

**People v Sutton**

2017 NY Slip Op 33048(U)

November 29, 2017

County Court, Westchester County

Docket Number: 17-0551-01-02

Judge: Helen M. Blackwood

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION and ORDER

Indictment No.: 17-0551-01-02

**FILED**

DEC 12 2017

THOMAS C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

PHILIP SUTTON and SINCERE SMITH,

Defendants

-----X

Defendant, SINCERE SMITH, has been indicted for aiding, abetting, and acting in concert with his co-defendant for the crimes attempted robbery in the first degree (PL §110/160.15[4]), attempted robbery in the second degree (PL §110/160.10[1]), attempted robbery in the second degree (PL §110/160.10[2][a]); assault in the second degree (PL §120.05[2]), and assault in the second degree (PL §120.05[6]). The defendant has filed a notice of motion, along with a supporting affirmation seeking omnibus relief. The People have responded by filing an affirmation in opposition and a memorandum of law. Upon consideration of the aforementioned submissions, along with a review of the grand jury minutes and exhibits and the consent discovery order entered in this case, the motion is disposed of as follows:

I. Motion to Inspect and Dismiss

The People have provided the grand jury minutes to the court and the court has reviewed

those minutes *in camera*. After doing so, the court finds that there is no basis to dismiss any charges of the indictment. Accordingly, the defendant's motion to do so is denied in all respects.

The court finds that the evidence offered to the grand jury was legally sufficient in accordance with section 70.10 of the Criminal Procedure Law. "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]). Moreover, "[c]ourts 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 N.Y.3d 269, 274-275, 804 N.E.2d 392 [2003], quoting People v. Carroll, 93 N.Y.2d 564, 568, 715 N.E.2d 500 [1999]; see also, People v. Wisey, 133 A.D.3d 799, 21 N.Y.S.3d 111 [2015]). The court finds that the evidence presented to the grand jury, in its entirety, met this burden.

Additionally, the court finds that the grand jury was properly instructed as the law, that there was nothing defective about the proceedings (see, People v. Calbud, 49 N.Y.2d 398, 402 N.E.2d 1140 [1980]), and that a quorum was present.

Finally, the court does not find that the release of the grand jury minutes or any portion thereof to the defendant is necessary, nor has the defendant set forth any compelling or particularized need for the production of the grand jury minutes. Therefore, the defendant's application for the release of said minutes is denied (see, CPL §190.25[4][a]).

## II. Motion to Suppress Identification

The defendant moves to suppress the noticed pre-trial identification of the defendant,

arguing that the procedure employed by law enforcement was unduly suggestive and violated the defendant's due process.

The People argue that the defendant's motion to suppress should be denied because the identification process was confirmatory in nature, as the witness and the defendant were well known to each other prior to the procedure.

The defendant's motion is granted insofar as a hearing shall be held immediately before trial as to whether the identifications were, in fact, confirmatory (People v. Rodriguez, 79 N.Y.2d 445, 593 N.E.2d 688 [1992]) or in the alternative, whether any police procedures employed were unduly suggestive, and, if so, whether an independent source exists for an in-court identification by the witness (People v. Pacquette, 17 N.Y.3d 87, 950 N.E.2d 489 [2011]; People v. McLemore, 264 A.D.2d 858, 696 N.Y.S.2d 464 [1999]).

### III. Motion for Disclosure of Brady Material

The defendant moves for the production of any "evidence or information of every form and nature which may tend to exculpate the defendant either by an indication of his innocence or by impeachment of a People's witness," (Notice of Motion, ¶3).

The People respond by acknowledging their continuing obligations pursuant to Brady v. Maryland, (373 U.S. 83, 83 S.Ct. 1194 [1963]) and Giglio v. United States (405 U.S. 150, 92 S.Ct. 763 [1972]). However, the court notes that if a question exists as to the potentially exculpatory nature of a particular item, or if the People are not willing to consent to an item's disclosure, the People are ordered to provide such item to the court forthwith for an *in camera* inspection and determination.

#### IV. Motion to Suppress Prior Bad Acts

The defendant requests a hearing to determine whether the prosecution should be permitted to use any criminal convictions, or bad acts of the defendant at trial. The defendant's motion is granted to the extent that prior to jury selection, the People are ordered to disclose to the defendant all specific instances of his prior uncharged crimes and bad acts they expect to introduce at trial for impeachment purposes in accordance with CPL §240.43. In response, the defendant must sustain his burden of showing the prior convictions and bad acts which will unduly prejudice him as a witness on his own behalf (People v. Matthews, 68 N.Y.2d 118, 497 N.E.2d 287 [1986]). In the event that the People seek to use any such conduct in their direct case against the defendant, they are ordered to request a hearing to determine the admissibility of such evidence pursuant to People v. Ventimiglia, 52 N.Y.2d 350, 420 N.E.2d 59 (1981).

V. Motion for Leave to File Additional Motions

The motion is denied. Should the defendant bring further motions for omnibus relief, he must do so by order to show cause setting forth the reasons why his motion was not and could not be brought in accordance with CPL §255.20.

The foregoing constitutes the opinion, decision, and order of this court.

Dated: White Plains, New York  
November 29, 2017



---

HON. HELEN M. BLACKWOOD  
Westchester County Court

To: ANTHONY A. SCARPINO, JR.  
District Attorney of Westchester County  
111 Dr. Martin Luther King, Jr. Blvd.  
White Plains, New York 10601  
Attn: ADA Jean Prisco

Eli M. Moore, Esq.  
P.O. Box 11H  
Scarsdale, New York 10583