

People v Keogh

2016 NY Slip Op 33034(U)

November 16, 2016

County Court, Rokcland County

Docket Number: 2016-281

Judge: David S. Zuckerman

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF ROCKLAND

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ROCKLAND COUNTY
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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

FRANK KEOGH,



Ind. No.: 2016-281

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Rockland County, NY
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ZUCKERMAN, J.

CO-2016-001152

By Indictment No. 2016-281, Defendant is charged with Murder in the Second Degree (Penal Law § 120.25 [1]) and Criminal Possession of a Weapon in the Third Degree (Penal Law §265.02[1]). It is alleged in the Indictment that, on July 16, 2016, in the County of Rockland, with the intent to cause the death of another person, Defendant caused the death of that other person by means of a dangerous instrument. By Notices of Motion dated October 20, 2016 and October 25, 2016, with accompanying Affirmations in Support, the People move to compel Defendant to submit to the taking of a DNA sample and to compel AT&T to provide cell tower information relating to Defendant's cellular telephone service. In two separate Affirmations in Opposition, each dated November 8, 2016, Defendant opposes the motions. The People have also submitted a Reply Affirmation, dated November 14, 2016.

1. MOTION TO COMPEL A DNA SAMPLE

The People move, pursuant to Criminal Procedure Law §240.40(2)(b)(v), to compel production by Defendant of a saliva

[*2]

sample via buccal swab in connection with the above-mentioned murder. The swab will then be sent to the New York State Police Forensic Identification Center (FIC) for processing. The People have affirmed that, at the time of Defendants' arrest, biological evidence consisting of what appeared to be blood was detected by FIC on a knife allegedly used by Defendant to stab the decedent. The People allege that the knife was recovered from a vehicle operated by Defendant approximately six hours after the murder. In their Reply, the People add that, on October 29, 2016, FIC identified the presence on the knife of DNA from two donors, one of which is male, and that the male sample is not from the decedent.

In *Matter of Abe. A.*, 56 NY2d 288, 291 (1982), the Court of Appeals held that a court may order an individual to provide a bodily fluid sample if the People establish probable cause to believe the accused has committed the crime charged, there is a "clear indication" that relevant material evidence will be found, and that the method used to secure the evidence is safe and reliable. This standard applies whether or not the suspect has been indicted.

In their Affirmation and Reply, the People set forth sufficiently reliable factual allegations to establish that Defendant was described and identified as the person who allegedly committed the above murder. In addition, the Grand Jury voted a true bill of indictment against Defendant charging him with the

instant offense. Therefore, there is probable cause to believe that this crime was committed and that this defendant committed it. Further, the Court finds that the taking of defendant's saliva sample via a buccal swab will likely provide relevant evidence. Finally, the sample requested herein would be taken from the defendant by way of buccal swab and, as commonly done, would not constitute an unreasonable intrusion or risk to the health of the defendant.

In sum, the People seek a saliva sample to confirm and corroborate that Defendant is the perpetrator of this crime. Even if it may or may not be dispositive of any single issue, evidence regarding the source of the DNA recovered from the scene of the crime may be relevant to "logically complete the evidentiary picture and avoid trial smokescreens." *People v. Wesley*, 140 Misc2d 306 (County Court, Albany County, 1988); *aff'd* 183 AD2d 75 (3d Dept 1992), *aff'd* 83 NY2d 417 (1994); *People v Russell*, 165 AD2d 327 (2d Dept 1991). Therefore, the People have established *prima facie* entitlement to the relief sought.

Based on the foregoing, the People's motion for an order directing that Defendant submit to having a saliva sample taken from him is granted. Such sample shall be taken by buccal swabbing the inside cheek of said defendant by qualified medical personnel in the presence of a representative of the Rockland County District Attorney, Rockland County Sheriff and/or Town of Haverstraw Police

Department. The extraction of the sample shall be taken upon at least three (3) days notice to Defendants' counsel.

2. MOTION TO COMPEL AT&T TO PROVIDE CELL SITE INFORMATION

The People also move, in effect pursuant to CPL Article 600, for a search warrant which seeks from cell telephone provider AT&T call detail and cell tower information for the telephone designated as 914-841-3021, subscribed to by Defendant Frank Keogh. As set forth in the Affidavit for a search warrant annexed to the People's application, Defendant is alleged to have possessed the target cellular telephone on July 16, 2016 at 9:00 p.m., the approximate time of the murder herein. Further, Defendant was the subject of a vehicle stop, and subsequent search warrant execution, conducted by New York State Police Officers at approximately 3:28 a.m. on July 17, 2016 (i.e. approximately six hours after the murder). Besides the above-referenced bloody knife, the cellular telephone associated with the account which is the subject of the instant application was recovered from the vehicle, which was operated (and occupied solely) by the Defendant.

The court therefore concludes that there is probable cause to believe that AT&T possesses call detail and cell tower information for the cellular telephone account designated as 914-841-3021, subscribed to by Defendant Frank Keogh, for the time period of 5:00 p.m. on July 16, 2016 to 3:30 a.m. on July 17, 2016; that the said

information is relevant and material regarding the instant matter;
and that therefore such information ought to be ordered to be
disclosed by the court.

Based on the foregoing, it is hereby

ORDERED, that the instant applications, to compel Defendant to
submit to the taking of a DNA sample, and to compel AT&T to provide
cell tower information relating to Defendant's cellular telephone
service, are hereby granted.

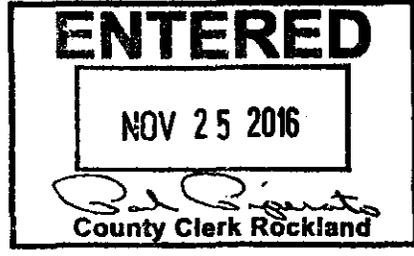
Submit Orders.

Dated: New City, New York
November 16, 2016



HON. DAVID S. ZUCKERMAN, J.C.C.

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