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STATE OF NEW YORK
COUNTY COURT : : BROOME COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

DECISION AND ORDER
Indictment No. 12-209

RAMAL ABDULLAH,

Defendant.

JOSEPH F. CAWLEY, J.

Defendant is presently charged with Criminal Possession of a Controlled Substance in the Third Degree (PL 221.16(1)), Criminal Possession of a Controlled Substance in the Fifth Degree (PL 220.06), Criminal Possession of a Weapon in the Second Degree (PL 265.03(3)), Criminal Possession of a Weapon in the Third Degree (PL 265.02(1)), Resisting Arrest (PL 205.30), Reckless Driving (VTL 1212) and two counts of Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (VTL 511 (1)(a)).

A trial date of April 15, 2013 is set.

Combined *Mapp*, *Huntley* and *Sandoval* hearings were held on January 4 and January 8, 2013. The People called Binghamton Police Officers Michael Gazdik and Sergeant Michael Senio, New York State Troopers Timothy Reese and Marco Mancini, as well as Vestal Police Officer Jared Fiacco.

Defendant submitted a Memorandum of Law on February 15, 2013. The People requested an extension of time within which to file their response, which was granted over defendant's objection. The People's Memorandum of Law was received on or about March 8, 2013. Defendant filed a Reply which was received March 28, 2013.

Based upon the credible evidence presented, the Court makes the following findings of fact and conclusions of law. All findings of fact are beyond a reasonable doubt.

FACTS

On April 2, 2011, Binghamton Police Officer Michael Gazdik was working as a member of the Community Response Team when he observed two people in a tan Buick LeSabre, New York registration FCJ1703, parked across the street from a target location of suspected narcotics activity. Gazdik performed a computer vehicle data check and determined that the registration

for the LeSabre was suspended. He then observed the vehicle in motion, and initiated a vehicle and traffic stop.

Gazdik approached the vehicle and asked the operator for license and registration. The operator (defendant herein) stated that he did not have a license, but produced an identification card. A computer check revealed that defendant's driver's license was suspended.

Defendant was asked to exit the vehicle, which he ultimately did. He was directed to the rear of the vehicle and notified that he was going to be searched incident to his arrest for the misdemeanor level offenses of Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree and Operating a Motor Vehicle with a Suspended Registration. The search revealed eight knotted corner wraps of a white substance consistent with crack cocaine. Defendant was arrested and handcuffed. Upon being processed into the Binghamton Police Station, $1341.35 in cash was recovered from defendant's pants pocket.

The foregoing events resulted in the charges of Criminal Possession of a Controlled Substance in the Third (Count 1 of Indictment No. 12-209), Criminal Possession of a Controlled Substance in the Fifth (Count 2), and Aggravated Unlicensed Operation of a Motor Vehicle (Count 9).

On October 31, 2011 at approximately 4:00 p.m., New York State Trooper Marco Mancini was on routine uniform patrol in the Town of Union when he observed a 2003 Buick LeSabre eastbound on Watson Boulevard without an operable brake light. A computer check revealed that the vehicle had been previously impounded by a downstate police department. Based upon the foregoing, Trooper Mancini activated his emergency lights to initiate a traffic stop for the aforesaid equipment violation. In response, the LeSabre pulled into a McDonald's parking lot, exited the drive-thru, made an illegal left-hand turn and accelerated on the George F. Highway, reaching speeds of 90 MPH with Trooper Mancini in pursuit.

After several miles, the LeSabre swerved into the oncoming lane of traffic, lost control, and struck a telephone pole. It backed up, struck another pole and stopped. Mancini stopped his patrol car immediately in front of the LeSabre, wherein the operator of the LeSabre (defendant herein) fled on foot, with Mancini in pursuit. Defendant was eventually tackled by Mancini and placed under arrest. He was turned over to New York State Trooper Phelps and removed from the scene.

Simultaneous therewith, Vestal Police Officer Jared Fiacco and his K-9 ("Kai"), were dispatched to the area of Main Street and Oakdale Road in the Village of Johnson City for Mancini's reported vehicle pursuit.

Upon arrival, Fiacco spoke with Mancini, who advised that he had been involved in a vehicle pursuit, and that the subject vehicle had crashed and the driver fled on foot through several yards before being taken into custody. Mancini requested that Fiacco and Kai perform an article search along the flight route to determine if any evidence/contraband had been discarded by defendant during the pursuit. This search failed to produce anything of value.

Mancini returned to the accident site and discussed the events with New York State Police Sergeants McCabe and Ginyard. They directed that an inventory search be completed and the vehicle towed.

New York State Trooper Reese, who was also on scene, was directed to prepare an accident report, and to simultaneously prepare the Vehicle Impound and Inventory Record (People's exhibit 4) as Trooper Mancini conducted the inventory search of the LeSabre. Reese explained that he was seated in his patrol vehicle, approximately three feet from the LeSabre with his driver's window down, such that as Mancini was conducting the inventory, he (Mancini) could advise Reese as to any items worth noting that were going to remain with the vehicle, whereupon Reese could memorialize them in the Vehicle Impound and Inventory Record (People's exhibit 4). Reese explained that nothing is noted on the Vehicle Impound and Inventory Record in this case (People's exhibit 4), because nothing of value was remaining with the vehicle. He explained that the handgun seized from the vehicle was not described on the Inventory Record (People's 4), because it was secured as ***evidence*** and was vouchered accordingly. Similarly, two cell phones that were seized are not reflected on the inventory because they were being retained by police, not remaining with the impounded vehicle, and were therefore listed on alternate police reports. Reese explained that he would only list on the Inventory Record items which were considered valuable ***and*** were being left with the vehicle, ***not*** items which were seized as evidence.

Trooper Mancini testified he recorded the vehicle's mileage, then began his inventory search of the vehicle by cataloguing damage to the vehicle's exterior. He then began his interior search of the vehicle, inspecting the front seat area, the rear seat area, glove box and console - all of which is reflected in the Inventory Record (People's 4). Within the front seat area, he recovered two cell phones. As previously indicated by Reese, Mancini testified that the cell phones were not reflected on the Vehicle Impound and Inventory Record because they were secured, rather than left in the vehicle, and were therefore logged in on corresponding police reports. Each Trooper testified that pursuant to policy, ***only items of value that were remaining with the vehicle*** were required to be noted on the Inventory Report.

Mancini's inventory search continued through the balance of the passenger compartment, which revealed nothing else "of value". Upon completing the inventory of the passenger compartment, K-9 Kai conducted a narcotics search of the passenger compartment of the vehicle

(January 4, 2013 transcript page 122, lines 1-3).[1] In so doing, Kai alerted on the center console, which ultimately revealed marijuana remnants.

As Kai was completing his search of the passenger compartment, Mancini moved to the trunk of the car, opened the trunk, and observed a small "carpet", which he moved aside, thereby uncovering a handgun. Further inspection of the weapon disclosed the firearm to be loaded with one round in the chamber. The weapon was seized by Mancini.

Mancini testified that the seized handgun was not listed on the Inventory Report, as per policy, because it was seized by police as evidence and vouchered accordingly, and was not therefore, an "item of value remaining with the vehicle".

Upon completing the search of the vehicle, Mancini returned to the State Police Barracks to complete the arrest of defendant, while Reese remained with the vehicle awaiting the tow truck, so as to complete the impound procedure (People's exhibit 4).

People's exhibits 1 (Vehicle Stop/Search Guide) , 2 (New York State Police Field Manual, Article 33, §33Y2, Impound Vehicles Procedures) and 3 (Amended Policies and Procedures for Vehicle Impound and Inventory Record [*in effect on subject date*]) were offered and received in evidence as the policies and procedures followed by Mancini and Reese in conducting the aforesaid search.

The foregoing events resulted in charges against the defendant of Criminal Possession of a Weapon in the Second Degree (Count 3 of Indictment No. 12-290), Criminal Possession of a Weapon in the Third Degree (Count 4), Resisting Arrest (Count 5), Reckless Driving (Count 6), and Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree (Count 10).

DISCUSSION

April 22, 2011

With respect to the April 22, 2011 events, the stop of defendant's vehicle was lawful based upon the registration suspension. Following the stop, it was determined that the defendant was operating the vehicle without a valid driver's license, and an arrest was lawfully effected. The search of his person incident to that arrest was likewise lawful, and resulted in the discovery of the narcotic evidence and cash. There being no valid grounds for suppression of the evidence recovered as a result of the foregoing stop and search, defendant's motion for suppression thereof is denied.

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[1] Although Trooper Mancini characterized the K-9 search of the passenger compartment as a search "for anything dangerous" (January 8, 2013 transcript at page 79), the Court finds that it was, in effect, a search for narcotics.

October 31, 2011

Turning to the date of October 31, 2011, New York State Trooper Mancini, observed defendant operating a motor vehicle with an inoperable brake light. Upon investigation, he determined that the vehicle had previously been impounded by law enforcement officials in the New York City area. Based upon the foregoing he engaged his emergency lights in an attempt to initiate a traffic stop for the aforesaid equipment violation.

Defendant responded by pulling through a McDonald's parking lot, making an illegal left-hand turn, and accelerating on a public highway to speeds approaching 90 MPH, ultimately losing control and crashing into a pole. Defendant then exited the vehicle and fled on foot with Mancini in pursuit.

At a minimum, the police had probable cause to arrest defendant for Second Degree Reckless Endangerment (*see,* People v. Ramirez, 103 A.D.3d 444 (1st Dept. 2013); People v. Gittens, 110 A.D.2d 908 (1985)). It was also reasonable, under the circumstances, for the People to impound the vehicle which had been involved in the accident, and therefore to conduct an inventory search (*see* People v. Ramirez, 103 A.D.3d 444) to ascertain exactly what property would be subject to State Police control by virtue of such impoundment (*see*, People v. Castillo, 150 A.D.2d 957)

Officer Fiacco and his canine were called to the scene, quite reasonably, to trace defendant's flight for the presence of contraband. They were ***not,*** however, called to conduct a narcotic search of defendant's vehicle.

The analysis of what constitutes a reasonable inventory search begins with the Fourth Amendment which protects citizens, not from all searches, but from those that are "unreasonable". The reasonableness of a search is calculated be weighing the governmental and societal interests advanced by the search against an individual's rights to be free from arbitrary interference by law enforcement officers (People v. Galak, 80 N.Y.2d 715 (1993) (*internal citations omitted*). For an automobile inventory search to withstand a defendant's suppression motion, the People must establish that it was conducted pursuant to a standard departmental procedure that conforms with constitutional dictates (People v. Taylor, 92 A.D.3d 961 (*internal citations omitted*).

An inventory search is exactly what its name implies: a search designed to properly catalogue the contents of the item searched (People v. Johnson, 1 N.Y.3d 252). An inventory search cannot be a ruse for a general rummaging in order to discover incriminating evidence. To guard against this, an inventory search should be conducted pursuant to "an established procedure clearly limiting the conduct of individual officers that assures that the searches are carried out consistently and reasonably" (Galak, *supra*). Three objectives are advanced by inventory searches: protecting an owner's property while it is in the custody of the police; protecting

police against claims of lost, stolen, or vandalized property; and guarding police and others from dangerous instrumentalities that would otherwise go undetected (Colorado v. Bertine, 479 U.S. 367 (1987)). Courts have insisted that an inventory search be conducted according to familiar routine procedure, and that the procedure meet two standards of reasonableness. First, the procedure must be rationally designed to meet the objectives that justify the search in the first place. Secondly, the procedure must limit the discretion of the officer in the field (Galak, *supra*; Florida v. Wells, 495 U.S. 1). Thus, two elements must be examined: first, the relationship between the search procedure adopted and the governmental objectives that justify the intrusion; and second, the adequacy of the controls on the officer's discretion (Galak, *supra*)

When a car is lawfully impounded, the reasonable expectation that its contents will remain private is significantly diminished. In such a case, the driver is presumed to expect that the police assuming possession of the vehicle will find whatever is in the car (People v. Galak, 80 N.Y.2d 715 (1993); *see also,* People v. Johnson, 1 N.Y.3d 252 (2003); People v. Gomez, 13 N.Y.3d 6 (2009)). However, an inventory search does not give the police *carte blanche* to conduct any search they want and call it an "inventory search." The police must follow a reasonable procedure and must prepare a "meaningful inventory list" (People v. Johnson, 1 N.Y.3d at 256). However, it would serve little purpose to micromanage the procedures used to search properly impounded cars. The United States Supreme Court implicitly recognized as much in Colorado v. Bertine, 479 U.S. 367 (1987)) by upholding as constitutionally valid a search producing what the trial court found to be a "somewhat slipshod" inventory (*id.*, at 369).

Consistent with Galak, *supra,* the Vehicle Stop/Search Guide of the New York State Police (People's exhibit 1) "established [a] procedure clearly limiting the conduct of individual officers that assure[d] that the searches are carried out consistently and reasonably" (Galak, *supra).* The Guide limited the inventory search to areas of the vehicle where "valuables, perishables or dangerous substances are likely to be stored". Article 33 of the New York State Police Field Manual (People's exhibit 2) requires that the officer, *inter alia*, inventory the contents of the impounded vehicle and complete a Vehicle Impound and Inventory Record (People's exhibit 4). It further requires that all vehicle compartments be opened (with certain limitations) and the contents be inventoried. By their terms, therefore, these policies served to safeguard property, protect against false claims of loss, and protect those coming into contact with the impounded vehicle from potential dangers.

The thrust of defendant's argument (though not limited thereto) appears to be that the search of his vehicle was not initiated or conducted for inventory purposes, but rather as a pretext to search for evidence of criminal activity. He supports his argument by, *inter alia,* noting the lack of valuables listed on the Inventory Record. The People respond that only items *of value* that were to remain with the vehicle need be listed on the Inventory Record, per the established police standard procedures. They note that items of value which were secured by law enforcement but did not remain with the vehicle were in fact identified, *albeit* on police reports other than the Inventory Record.

Consistent with the New York State Police policy, Trooper Mancini began his search by visually inspecting the exterior of the vehicle for damage and noting same, thereby eliminating potential for claims of damage to the vehicle during towing or storage by law enforcement. The exterior inspection was followed by an interior inspection of the front seat, rear seat, glove box and console (People's exhibit 4). Pursuant to their policy, as understood by Troopers Mancini and Reese, *any items of value that were to remain with the vehicle* would be noted, the obvious purpose of this requirement being to safeguard property and protect against false claims of loss.

Requiring that each and every item contained in a vehicle, regardless of value, be noted on an Inventory Form, would not, in this Court's opinion, be either reasonable nor necessary to satisfy constitutional mandates. Numerous articles of insubstantial value are routinely found in virtually every motor vehicle, i.e., items such as floor mats, pens and/or pencils, music CD's or tapes, street maps, automobile owner's manuals, tissues, and miscellaneous papers. To require that every article, item and scrap of paper be separately identified and described on an Inventory Record would be to put form over substance and lose perspective of the purpose for which the inventory was required--to safeguard property and protect against false claims of loss.

No one would logically argue that a flashlight, street map, owner's manual, floor mat or other "non-valuable" item would require safeguarding, or likely be the subject of a claim of loss. Conversely, items of significant value, such as cameras, laptop computers, and luggage ***are*** such items, and their description would reasonably be required on an Inventory Report.

As pointed out by defendant, Trooper Mancini candidly admitted that some items remained with the vehicle that were not listed on the inventory (January 8, page 102) or otherwise documented. Mancini explained, however, that the items were not documented because the items which remained in the vehicle were not "of value". Further, no direct evidence was presented by the defendant or anyone on his behalf that items of value ***did*** remain with the vehicle, while Mancini and Reese testified that ***no*** such items of value were left therein.

Certainly it would make judicial review easier if every single item, without regard to value, were listed on the inventory sheet, including floor mats, pens, tissues, road maps, etc. However, in this Court's opinion, it would be wholly impractical and unreasonable to require the police to do so contemporaneously with impoundment of the vehicle, especially when the subject items are not things likely to be subjected to damage or loss, nor to expose the police to false claims of loss or destruction, and are therefore not within the scope of the purpose for inventorying items remaining with the vehicle.

It is, of course, reasonable to require that items seized during the search be documented, as were the two cell phones and one handgun seized in this case. Although they were not listed on the Inventory Record, the seizure of these items ***was*** accurately reflected in other police reports generated contemporaneously therewith. In so doing, the police retained possession of the items, thereby ensuring their safekeeping, while also protecting against false claims of loss,

damage or destruction. To require the redundant listing of items that have been secured on yet another form(s), or risk a declaration of unconstitutionality, would serve no logical purpose.

This decision does not grant greater discretion to the officer in conducting inventory searches. Inventory searches must be consistent with proper procedure, and items retained by law enforcement must be documented. Similarly, items of value that remain with the vehicle must also be accounted for on the Inventory Record. The process involved herein was designed to meet the objectives that justified the search initially, and the procedures employed therewith appropriately limited the discretion of the officer in the field (Galak, *supra;* Florida v. Wells, 495 U.S. 1). The procedure employed was "reasonably tailored to protect the seized property while it was in police custody and was designed to limit police discretion (People v. Watson, 213 A.D.2d 996; People v. Schroo, 199 A.D.2d 1010, *lv. den.* 83 N.Y.2d 858).

People v. Johnson, 1 N.Y.3d 252, cited by defendant does not compel a different result here. The Court of Appeals in Johnson declared that search improper because the People failed to establish the existence of any departmental policy regarding inventory searches. An alternate finding has been made in this case. Similarly, People v. David, 223 A.D.2d 551, also cited by defendant, is distinguishable in that the Appellate Court found no basis for the initial stop of defendant's vehicle, nor probable cause for his arrest. They explained that the inventory began without an inventory sheet in hand, and lasted only 30-60 seconds before removal of an air conditioning grill. Further, no entries were made on the inventory sheet at the scene, and the inventory search terminated upon removing the air conditioning grill. Additionally, the policies involved in the David case required a superior officer be present before opening any closed compartment or container, which did not occur. Finally, the Appellate Court in People v. Elpenord, 24 A.D.3d 465 (2005) did deem an inventory search to be invalid, but did so because, unlike the officers in the instant case, the police failed to abide by the pertinent Police Department's Inventory Search procedures. The officer in Elpenord never completed the inventory form, and never made any entries in his memorandum as required by that agency's Patrol Guide.

The Court finds that the search of the vehicle by Officers Mancini and Reese constituted a valid inventory search in connection with the lawful impoundment of a vehicle used in the course of a crime and involved in an accident. The cell phones and handgun discovered in the course of that search were lawfully seized and documented. Defendant's motion to suppress evidence thereof is denied.

However, the Court finds that the search of the passenger compartment by the canine was ***not*** reasonably related to the inventory of the contents of the vehicle, but was instead a search for narcotics. Evidence of the narcotics located as a result of that search, or any reference thereto, is hereby suppressed at the upcoming trial of this Indictment.

SPEEDY TRIAL

Over the course of this prosecution, defendant has brought several motions to dismiss, alleging speedy trial violations pursuant to CPL 30.20 and 30.30. With respect to those prior applications, this Court issued a Decision and Order dated November 8, 2012.

Contained within that decision was a directive that trial begin November 26, 2012. As memorialized by a letter dated November 26, 2012 to both the People and defendant, trial was adjourned ***at defendant's request,*** and was rescheduled, to now begin April 15, 2013. Similarly, hearings previously scheduled were also adjourned ***at defendant's request,*** until January 4, 2013.

On January 4, 2013, the first witness was called by the People at or about 10:00 a.m., with the fourth and final witness of the day finishing at approximately 2:45 p.m. The People requested and were granted an adjournment to call their final witness over defendant's objection. The matter was adjourned four days until January 8, 2013 at which time testimony was concluded. Once the People answer ready for trial, the People are not chargeable with any post-readiness delay in excess of the specific adjournment they request (*see,* People v. Williams, 229 A.D.2d 603). The People are therefore chargeable with the four days of post-readiness delay resulting from their request to adjourn completion of the hearing.

At the conclusion of the hearing, defendant and prosecutor were each given an opportunity to submit post-hearing memorandum: the defendant by February 15, 2013, with the People's answer by March 1, 2013.

Defendant alleges that "the Court strategically did not provide Defendant with a copy of the stenographic minutes from the pre-trial hearings until February 9, 2013, Defendant was still able to file his memorandum of law in a timely fashion before his Feb. 15th due date" (Affidavit in Support at para. 6). It goes without saying, but will be said notwithstanding, that this Court has no control over when stenographic minutes are completed by the reporter and forwarded to the requesting party. To suggest that any delay in preparing and forwarding said minutes was as a result of Court intervention is ludicrous.

On February 15, 2013, in light of the prosecutor's resignation from the District Attorney's Office and the assignment of a new prosecutor, an adjournment was requested and granted for the People's submission until March 8, 2013 (7 days). The People's answering memorandum was received on March 8, 2013.

If at the conclusion of a hearing, a court requests submission of legal memorandum on issues raised, and adjourns the case for reserved decision, that time is excludable for speedy trial calculations, as constituting a period in which pre-trial suppression motions are under considera-

tion by the court (People v. Taylor, 16 Misc.3d 339 (NYC Crim. Ct. 2007)); CPL 30.30(4)(a)). The delay requested was entirely reasonable. More importantly, the adjournment has not affected the scheduled trial date in any way. The matter is scheduled for trial (and has been so scheduled since November 26, 2012) to begin April 15, 2013. Further, the most recent adjournment of the trial from November 2012 until April 2013 was at **defendant's** request. Inasmuch as the time frame post-hearing until this date has been for the determination of pre-trial suppression motions, it is excludable.

Taking into consideration the analysis contained in this Court's period determination of defendant's previous speedy trial motions (Decision and Order November 8, 2012), and assessing an additional four (4) days to the People as indicated above, the Court again finds that the defendant's right to a speedy trial has not been violated.

Defendant's application to dismiss the instant indictment for a violation of CPL 30.30 is denied.

SANDOVAL

A criminal defendant who chooses to testify, like any other civil or criminal witness, may be cross-examined regarding prior crimes and bad acts that bear on credibility, veracity or honesty (*see*, People v. Sandoval, 34 N.Y.2d at 376; People v. Schwartzman, 24 N.Y.2d 241, 244). As Sandoval explains:

> "To the extent...that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity" (34 N.Y. at 377).

Such evidence necessarily carries with it some risk of prejudice to the defendant, however, and the Court must therefore weigh the probative value versus the potential for undue prejudice in determining whether (and if so, to what extent) it will permit cross-examination of the defendant with prior bad acts.

Having completed the aforesaid weighing test, the Court determines that the People will, on cross-examination of this defendant, be permitted to elicit information relevant to the following convictions as hereinafter indicated:

**1) Criminal Possession of Marijuana in the Fifth Degree,
August 29, 2010, Kings County, NY**

In light of the charges pending, no inquiry will be permitted into the underlying acts or the conviction.

**2) Failure to Make Lawful Dispo,
October 28, 2009, Byram Township, NJ**

In light of the prosecution's lack of information regarding this offense or the conduct complained of, no inquiry will be permitted into the underlying acts or the conviction.

**3) Robbery in the First Degree and Attempted Murder in the Second Degree,
May 7, 1995, Broome County, NY**

There is no bright line establishing a time limit from which convictions may be admitted (*see, e.g.*, People v. Walker, 83 N.Y.2d 455), and the passage of time does not preclude the use of the conviction in this case. Certainly the facts of this conviction are relevant to the defendant's willingness to place his own interest above that of society; however, they are also indisputably prejudicial to the defendant. As such, a *Sandoval* compromise is warranted. With respect to the aforesaid convictions, the People will be permitted to elicit that defendant was convicted on May 7, 1995 of a felony level offense, for which he was sentenced to 10 years in the New York State Department of Corrections. No inquiry will be permitted into the underlying acts or the title of offense.

**4) Attempted Criminal Possession of a Controlled Substance in the Third Degree,
December 15, 1995, Broome County, NY**

Again utilizing a *Sandoval* compromise, the People will be permitted to elicit that defendant was convicted of a felony level offense in December 1995, which resulted in a prison sentence of 2-6 years, without reference to underlying acts or title of offense.

**5) Attempted Robbery in the Second Degree,
May 18, 1995, Kings County, NY**

In light of this decision, and to avoid undue prejudice, no inquiry will be permitted into this particular conviction

6) the People have also sought to elicit evidence of the use of certain aliases by this defendant during their cross-examination of him, should he elect to testify. However, none resulted in convictions or criminal prosecutions, nor was evidence of or the circumstances relevant thereto set forth in the People's application. Therefore, no inquiry will be permitted with respect to the defendant's use of such aliases.

MOLINEUX

In a letter dated November 13, 2012, the People sought permission pursuant to *Molineux/ Ventimiglia* to introduce at trial evidence of defendant's possession, at the time of his April 2, 2011 arrest, of a cell phone and cash totaling ($1,341.35). Defendant objects to the introduction of the proposed evidence.

As correctly pointed out by defendant in his opposition papers dated February 20, 2013, the instant application is not one governed by *Molineux* (168 N.Y. 264) and/or *Ventimiglia* (52 N.Y.2d 350), inasmuch as the conduct is not criminal in nature and need not fit within their framework for admissibility.

However, the People have also moved to permit expert testimony regarding the significance of defendant's possession of a large sum of cash and a cell phone, as evidence of his intent to sell drugs.

As previously indicated, a *Mapp* hearing was held to determine the admissibility of evidence seized from defendant at or about the time of his arrest. No evidence was offered at the hearing (conducted on January 4 and 8, 2013) regarding the legality and/or circumstances surrounding the police seizure of defendant's cell phone. Evidence of defendant's possession of a cell phone at the time of his arrest on April 2, 2011 is, therefore, inadmissible at trial.

The seizure of monies from the defendant at or about the time of his arrest on April 2, 2011 has been litigated. As previously discussed in this decision, the stop and arrest of the defendant on the aforesaid date was lawful, and the seizure of narcotics and cash discovered during the search of his person incident to that arrest has already been determined to have been lawful as well, and suppression of such evidence on that basis has been denied.

The use of expert testimony is properly admitted where the particular issues are likely to be beyond the ken of the average juror (*see*, People v. Hicks, 2 N.Y.3d 750 (2004); People v. Tarver, 292 A.D.2d 110 (3d Dept. 2002), *lv. den.* 98 N.Y.2d 702). Expert testimony, such as is proposed here, is properly admitted to establish that the amount of cash recovered from defendant was inconsistent with the amount of cash recovered from persons arrested for the possession of drugs for personal use (People v. Coles, 43 A.D.3d 1424 (4th Dept 2007)).

However, defendant does allege a potential *Rosario* and/or discovery violation, based upon the People's submission with their application of a Binghamton Police Department Inmate Medical History Sheet.

There is no discovery violation with respect to monies seized from defendant at or about the time of his April 2, 2011 arrest. CPL 240.20(1)(f) requires that the People disclose to

defendant and make available for inspection, photographing, copying or testing, any property obtained from the defendant. Disclosure of the money seized had obviously occurred, inasmuch as the People's demand for forfeiture of those monies was the only obstacle preventing the parties from reaching a disposition of the subject charges in September, 2011. Further, based upon representations made by the parties in court, defendant was given an opportunity to review all evidence seized.

On the other hand, whether a *Rosario* violation has occurred cannot be determined from this record. There is no statutory obligation on the part of the People to disclose all police reports to defendant. If, however, a witness has prepared a writing which involves the subject matter of his testimony, that document must be disclosed (CPL 240.45(1)(a); People v. Rosario, 9 N.Y.2d 937). It is impossible to tell from a review of the Inmate History Sheet at issue who authored it. In the event it was prepared by an individual called as a witness at the *Mapp* hearing, the failure to disclose it would constitute a *Rosario* violation. If it was not, then no such violation occurred.

An appearance is hereby scheduled for Monday, April 8, 2013, at which the People shall identify the author of the subject document. Based upon that disclosure, a decision will be made by the Court as to the admissibility of the proposed expert testimony.

This constitutes the Decision and Order of the Court.

It is So Ordered.

DATED: April 3, 2013
Binghamton, NY

HON. JOSEPH F. CAWLEY
Broome County Court Judge

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