case in chief, they shall so notify the Court and defense counsel, *in compliance with CPL Article 245, and, in any event, not less than 15 days prior to the first scheduled trial date*, and a *Ventimiglia/Molineux* hearing (*see People v Ventimiglia*, 52 NY2d 350 [1981]; *People v Molineux*, 168 NY 264 [1901]) shall be held immediately prior to trial to determine whether or not any evidence of uncharged crimes may be so used by the People. The People are urged to make an appropriate decision in this regard sufficiently in advance of trial to allow any *Ventimiglia/Molineux* hearing to be consolidated and held with the other hearings herein.

VI.

BRADY MATERIAL

The People acknowledge their continuing duty to disclose exculpatory material (*Brady v Maryland*, 373 US 83 [1963]; *see Giglio v United States*, 405 US 150 [1971]). The People also acknowledge that they have or will comply with their obligations under CPL 245.20(1) (k), (l), and (p). If the People are or become aware of any such material which is arguably subject to disclosure under *Brady* and its progeny and Criminal Procedure Law Article 245 which they are unwilling to consent to disclose, they are directed to bring it to the immediate attention of the Court and to submit it for the Court's in camera inspection and determination as to whether it constitutes *Brady* material discoverable by defendant.

VII.

LEAVE TO MAKE ADDITIONAL MOTIONS

Defendant's motion for leave to make additional motions is denied. Defendant must demonstrate good cause for any further pre-trial motion for omnibus relief, in accordance with CPL 255.20(3).

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
November 22, 2022

Honorable Anne E. Minihan
Acting Justice of the Supreme Court

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