

<b>People v Cancel</b>
2018 NY Slip Op 33590(U)
February 22, 2018
County Court, Orange County
Docket Number: 2017-868
Judge: Craig Stephen Brown
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STATE OF NEW YORK  
COUNTY COURT : ORANGE COUNTY

-----X  
PEOPLE OF THE STATE OF NEW YORK,

-against-

THOMAS CANCEL,

Defendant.

-----X  
**CRAIG STEPHEN BROWN, Judge.**

DECISION & ORDER

Ind No. 2017-868  
Index #10261/2017

Defendant Thomas Cancel moves for an order granting the following relief:

1. For an in camera inspection of the Grand Jury Minutes and Dismissal and/or reduction of the Indictment;
2. For an order for a bill of particulars;
3. For an order of discovery pursuant to CPL §240.40;
4. For an order for disclosure of evidence or other exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83;
5. For an order pursuant to CPL §710.20(1) to suppress any tangible property taken from the defendant in connection with his arrest by any police officer, or their agent, as this property was obtained by means of an unlawful search and seizure under circumstances which preclude admissibility thereof in a criminal action against such defendant, or in the alternative, for an order to grant a hearing pursuant to CPL §710.60(4) to determine said issue;
6. For a hearing pursuant to *People v. Dunaway*, 38 N.Y.2d 812 (1975) and *Mapp v. Ohio*, 367 U.S. 643 (1961) to determine whether there was

- cause to detain/stop the defendant Thomas Cancel, and to suppress any evidence that was the product of his unlawful seizure or arrest;
7. For a hearing pursuant to *People v. Devone*, 15 N.Y.3d 106, 931 N.E.2d 70, 905 N.Y.S. 2d 101 (Ct. of App. 2010) to determine whether the Town of Warwick Police had “founded suspicion that criminality was afoot” to justify a canine sniff of the exterior of the vehicle being operated by defendant Thomas Cancel at the time of his arrest, and to suppress any evidence that was the product of an unlawful search of his vehicle by canine sniff;
  8. For a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) to afford the defendant Cancel the opportunity to challenge the truthfulness of all the factual statements made in any affidavit supporting any search warrants issued in this case;
  9. For a hearing pursuant to *People v. Darden*, 34 N.Y.2d 177 (1974) to determine the accuracy of any search warrants issued in this case;
  10. For a hearing to prohibit the use of defendant’s prior crimes or bad acts pursuant to *People v. Sandoval*, 34 N.Y.2d 371, 378 (1974);
  11. For a hearing pursuant to *People v. Ventimiglia*, 52 N.Y.2d 350, 438 N.Y.S.2d 261 (1981);
  12. For an order of disclosure of information pursuant to *People v. Geaslen*, 54 N.Y.2d 510, 446 N.Y.S.2d 227 (1981);
  13. For an order granting leave to file additional motions;
  14. For an order dismissing the indictment in the interest of justice pursuant

to CPL §210.40 and a hearing pursuant to *People v. Clayton*, 41 A.D.2d 204 (2<sup>nd</sup> Dept., 1973);

- 15. For an order pursuant to CPL §216.05(1) ordering the defendant Thomas Cancel to undergo an alcohol and substance abuse evaluation;
- 16. For an order pursuant to CPL §216.05(3) granting defendant Cancel a hearing on whether defendant Cancel should be offered alcohol or substance abuse treatment; and, if it is determined that such alcohol or substance abuse treatment is warranted, for an order pursuant to CPL §216.05(4) admitting defendant Cancel into this Court's Judicial Diversion Program.

The following papers were read:

Notice of Motion - Affirmation of Jon C. Dupee, Jr., Esq. - Affidavit of Thomas Cancel - Affidavit of Service - Annexed Exhibits	1 - 5
Janine M. Kovacs, Esq.'s Affirmation in Opposition - Affidavit of Service	6 - 7
Grand Jury Minutes - Indictment - Voluntary Disclosure Form	8 - 9

Upon the foregoing papers it is hereby ORDERED that the defendant's motion is decided as follows:

**MOTION TO INSPECT GRAND JURY MINUTES  
AND DISMISS INDICTMENT**

The motion is granted to the extent that the Court has reviewed the minutes of the Grand Jury and finds that the Indictment is based upon legally sufficient evidence and that the Grand Jury was properly instructed with respect to the applicable law.

### **MOTION FOR A BILL OF PARTICULARS**

The request for information set forth in paragraph “25(1)”, “25(3)”, “25(9)”[reports], “25(12)”, and “25(13)(c)” of defendant’s counsel’s affirmation is denied as the information has been provided in the Voluntary Disclosure Form or the People have consented to the inspection thereof.

The remaining requests for information set forth in paragraph “25” are denied.

### **MOTION FOR DISCOVERY AND INSPECTION**

The request for information set forth in paragraphs “27(1)”, “27(2)”, “27(3)”, “27(4)”, “27(5)”, “27(6)”, “27(7)”, “27(17)”, and “27(19)” of defendant’s counsel’s affirmation is denied on the basis that such information was previously provided in the Voluntary Disclosure Form or the People have consented to the inspection thereof.

The request for information set forth in paragraph “27(11)(b)”, “27(11)(c)”, “27(12)”, and “27(20)” is granted and the People are directed to provide (unless already provided) any such information within ten (10) days of the date of this Order.

The request for information set forth in paragraph “27(22)” is denied based upon the District Attorney’s representation that no such information is presently known.

The request for information set forth in paragraph “27(23)” is denied as a protective order has been issued.

The remaining requests for information is denied as such information is not discoverable pursuant to CPL §240.20.

### **MOTION PURSUANT TO *BRADY V. MARYLAND***

Defendant’s motion is granted to the extent that it is hereby ordered that the District Attorney provide defendant with any and all documents and materials as required under *Brady v.*

[\* 5]  
*Maryland.*

**MOTION FOR A SANDOVAL HEARING**

The motion is granted to the extent that a hearing is hereby 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. The Court further orders the District Attorney to provide defendant's attorney with a true copy of defendant's DCJS Summary Case History and to disclose to defendant's attorney any and all acts about which it intends to use as impeachment. The above information must be provided to defendant's attorney at least three days, excluding Saturdays, Sundays and holidays, prior to the commencement of jury selection.

**MOTION PURSUANT TO VENTIMIGLIA**

Defendant's motion for relief pursuant to *People v Ventimiglia*, 52 NY2d 350 is denied with leave to renew in the event that the District Attorney seeks to introduce evidence at trial of defendant's prior bad acts or convictions.

**MOTION PURSUANT TO GEASLEN**

Defendant's motion is granted to the extent that the District Attorney is ordered to provide to defendant's attorney, within ten (10) days from the date of this Order, any information required to be disclosed pursuant to *People v. Geaslen*.

**MOTION TO SUPPRESS PHYSICAL EVIDENCE  
AND STATEMENTS**

Defendant's motion is granted to the extent that a combined *Dunaway/Mapp/Huntley/Devone* hearing is ordered pursuant to CPL §710.60(4).

**MOTION TO SUPPRESS PHYSICAL EVIDENCE  
SEIZED PURSUANT TO A SEARCH WARRANT**

Defendant's motion to suppress physical evidence obtained pursuant to a search warrant

[\* 6]

is denied. The Court has reviewed the application for the issuance of the search warrant and finds that the search warrant was based upon probable cause.

Defendant's motion for a hearing to controvert the search warrant is denied on the ground that defendant failed to make the necessary substantial preliminary showing that the warrant was based upon an affidavit containing false statements made knowingly or intentionally, or with reckless disregard for the truth (See, *Franks v Delaware*, 438 US 154, *People v Cohen*, 90 NY2d 632, *People v Alfinito*, 16 NY2d 181, *People v Rhodes*, 49 AD3d 668, *People v Tordella*, 37 AD3d 500 [2<sup>nd</sup> Dept.: 2007], *lv. app. den.*, 8 NY3d 991, *People v Novick* 203 AD2d 692 [2<sup>nd</sup> Dept.: 2002], *lv. app. den.* 98 NY2d 712).

#### **MOTION FOR A *DARDEN* HEARING**

Defendant's motion for a *Darden* hearing is denied. A *Darden* hearing is not necessary "because probable cause for the search warrant was established through independent police observations" and other evidence (*People v Crooks*, 27 NY3d 609 [2016]).

#### **MOTION TO DISMISS IN THE INTEREST OF JUSTICE**

The defendant's motion for dismissal is denied. In considering a motion for dismissal, the Court must consider the following:

- “(a) the seriousness and circumstances of the offense;
- (b) the extent of harm caused by the offense;
- (c) the evidence of guilt, whether admissible or inadmissible at trial;
- (d) the history, character and condition of the defendant;
- (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
- (f) the purpose and effect of imposing upon the defendant a sentence authorized

for the offense;

- (g) the impact of a dismissal upon the confidence of the public in the criminal justice system;
- (h) the impact of a dismissal on the safety or welfare of the community;
- (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; [and]
- (j) any other relevant fact indicating that a judgment of a conviction would serve no useful purpose.” (CPL §210.40[1]).

Upon such consideration, the Court finds that dismissal would not be in the furtherance of justice. Accordingly, the defendant’s motion must be denied.

**MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS**

Defendant’s motion for leave to file additional motions is granted only to the extent set forth in CPL §255.20(3).

**MOTION FOR AN ORDER DIRECTING DEFENDANT TO UNDERGO AN ALCOHOL AND SUBSTANCE ABUSE EVALUATION**

The defendant’s motion is denied as moot as the defendant has already undergone an alcohol and substance abuse evaluation and has provided same to the Court.

**MOTION FOR JUDICIAL DIVERSION HEARING**

The defendant’s motion is granted and a judicial diversion hearing shall be scheduled.

**MOTION TO PERMIT TESTIMONY OF DEFENDANT’S THERAPIST**

The defendant’s motion is granted to the extent that the Court will permit testimony and documentary evidence in admissible form in making a full and fair evaluation in determining if



judicial diversion is appropriate.

**ADJOURNED DATE**


This matter is scheduled for a conference to be held on February 27, 2018 at 9:15 A.M.

The defendant, the defendant's counsel, and District Attorney are directed to be present.

The aforesaid constitutes the Decision and Order of the Court.

Dated: February 22, 2018  
Goshen, New York

ENTER



HON. CRAIG STEPHEN BROWN  
COUNTY COURT JUDGE

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