SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

KELVIN GARCIA LIRIANO
Defendant.

DECISION & ORDER
Indictment No. 23-71080

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MINIHAN, J.

Defendant Kelvin Garcia Liriano, charged by Westchester County Indictment Number 23-71080 with Grand Larceny in the Second Degree (Penal Law § 155.40[1]) (3 counts), has filed an omnibus motion consisting of a Notice of Motion, an Affirmation in Support, and a Memorandum of Law. In response, the People filed an Affirmation in Opposition together with a Memorandum of Law.

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 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. With respect to defendant's request that the Court retain a sealed copy of the Grand Jury minutes as a court exhibit for inclusion in the record of appeal, that request is denied. The People are to retain a complete set of Grand Jury minutes, including their instructions, within their file.

II.

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]).

In their papers, the People indicate that during their case in chief, they intend to introduce evidence of defendant's uncharged matters in New Rochelle, Yonkers, and Rahway, New Jersey. As such, 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 these uncharged crimes may be so used by the People.

III.

MOTION for DISCOVERY, DISCLOSURE, and INSPECTION
CPL ARTICLE 245

To whatever extent material that is discoverable under CPL Article 245 has not already been provided to the defense by the People, the defendant's motion is granted and such discovery,

including both *Brady* material[1] and *Rosario* material, shall be provided forthwith. Leave is granted for either party to seek a protective order (CPL Article 245).

In defendant's motion, counsel lists items of discovery she claims to be outstanding (*see* Defendant's Memorandum of Law, Point III, ¶ 1-19). The People, in their answer, allege that all existing discovery in their possession has been turned over. The People provided continued discovery in this matter on the following dates in 2023: April 18, April 24, April 26, May 2, May 15, May 18, June 22, and June 30. If the People have fulfilled their discovery obligations but have not yet filed a Certificate of Compliance, they are directed to do so forthwith and they are reminded of their continuing obligation to remain in compliance with the discovery mandates set forth in CPL Article 245 and to file supplemental Certificates of Compliance as the need arises.

Moreover, the People must disclose the terms of any deal or agreement made between the People and any prosecution witness at the earliest possible date (*see People v Steadman*, 82 NY2d 1 [1993]; *Giglio v United States*, 405 US 150 [1972]; *Brady v Maryland*, 373 US 83 [1963]; *People v Wooley*, 200 AD2d 644 [2d Dept 1994]).

Defense counsel is directed to contact the assigned Assistant District Attorney, Adrian Murphy, upon receipt of this order. If any discovery issues remain unresolved within three business days of receipt of this order, counsel for defendant shall contact the Court to request an immediate compliance conference.

IV.

MOTION to SUPPRESS NOTICED STATEMENTS

The People, pursuant to CPL 710.30(1)(a), noticed two statements allegedly made by defendant to members of the New York State Police on November 12, 2022. Defendant moves to suppress these noticed statements as involuntary, the product of an unlawful arrest, made without being adequately apprised of *Miranda* warnings, and in violation of his right to counsel. 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 statements were 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 statements were obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]), or his Sixth Amendment right to counsel.

[1] The People have a continuing duty to disclose exculpatory material (*Brady v Maryland*, 373 US 83 [1963]; *see Giglio v United States*, 405 US 150 [1971]). If the People are or become aware of any such material which is arguably subject to disclosure under *Brady* and its progeny and CPL 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 an in-camera inspection by the court and determination as to whether it constitutes *Brady* material discoverable by defendant. The Court has served a *Brady* Order on the People, dated May 4, 2023, which details the time period their disclosure must be made in accordance with the standards set for in the United States and New York State Constitutions and CPL Article 245.

V.

MOTION to CONTROVERT SEARCH WARRANTS

To the extent that defendant has standing to contest any property seized pursuant to search warrant, and to the extent that defendant challenges the sufficiency of the search warrants, that argument fails. The results of a search conducted pursuant to a facially sufficient search warrant are not subject to a suppression hearing (*People v Arnau*, 58 NY2d 27 [1982]). The Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article I § 12 of the New York State Constitution contains identical language. Consistent with these constitutional provisions, CPL 690.45(4) requires that when a search warrant authorizes the seizure of property, the warrant must include "[a] description of the property which is the subject of the search." "To meet the particularity requirement, the warrant must be specific enough to leave no discretion to the police" (*see People v Cahill*, 2 NY3d 14, 41 [2003]). Upon review of the four corners of the search warrant affidavit, the warrants were adequately supported by probable cause, and sufficiently particular as to the place to be searched and the things to be seized (*see People v Keyes*, 291 AD2d 571 [2d Dept 2002]; *see generally People v Badilla*, 130 AD3d 744 [2d Dept 2015]; *People v Elysee*, 49 AD3d 33 [2d Dept 2007]). The Court has also reviewed the orders and finds them to be proper.

Moreover, defendant's argument that "[t]he reliability and basis of knowledge must be established as to each informant" pursuant to *Aguilar v Texas*, 84 S. Ct. 1509 (1964) and *Spinelli v United States*, 89 S. Ct. 584 (1969) (*see* Defendant's Memorandum of Law, page 9), is improper here since the warrants were based upon a police officer's knowledge and not that of a confidential informant or anonymous tip. Defendant's allegation that the police sought the warrants as a "fishing expedition" is without merit. The warrants were supported by probable cause. Finally, defendant claims that a memo made by New York State Police Investigator Palladino indicated "installation of GPS tracker, 3/5," three days prior to the issuance of the warrants. In his papers, Assistant District Attorney Adrian Murphy, the assistant assigned this investigation, stated that the warrants were signed (Cacace, J.) on March 8, 2023 and the "GPS trackers were installed on the vehicles within 10 days" (*see* People's Affirmation in Opposition, page 8). The Court will allow defense counsel to question the investigator at the pre-trial hearings held herein regarding the limited issue of the date referred to in his memo and the date on which the GPS tracking devices were installed on the vehicles.

VI.

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 from defendant (*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]).

Defendant also asserts that cell phone records and documents pertaining to defendant's business obtained pursuant to subpoena should be suppressed because they "were issued as a fishing expedition, after [New York State Police Investigator] Palladino had already spoken with the [d]efendant" (*see* Defendant's Memorandum of Law, Point VI). In the alternative, defendant requests a hearing. In *United States v Dionisio*, 410 US 1 (1973), the Supreme Court held that service of a Grand Jury subpoena did not constitute a "seizure" under the Fourth Amendment. "A Grand Jury has broad investigative powers to determine whether a crime has been committed and who has committed it" (*United States v Dionisio*, 410 US at 15) and "[u]nlike searches and seizures, where a preliminary showing of probable cause is required before a warrant may issue, a Grand Jury is not saddled with such a requirement in issuing a subpoena duces tecum … All that is required under the State and Federal Constitutions is that the subpoenaed materials be relevant to the investigation being conducted and that the subpoena not be overbroad or unreasonably burdensome" (*Matter of Hynes v Moskowitz*, 44 NY2d 383, 394 [1978]). On July 20, 2023, the Court asked the People to provide copies of the Grand Jury subpoenas duces tecum issued in this matter for the Court's review. According to the People, there was one Grand Jury subpoena duces tecum issued during the investigation of this matter, on March 15, 2023, to T-Mobile for phone records. The Court has reviewed this subpoena duces tecum, along with the Grand Jury minutes, and finds the subpoenaed documents were relevant to the investigation and not overbroad or unreasonably burdensome.

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
July 27, 2023

Honorable Anne E. Minihan
Justice of the Supreme Court

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