

<b>People v Montgomery</b>
2017 NY Slip Op 33288(U)
November 27, 2017
County Court, Dutchess County
Docket Number: 2025/2017
Judge: Peter M. Forman
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2025-2017

STATE OF NEW YORK: COUNTY OF DUTCHESS  
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

- against -

KEIRON MONTGOMERY,

Defendant.

DECISION AND ORDER

Ind. No. 119/2017

William V. Grady,  
District Attorney  
by: Sinead M. McLoughlin, Esq.

Mikael A. Cohn, Esq.  
Counsel for Defendant

HON. PETER M. FORMAN, County Court Judge

The following papers were read and considered in deciding this motion:

PAPERS NUMBERED

<b>NOTICE OF OMNIBUS MOTION.....</b>	<b>1</b>
<b>AFFIRMATION IN SUPPORT.....</b>	<b>2</b>
<b>NOTICE OF CROSS MOTION.....</b>	<b>3</b>
<b>AFFIRMATION.....</b>	<b>4</b>

Defendant stands accused by the Grand Jury of the County of Dutchess of one count of Criminal Sale of a Controlled Substance in the Third Degree, a Class B Felony, in violation of Penal Law §220.39(1); and one count of Criminal Possession of a Controlled Substance in the Third Degree, a Class B Felony, in violation of Penal Law §220.16(1).

By Omnibus Motion, Defendant seeks various forms of relief which this Court will address in order:

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GRAND JURY MINUTES AND INDICTMENT

With respect to Defendant's motion for inspection of the Grand Jury minutes and dismissal or reduction of the indictment, the same is granted to the extent that the Court has reviewed such minutes for the purpose of determining Defendant's motion to dismiss or reduce the charges to a lesser included offense upon the grounds that said inspection would allegedly show that the evidence upon which the indictment was based was legally incompetent, insufficiently corroborated or otherwise inadmissible. CPL §190.65(1). Having examined the minutes of the testimony before the Grand Jury of Dutchess County, this Court determines that the indictment is based upon evidence which is legally sufficient to establish that Defendant committed the offenses as set forth therein, and that competent and admissible evidence before the Grand Jury provides reasonable cause to believe that the defendant committed those offenses [CPL §190.65; *People v. Swamp*, 84 N.Y.2d 725(1994); *People v. Haney*, 30 N.Y.2d 328 (1972)].

Further, this Court determines that the evidence is legally sufficient to support every element of the charges contained in said indictment and any lesser included offenses, and that legally sufficient evidence was presented to establish that Defendant committed such offenses. See *People v. Jensen*, 86 N.Y.2d 248 (1995); *People v. Jennings*, 69 N.Y.2d 103 (1986); *People v. Mayer*, 1 A.D.3d 461 (2<sup>nd</sup> Dept. 2003). This Court has also reviewed the instructions given by the Assistant District Attorney to the Grand Jury and finds that the same satisfy the applicable standards [*People v. Calbud, Inc.*, 49 N.Y.2d 389(1980)]. Further, this Court finds nothing that would render this indictment defective. Accordingly, Defendant's motion to dismiss or reduce the indictment is denied.

Defendant's motion to be provided with a copy of the Grand Jury minutes is denied in the exercise of discretion. Defendant's motion to be provided with a copy of the legal instructions given to the Grand Jury is also denied in the exercise of discretion.

#### BILL OF PARTICULARS

"The sole function of a bill of particulars is to define more specifically the crime or crimes charged in the indictment, or, in other words, to provide clarification of certain matters set forth in the pleading. A bill of particulars serves to clarify the pleading; it is not a discovery device." [*People v. Davis*, 41 N.Y.2d 678, 679-80 (1977)]. See also [*People v. Zurita*, 64 A.D.3d 800, 801 (2d Dept. 2009)]. While a bill of particulars must apprise defendant of the theory to be advanced at trial, there is no requirement that the bill of particulars provide information as to the evidence that will be used to prove that theory. [*People v. Earel*, 220 A.D.2d 899 (3d Dept. 1995), *aff'd* 89 N.Y.2d 960 (1997); *Preisser*, McKinney's Practice Commentaries to CPL §200.95, citing [*People v. Fitzgerald*, 45 N.Y.2d 574 (1978)]. Stated differently, "the bill of particulars is meant to provide what the People intend to prove, not show how they intend to do so." [*People v. Young*, 289 A.D.2d 866, 868 (3d Dept. 2001)].

The Court has reviewed the Bill of Particulars and concludes that it provides Defendant with fair notice of the charges against him, adequately appries Defendant of the theory to be advanced at trial and specifies the substance of Defendant's conduct that the People intend to prove at trial, and contains the information that is necessary for Defendant to adequately prepare and conduct a defense. [*People v. Ribowsky*, 77 N.Y.2d 284, 290 (1991); *People v. Byrnes*, 126 A.D.2d 735, 736 (2d Dept. 1987); *People v. Wideman*, 195 A.D.2d 582, 583 (2d Dept. 1993)].

DISCOVERY

Defendant's motion for discovery is granted to the extent that the District Attorney is directed to make available to Defendant's attorney any and all property and information required to be disclosed pursuant to CPL 240.20, subject to the provisions of the protective order that was signed by this Court on October 25, 2017.

The People's motion for reciprocal discovery is granted to the extent that Defendant is directed to make available to the People any and all property and information required to be disclosed pursuant to CPL 240.30.

BRADY AND IMPEACHMENT MATERIAL

Defendant's motion to be provided with all Brady and impeaching material is granted to the extent that the People shall provide Defendant with any evidence in their possession or control which may tend to exculpate Defendant or which is otherwise favorable to him as provided in Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Bagley, 473 U.S. 667 (1985).

SUPPRESSION OF IDENTIFICATION

Defendant has moved to suppress identification testimony at trial on the grounds that the two photographic identification procedures identified in the People's CPL §710.30 Notice were unduly suggestive. That motion is granted solely to the extent that a Wade hearing will be held prior to trial. [CPL§710.60[4]; People v. Boyer, 6 N.Y.3d 427, 431 (2006)].

[\* 5]

## PRECLUSION OF IDENTIFICATION TESTIMONY

Defendant moves for an order of preclusion as its relates to any additional, out-of-court identification procedures that were not identified in the People's CPL §710.30 Notice, on the grounds that no timely notice has been provided of those additional identification procedures, if any, as required by CPL §710.30. CPL §710.30 compels the People to provide Defendant with notice of their intent to introduce identification testimony at trial by a witness who previously identified the Defendant. Pursuant to CPL §710.30(2), this notice must be served within fifteen (15) days of arraignment. If the People fail to timely serve that notice, the Court is ordinarily required to preclude that identification testimony at trial, regardless of whether the Defendant has been prejudiced by the late notice. [*People v. Lopez*, 84 N.Y.2d 425, 428 (1994)]. However, the Court may permit the People to serve late notice of a qualifying out-of-court identification procedure for good cause shown, after providing Defendant with a reasonable opportunity to make a suppression motion. [CPL §710.30(2)].

The People have served a CPL §710.30 identification notice identifying one out-of-court identification procedure. To the extent that the People seek to offer at trial any testimony from a witness who has previously identified Defendant in an out-of-court identification procedure arranged by law enforcement authorities that was not contained in the People's CPL §710.30 Notice, Defendant's motion for preclusion is granted as to those out-of-court identification procedures, if any, subject to the limited "good cause shown" exception set forth in CPL §710.30(2).

## PRECLUSION OF STATEMENTS

Defendant moves for an Order of Preclusion as it relates to any statements by Defendant that the People may attempt to introduce at trial, on the grounds that no timely notice of those statements has been provided as required by CPL §710.30. That statute compels the People to provide Defendant with notice of prior statements made by Defendant when: (1) the People intend to offer those statements at trial; and (2) those statements were made to a public servant; and (3) if made involuntarily, those statements would be suppressible upon motion pursuant to CPL §710.20(3).

Pursuant to CPL §710.30(2), this notice must be served within fifteen (15) days of arraignment. If the People fail to serve timely notice of a qualifying statement, the Court is ordinarily required to preclude the statement at trial, regardless of whether the Defendant has been prejudiced by the late notice. [*People v. Lopez*, 84 NY2d 425, 428 (1994)]. However, the Court may permit the People to serve late notice of a qualifying statement for good cause shown, after providing Defendant with a reasonable opportunity to make a suppression motion. [CPL §710.30(2)].

“The purpose of CPL §710.30 is to provide defendant with an opportunity to challenge the admissibility of inculpatory statements made to law enforcement personnel which the People intend to offer at trial.” [*People v. Martinez*, 9 AD3d 679, 680 (3d Dept. 2004). See also *People v. Lazzaro*, 62 AD3d 1035, 1035-36 (3d Dept. 2009)]. However, when a defendant alleges that a CPL §710.30 statement notice was insufficient, no preclusion is necessary if the defendant also moves to suppress that statement. [*Id.* at 680. See also *People v. O’Doherty*, 70 NY2d 479, 483 (1987); *People v. Barton*, 301 AD2d 747, 748 (3d Dept. 2003)].

[\* 7]

The People have not served timely notice of any statements that Defendant to law enforcement authorities that the People intend to introduce at trial. Therefore, Defendant's motion for preclusion is granted, subject to the limited "good cause shown" exception set forth in CPL §710.30(2). This Order does not preclude the People from using any precluded statements for purposes of impeachment or rebuttal. [*People v. Rigo*, 273 AD2d 258 (2d Dept. 2000)].

#### SUPPRESSION OF EVIDENCE

Defendant seeks suppression of all evidence obtained as a result of any search and seizure that has been conducted by law enforcement authorities or their agents. Defendant's motion is denied because it fails to allege grounds constituting a legal basis for that motion, and because it fails to set forth factual allegations sufficient to warrant a hearing. [CPL §710.60(3). *People v. Mendoza*, 82 N.Y.2d 415 (1993); *People v. Wright*, 54 A.D.3d 695 (2 Dept. 2008)]. Defendant's motion is also denied because no evidence was obtained as a result of the search and seizure of Defendant.

#### SANDOVAL

The Court grants Defendant's motion for a *Sandoval* hearing to the extent that a hearing is ordered which will be held immediately prior to trial to determine which, if any, bad acts or convictions may be used as impeachment in the event that the Defendant elects to testify at trial. See *People v. Sandoval*, 34 NY2d 371 (1974). The District Attorney has provided Defendant's attorney with a true copy of Defendant's Division of Criminal Justice Services Summary Case

[\* 8]

History. The Court orders the District Attorney to disclose to Defendant's attorney any and all acts upon which it intends to impeach Defendant, including without limitation all prior instances of Defendant's alleged prior uncharged criminal, vicious or immoral conduct that the People intend to use at trial for the purposes of impeaching Defendant's credibility. [CPL §240.43].

#### VENTIMIGLIA

Defendant has requested that the People supply Defendant with all specific instances of prior uncharged conduct which the People will seek to offer against Defendant at trial upon its direct case.

The People have not made any application to offer evidence of any specific instances of uncharged crimes which they intend to offer in their direct case pursuant to People v Ventimiglia, 52 N.Y.2d 350 (1981). If the People intend to make an application pursuant to People v Ventimiglia, they should do so prior to the Sandoval hearing ordered herein .

#### PRE-TRIAL HEARING TRANSCRIPTS

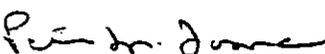
Defendant's request that any pre-trial hearings be conducted at least twenty (20) days prior to trial to allow sufficient time for the production of hearing transcripts is denied. All pre-trial hearings will be scheduled at the convenience of the Court and the parties herein. Transcripts will be provided to the defense prior to the commencement of trial testimony.

LEAVE TO FILE ADDITIONAL MOTIONS

Leave to file additional motions beyond the statutory 45-day time limit will only be granted upon an application that meets the requirements of CPL §255.20(3).

The foregoing constitutes the Decision and Order of this Court.

Dated: Poughkeepsie, NY  
November 27, 2017

  
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**PETER M. FORMAN**  
**COUNTY COURT JUDGE**

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