STATE OF NEW YORK
COUNTY COURT :: COUNTY OF BROOME

THE PEOPLE OF THE STATE OF NEW YORK

-v-

RODNEY R. DAVIS,
Defendant.

DECISION AND ORDER
Indictment No. 16-494

KEVIN P. DOOLEY, J.

On November 2, 2016, a Broome County Grand Jury handed up Indictment No. 16-494, charging the above-named defendant with two counts of Criminal Possession of a Controlled Substance in the Third Degree, class B felonies, and one count of Criminal Possession of Marijuana in the Fifth Degree, a class B misdemeanor. The charges contained in the three-count indictment relate to the defendant's alleged possession of heroin and marijuana in the Town of Sanford on September 2, 2016.

The defendant was arraigned in Broome County Court on November 23, 2016. On January 9, 2017, the defendant filed with the Court an Omnibus Motion seeking certain Orders and relief in connection with the indictment filed against him. The People's response was filed on February 6, 2017. The following constitutes the Decision and Order of the Court.

GRAND JURY MOTIONS

The defendant moves for an Order, pursuant to CPL 210.30, for inspection of the stenographic minutes of the Grand Jury proceeding for the purpose of determining whether the evidence before the Grand Jury was legally sufficient to support the charges contained in the indictment, whether any count or counts should be reduced to a lesser included offense, and/or whether the Grand Jury proceedings were defective within in the meaning of CPL 210.35. The People have no objection to the Court examining the Grand Jury minutes and provided copies of the same for the Court's review on February 10, 2017. Upon examination of the minutes, the Court finds that release of the minutes to the defense is not necessary to assist the Court in making its determination of the motion. Accordingly, the defendant's request for release of the Grand Jury minutes is denied.

In reviewing the legal sufficiency of the evidence presented, the Court must view the evidence in a light most favorable to the People and determine whether the evidence, if unexplained or uncontradicted, would be sufficient to support a guilty verdict after trial. The Court's inquiry is limited to assessing whether the facts, if proven, and the logical inferences flowing therefrom, provide proof of every element of the crimes charged and the defendant's commission of those crimes. Its inquiry does not include weighing the proof or examining its adequacy, or determining whether there was reasonable cause to believe the accused committed the crimes charged, as the resolution of such questions is exclusively the province of the Grand Jury. *People v. Jensen,* 86 NY2d 248 (1995).

Upon examination, the evidence presented to the grand jury was legally sufficient to establish the commission by the defendant of the offenses charged in the indictment or lesser included offenses thereof.

In addition, there were no defects in the grand jury proceedings within the meaning of CPL 210.20 (1) (c) and 210.35 (5), that would require the dismissal of the indictment. The Court notes, however, that the prosecutor improperly elicited hearsay testimony from Trooper Paulo Garcia concerning the accuracy or reliability of the field testing kit he used to determine the presence of heroin in the suspected drugs seized from the trunk of the defendant's car. Trooper Garcia was asked:

> Q. How many field tests have you performed in the past with respect to suspected heroin?
>
> A. Probably I would say about ten.
>
> Q. Have you ever been informed by the New York State Police that any of the field tests you have performed on suspected heroin that came back positive were, in fact, negative?
>
> A. No.
>
> Q. In other words, you never had a false positive that you're aware of?
>
> A. No, never.

In *People v. Swamp,* 84 NY2d 725 (1995), the Court of Appeals held that an uncontradicted field test result may provide legally sufficient evidence of the presence of a controlled substance at the grand jury stage of a prosecution. The scientific reliability of a field

test kit which is routinely used by law enforcement officers to determine the presence of controlled substance is not an issue that must be established at this preliminary stage of the proceedings. As long as the evidence presented establishes that the field test was properly conducted by a person trained to conduct the test, the result of the test may be considered by the grand jury when making its determination whether to indict a person for narcotics possession or sale. *See Matter of Angel A.*, 93 NY2d 430 (1998); *People v. Van Hoesen*, 12 AD3d 5 (3d Dept., 2004).

Trooper Garcia's testimony concerning prior test results he received from the New York State Police laboratory constitutes inadmissible hearsay. His testimony references test results from analysts at the New York State Police laboratory in unrelated cases without any testimony from the analysts in those cases. It is improper to attempt to bolster the single field test utilized in this case by the use of such hearsay.[1]

Dismissal of an indictment because the integrity of the proceedings was impaired and the defendant possibly prejudiced by improper conduct during the presentation is "a drastic remedy and will be granted only in exceptional circumstances." *People v. Huston, 88 NY2d 400, 409 (1996).* However, not every improper comment, introduction of inadmissible testimony, impermissible question, or mere mistake renders an indictment defective, and the submission of some inadmissible evidence will be deemed fatal to an indictment only when the remaining evidence is insufficient to sustain the indictment. Here, aside from improperly eliciting the hearsay testimony of Trooper Garcia, there was no deliberate misconduct on the part of prosecutor, and the other evidence presented to the grand jury was legally sufficient to establish the commission by the defendant of crimes alleged in the indictment or lesser includes offenses.[2]

Therefore, the defendant's motion to dismiss the indictment is denied.

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[1] This same evidentiary issue was addressed by the Court in its Decision and Order in *People v. Stephen Blanford (Ind. 16-276)*, dated September 19, 2016.

[2] Prosecutors in the District Attorney's office continue to elicit testimony concerning "lack of false positives" based upon hearsay reference to purported lab results in unrelated cases, despite multiple warnings by the Court concerning the impropriety of such testimony. The Court will consider such testimony to constitute "deliberate misconduct" in future cases.

MOTIONS FOR DISCOVERY AND OTHER PRE-TRIAL DISCLOSURES

As part of his affidavit in support of the defendant's Omnibus Motion, defense counsel filed a Motion to Compell *(sic)* Discovery and Bill of Particulars.[3] The prosecutor responds that a copy of the police report, including a report from the New York State Police Southern Tier Satellite Crime Laboratory, was provided to the defense by facsimile on September 14, 2016.[4] The prosecutor states that he will provide the "benchnotes" for the analyses conducted, and any photographs taken in this case, upon his receipt of the same. All physical evidence will also be made available for the defendant's inspection, examination and testing.

The prosecutor also states that he will provide the defendant, at trial after the jury is sworn and prior to opening statements, any written or recorded statements, including any grand jury testimony of any witnesses he intends to call at trial and any information known to him relating to any criminal convictions or pending charges of those witnesses.

The defendant also moves for an Orders requiring the prosecutor to disclose any and all potential favorable information pursuant to *Brady v. Maryland*, 373 US 83 (1963). The prosecutor acknowledges his duty to provide any such material to the defendant and states he believes he has done so in this case.

If the defendant believes he has not received discovery materials to which he is entitled, he can move for an Order to compel specific disclosure, preclude evidence, or other applicable relief.

REQUESTS AND MOTIONS FOR PRE-TRIAL HEARINGS

Request for Sandoval/Ventimiglia Hearing

The defendant requests that the Court conduct a pre-trial hearing to determine the admissibility at trial, either in the People's direct case or for the purpose of cross-examination, of the defendant's prior criminal convictions and/or uncharged criminal conduct. In response, the prosecutor indicates that the defendant has two prior convictions he seeks to use during cross-

[3] Defense counsel's affidavit is mislabeled as a Notice of Motion.
[4] Copies of the facsimile cover sheet and report are attached as Exhibit A to the prosecutor's response to the Omnibus Motion.

examination. He also seeks permission to question the defendant about his use of an alias in the past. Therefore, a *Sandoval* hearing will be conducted on February 22, 2017, at 1:30 p.m. At the hearing, the prosecutor must also set forth any evidence he seeks to introduce in the People's case-in-chief pursuant to *People v. Molineux,* 168 NY2d 264 (1901).

Motion to Suppress Statements

The defendant moves for an Order suppressing all statements and admissions attributed to him that were made to law enforcement officers on the grounds the statements were involuntarily made. The prosecutor has no objection to the Court conducting a hearing pursuant to *People v. Huntley*, 15 NY2d 72 (1965). Therefore, a pre-trial hearing will be conducted on February 22, 2017, at 1:30 p.m.

Motion to Suppress Physical Evidence[5]

The defendant also moves for an Order suppressing the heroin and marijuana seized from the trunk of the defendant's car on the grounds such evidence is the fruit of an unlawful arrest or obtained by means of an unlawful search and seizure. However, the defendant has failed to allege a ground constituting a legal basis for his motion. In his affidavit in support of the suppression motion, defense counsel does not deny that the defendant was speeding or claim that Trooper Garcia did not have probable cause to stop the defendant's vehicle for "allegedly" speeding. Nor does he deny that there was a strong odor of marijuana emanating from the vehicle at the time the trooper approached the defendant's stopped car, which provided probable cause for the subsequent search of the passenger compartment and trunk of the car. The defendant concedes that when the trooper searched the trunk of the car, a plastic bag contained marijuana and a plastic bag containing heroin were found.

The affidavit in support of the defendant's suppression motion does not raise any issues of fact requiring an evidentiary hearing. *People v.* Huntley, 259 AD2d 843 (3d Dept., 1999); *People v. Daniger,* 227 AD2d 846 (3d Dept., 1996). Based on motion papers of both the defendant and prosecutor, it is clear that there was probable cause to justify the initial stop of the defendant's vehicle and the subsequent search of the defendant's vehicle was justified under the

[5] The defendant's motion to suppress physical evidence is contained in paragraphs F and I in the Notice of Motion, and under paragraphs 13-44 and 64-65 of defense counsel's affidavit in support of the Omnibus motion.

"automobile exception" to the warrant requirement of the state and federal constitutions. *United States v. Ross*, 456 US 798 (1982); *People v. Ellis*, 62 NY2d 393 (1984); *People v. Acevedo*, 118 AD3d 1103 (3d Dept., 2014); *People v. Horge*, 80 AD3d 1074 (3d Dept., 2011). The troopers had reasonable cause to believe that marijuana was present in the defendant's car, and therefore, could properly search the vehicle, and any containers that might contain marijuana, including the trunk. Once Trooper Garcia opened the trunk to search for marijuana, he found the heroin and properly seized it along with the marijuana he found. Therefore, the defendant's motion for suppression of the marijuana and heroin seized from the trunk of his car by the trooper is summarily denied.

Motion to Preclude Opinion Testimony

The defendant moves for an Order precluding any opinion testimony concerning his possession of marijuana and heroin. He argues that only witnesses qualified to provide expert testimony should be permitted to testify, and should only be permitted to testify when "the subject matter is a topic for which expert testimony is appropriate." The defendant's motion is clearly premature, and the Court declines to entertain the defendant's motion unless and until the prosecutor offers expert testimony at trial.

DEMAND FOR RECIPROCAL DISCOVERY

As part of his response to the defendant's Omnibus Motion, the prosecutor served a Demand for Reciprocal Discovery pursuant to CPL 240.30. The defendant is directed to file a response to the Demand by March 3, 2017.

MOTION FOR FURTHER RELIEF

Criminal Procedure Law Section 255.20 provides that absent a showing of good cause, all pre-trial motions must be filed at the same time and within 45 days of arraignment. Therefore, good cause must be established before the Court will consider granting the defense leave to renew or make further motions.

The above constitutes the Decision and Order of Court.

It is so Ordered.

Dated: February 16, 2017
Binghamton, New York

HON. KEVIN P. DOOLEY
Broome County Court Judge