SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOSE PABELLON

Defendant.

DECISION & ORDER
Indictment No. 23-71262

MINIHAN, J.

Defendant Jose Pabellon, charged by Westchester County Indictment Number 23-71262 with Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) and Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (2 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.

MOTIONS to STRIKE STATEMENT and IDENTIFICATION NOTICES and PRECLUDE UNNOTICED STATEMENTS and IDENTIFICATIONS

The People, pursuant to CPL 710.30(1)(a), provided notice of a videotaped statement made by defendant to a member of the City of Yonkers Police Department on October 19, 2022 at approximately 6:26 P.M. at 470 Nepperhan Avenue in the City of Yonkers. Defendant argues that the notice should be stricken as insufficient for failing to specify the sum and substance of the statement.

A statement notice must "inform defendant of the time and place the oral or written statements were made and of the sum and substance of those statements" (*People v Lopez*, 84 NY2d 425, 428 [1994]). In the notice here, dated May 9, 2023, the People provided the date, time, and place of the statement, but rather than including a written summary of the substance of it, they directed the defendant to "see [the] videotaped statement sent via the Discovery Portal to defense counsel on November 4, 2022." However, in *Lopez*, 84 NY2d at 428, the Court found that "[f]ull copies of the statements need not be supplied but they must be described sufficiently so that the defendant can intelligently identify them." Here, the People provided the full statement and described the statement sufficiently, indicating that it had been sent to defense counsel on November 4, 2022, and therefore, defendant could identify the statement, particularly since defense counsel was in possession of the video statement for months prior to receiving the notice. As such, the People's notice was proper and in conformity with the statutory requirements of CPL 710.30.

Pursuant to CPL 710.30(1)(b), the People noticed two identifications made of defendant. Defendant argues that the identification notices should be stricken because they fail to indicate who made the identifications and to whom they were made. The first notice states that the identification was made from a video on October 19, 2022 at approximately 2:45 P.M. by members of the City of Yonkers Police Department who observed the defendant, previously known to them, on city camera

video surveillance in the vicinity of 60 Maple Street in Yonkers. The second identification referenced in the 710.30(1)(b) notice was made from a video on April 27, 2023 at 11 A.M. during the Grand Jury proceedings. An identification notice must "inform defendant of the time, place and manner in which the identification was made" (*People v Lopez*, 84 NY2d 425, 428 [1994]). There is no requirement that the People name the person who made the identification or the person to whom it was made. Therefore, both identification notices are proper and in conformity with the statutory requirements of CPL 710.30. It should be noted, however, the People point out that the second "identification" involved a police officer providing their lay opinion to the grand jurors that the person in the video was defendant and thus, the People argue, this opinion testimony does not qualify as an identification procedure under CPL 710.30 and as such, they argue the notice given was gratuitous.

Based on the foregoing, defendant's motion to strike the statement and identification notices is denied.

The motion to preclude the People from introducing statements and identifications at trial that were not noticed is denied as premature. The People acknowledge the statutory requirements of CPL 710.30. To the extent the People choose to cross-examine defendant, should he elect to testify, the People are instructed to obtain a ruling from the trial court should they seek to impeach him with any unnoticed statements.

II.

MOTION to PRECLUDE NOTICED IDENTIFICATION TESTIMONY
CPL 710

Defendant's motion to suppress testimony of the noticed identifications is granted to the limited extent of ordering a pre-trial *Wade* hearing (*see United States v Wade*, 388 US 218 [1967]). At the hearing, the People bear the initial burden of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness (*see People v Chipp*, 75 NY2d 327, 335 [1990] *cert. denied* 498 US 833 [1990]; *People v Berrios*, 28 NY2d 361 [1971]). Once that burden is met, defendant bears the ultimate burden of proving that the procedure was unduly suggestive. Where suggestiveness is shown, the People must show the existence of an independent source by clear and convincing evidence. The hearing will address the People's claim that an identifying witness had a sufficient prior familiarity with defendant as to render the witness impervious to police suggestion (*see People v Rodriguez*, 79 NY2d 445 [1992]).

III.

MOTION to SUPPRESS NOTICED STATEMENT

Defendant moves to suppress the noticed statement as involuntary, the product of an unlawful arrest, and made without understanding the *Miranda* warnings given to him. 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]).

IV.

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.

V.

MOTION to STRIKE PREJUDICIAL LANGUAGE

Defendant moves to strike certain language from the indictment on the grounds that it is irrelevant and potentially prejudicial. The language contained in the indictment merely identifies defendant's acts as public, rather than private wrongs and such language need not be stricken on the ground that it is prejudicial. This motion is denied (*see People v Gill*, 164 AD2d 867 [2d Dept 1990]; *People v Winters*, 194 AD2d 703 [2d Dept 1993]; *People v Garcia*, 170 Misc. 2d 543 [Westchester Co. Ct. 1996]).

VI.

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).[2]

In defendant's motion, counsel states that she has not received a witness list nor complete law enforcement information pursuant to CPL 245.20(1)(k). The People, in their answer, allege that all existing discovery in their possession has been turned over, including a list of all non-law enforcement witnesses and law enforcement personnel with information about the case and CPL 245.20(1)(k) information. The People provided discovery in this matter on the following dates in 2022: November 2, November 4, and November 14, and on the following dates in 2023: May 8, May 9, May 18, and July 3.

The People filed a Certificate of Compliance on or about July 3, 2023 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.

VII.

MOTION to STRIKE PEOPLE'S CERTIFICATE of COMPLIANCE
and STATEMENT of READINESS

Defendant moves to strike the People's Certificate of Compliance ("COC") and Statement of Readiness ("SOR") filed on July 3, 2023 as illusory, arguing that their filing before CPL 245.20(1)(k) materials were fully provided was premature. The motion to strike is denied.

The People indicate that CPL 245.20(1)(k) materials were provided to defendant prior to the filing of the COC and SOR and state that "there is no indication that additional materials exist" (*see* People's Memorandum of Law, Point F). Defense counsel does not specify which materials or information she alleges has not been turned over. Defense counsel is directed to contact the assigned Assistant District Attorney, Courtney Johnson, 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.

Regardless, perfect compliance is not required by statute before filing a COC. If the Legislature intended to require complete disclosure of every single discoverable item prior to filing a COC or SOR, it would have explicitly stated as such (*see People v Askin*, 68 Misc3d 372 [County Ct Nassau County April 28, 2020] [rejecting claim that complete disclosure of discovery is required before filing COC as "not reasonable" and "clearly not what the Legislature intended"]). In fact, CPL Article 245 allows for, and mandates, the filing of multiple Certificates of Compliance and such subsequent filings do not negate or vitiate the prior filing of the People if done in good faith and after diligent efforts were made to obtain the required materials (*see People v Cano*, 71 Misc3d

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[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 23, 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.

[2] In fact, a Protective Order was signed (McCarty, J.) in this matter on June 28, 2023.

728, 739 [Sup Ct Queens County December 3, 2020]; *People v Percell*, 67 Misc3d 190 [Criminal Ct New York County February 10, 2020]).

"By allowing for the possibility that the People be deemed ready even when some discovery is outstanding, the legislature acknowledged that unavoidable delays and unforeseen hurdles may prevent a diligent prosecutor from complying fully with their discovery obligations, despite their best efforts to obtain all the relevant material in a timely fashion" *(People v Aquino,* 72 Misc3d 518 [Criminal Ct Kings County May 7, 2021]; *see also People v Weston*, 66 Misc3d 785 [Criminal Ct Bronx County February 20, 2020]).

The People provided continued discovery in this matter as indicated in Point VI *supra*. The People's ongoing efforts to fulfill their discovery obligations demonstrate that they exercised due diligence and filed the COC and SOR on July 3, 2023 in good faith.

For these reasons, defendant's motion to strike the People's COC and SOR filed on July 3, 2023 is denied.

VIII.

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]).

Moreover, as to defense counsel's additional claims in her Memorandum of Law, the Court finds that there were no unauthorized persons present in the Grand Jury, the indictment was not voted by an extended term of the Grand Jury, the presentation of evidence was not withdrawn prior to a vote being taken and then re-submitted, the prosecutor properly answered questions raised by the Grand Jurors, the prosecutor did not inject her personal opinions or beliefs or vouch for the credibility of witnesses, oaths were properly administered, there was no unsworn testimony, no hearsay was elicited, and the prosecutor's legal instructions were understandable.

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.

IX.

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]).

X.

MOTION to STRIKE ALIBI NOTICE

Defendant's motion to strike the People's alibi notice is denied. Contrary to defendant's contentions, it is well-settled that CPL 250.20 is indeed in compliance with the constitutional requirements (*see People v Dawson,* 185 AD2d 854 [2d Dept 1992]; *People v Cruz*, 176 AD2d 751 [2d Dept 1991]; *People v Gill*, 164 AD2d 867 [2d Dept 1990]) and provides equality in the required disclosure (*People v Peterson*, 96 AD2d 871 [2d Dept 1983]; *see generally Wardius v Oregon*, 412 US 470 [1973]).

XI.

BRADY and MOTION for PRODUCTION of INFORMANTS and DISCLOSURE of DEALS and AGREEMENTS

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). Again, 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.

Defendant also moves for disclosure and production of any confidential informant, as well as disclosure of any deals and agreements between authorities and any witness. The People indicate that there was no confidential informant involved in this case and as such, defendant's request is moot. 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]).

XII.

HEARINGS TWENTY DAYS BEFORE TRIAL

Defendant requests that pre-trial hearings be scheduled at least twenty days before trial. The hearings will be scheduled at a time that is convenient to the court, upon due consideration of all of its other cases and obligations.

XIII.

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
August 11, 2023

Honorable Anne E. Minihan
Justice of the Supreme Court

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