| **People v Morales** |
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| 2018 NY Slip Op 33952(U) |
| October 15, 2018 |
| County Court, Westchester County |
| Docket Number: 18-0468-01 |
| Judge: Anne E. Minihan |
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FILED AND ENTERED
ON 10-15- 2018
WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
---------------------------------------------------------------X
THE PEOPLE OF THE STATE OF NEW YORK

FILED
OCT 16 2018
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

-against-

DECISION & ORDER
Ind No.: 18-0468-01

HERIBERTO MORALES,

Defendant.
---------------------------------------------------------------X
MINIHAN, J.

Defendant, by Westchester County Indictment No. 18-0468-01, is charged with Murder in the Second Degree (Penal Law § 125.25 [1]); Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03) (two counts); Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02); Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.03); Criminal Possession of a Controlled Substance in the Fifth Degree (Penal Law § 220.06 [5]); Tampering With Physical Evidence (Penal Law § 215.40 [2]); and Unlawful Possession of Marijuana (Penal Law § 221.05).

Defendant has filed an omnibus motion on September 4, 2018 and a supplemental motion dated September 10, 2018, both consisting of a Notice of Motion and an Affirmation in Support. In response thereto, the People have filed an Affirmation in Opposition together with a Memorandum of Law replying to both motions. Defendant filed a reply.

Upon consideration of these papers, the stenographic transcript of the grand jury minutes and the Consent Discovery Order, entered in this case, this Court disposes of this motion as follows:

A.

MOTION to INSPECT and to DISMISS and/or REDUCE
CPL ARTICLE 190

The court grants the defendant's motion to the limited extent that the court has conducted, with the consent of the People, an *in camera* inspection of the stenographic transcription of the grand jury proceedings. Upon such review, the court finds no basis upon which to grant defendant's application to dismiss or reduce the indictment.

The defendant, who bears the burden of refuting with substantial evidence the presumption of regularity which attaches to official court proceedings (*People v Pichardo*, 168 AD2d 577 [2d Dept 1990]), has offered no sworn factual allegations in support of his argument that the grand jury proceedings were defective. The minutes reveal a quorum of the grand jurors

was present during the presentation of evidence, and that the Assistant District Attorney properly instructed the grand jury on the law and only permitted those grand jurors who heard all the evidence to vote the matter (*see People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]).

The evidence presented to the grand jury, if accepted as true, is legally sufficient to establish every element of each offense charged (CPL 210.30[2]). "Courts 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 NY3d 269, 274-275 [2002]). 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]; *see People v Flowers*, 138 AD3d 1138, 1139 [2d Dept 2016]). "In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v Jessup*, 90 AD3d 782, 783 [2d Dept 2011]). "The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference. That other, innocent inferences could possibly be drawn from those facts is irrelevant to the sufficiency inquiry as long as the Grand Jury could rationally have drawn the guilty inference" (*People v Bello*, 92 NY2d 523, 526 [1998]).

Specifically, defendant's motion to dismiss the indictment on the basis that the spousal privilege was compromised due to the defendant's wife's testimony, is denied. Civil Practice Laws and Rules, Rule 4502(b) provides that, in general, neither spouse is required or permitted to disclose a confidential communication that was made during marriage without consent of the other (CPLR 4502 [b]). "The traditional rationale of the privilege for interspousal communications is that it fosters domestic harmony: courtroom revelation of confidential communications between husband and wife would undermine the trust and mutuality of exchange necessary for the successful nourishment of marriage" (CPLR4502:1, Practice Commentaries *citing Poppe v Poppe*, 3 NY2d 312, 315 [1957] [privilege is "[d]esigned to protect and strengthen the marital bond"]). The privilege for confidential communications between spouses applies to: (a) a communication (b) induced by the marital relationship (c) made in confidence (d) during the marriage, if it is (e) not waived and (f) not subject to an exception (*see* CPLR 4502:2, Practice Commentaries). Here, defendant's wife, Melissa Morales, testified, without objection, before the Grand Jury however her testimony did not reveal confidential communications that invoked the spousal privilege as the privilege does not protect all daily and ordinary exchanges between spouses, and only those which would not have been made but for the absolute confidence in, and induced by, the marital relationship (*see People v Melski*, 10 NY2d 78 [1961]; *see also People v Easter*, 90 Misc2d 748 [Albany Co. Ct. 1977] [wife's grand jury testimony not privileged]). After a review of the minutes, her testimony did not reveal information from medical personnel about the defendant undergoing x-rays nor the recovery of a shell casing or whether the defendant was given something at the hospital to cause him to defecate.

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Based upon the *in camera* review, since this court does not find release of the grand jury minutes or any portion thereof necessary to assist it in making any determinations and as the defendant has not set forth a compelling or particularized need for the production of the grand jury minutes, defendant's application for a copy of the grand jury minutes is denied (*People v Jang*, 17 AD3d 693 [2d Dept 2005]; CPL 190.25[4][a]).

B.

MOTION for DISCOVERY, DISCLOSURE and INSPECTION
CPL ARTICLE 240

The parties have entered into a stipulation by way of a Consent Discovery Order consenting to the enumerated discovery in this case. Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 240. If there any further items discoverable pursuant to Criminal Procedure Law Article 240 which have not been provided to defendant pursuant to the Consent Discovery Order, they are to be provided forthwith.

As to the defendant's demand for exculpatory material, the People have acknowledged their continuing duty to disclose exculpatory material at the earliest possible date upon its discovery (*see Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]). The People have also acknowledged their duty to comply with *People v Rosario* (9 NY2d 286 [1961]). In the event that the People are or become aware of any material which is arguably exculpatory and they are not willing to consent to its disclosure to the defendant, they are directed to immediately disclose such material to the Court to permit an *in camera* inspection and determination as to whether such must be disclosed to the defendant.

As to the defendant's demand for scientific related discovery, the People have acknowledged their continuing duty to disclose any written report or document concerning a physical or mental examination or test that the People intend to introduce, or the person who created them, at trial pursuant to CPL 240.20(1)(c).

Defendant's motion for a further Bill of Particulars is denied. The Bill of Particulars set forth in the Consent Discovery Order provided to the defendant has adequately informed the defendant of the substance of his alleged conduct and in all respects complies with CPL 200.95.

Except to the extent that defendant's application has been specifically granted herein, it is otherwise denied as seeking material or information beyond the scope of discovery (*see People v Colavito*, 87 NY2d 423 [1996]; *Matter of Brown v Grosso*, 285 AD2d 642 [2d Dept 2001]; *Matter of Brown v Appelman*, 241 AD2d 279 [2d Dept 1998]; *Matter of Catterson v Jones*, 229 AD2d 435 [2d Dept 1996]; *Matter of Catterson v Rohl*, 202 AD2d 420 [2d Dept 1994]).

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C.

MOTION to SUPPRESS NOTICED STATEMENTS

The People noticed pursuant to CPL 710.30(1)(a) three statements allegedly made by defendant, who moves to suppress them as unconstitutionally obtained. This branch of defendant's motion is granted, on consent, to the extent that a *Huntley* hearing shall be held prior to trial to determine whether the statements were involuntarily made by defendant within the meaning of CPL 60.45 (*see* CPL 710.20(3); CPL 710.60[3][b]; *People v Weaver*, 49 NY2d 1012 [1980]), obtained in violation of defendant's Sixth Amendment right to counsel, and/or obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

D.

MOTION to SUPPRESS IDENTIFICATION TESTIMONY
CPL 710

Inasmuch as defendant's motion seeks to suppress identification testimony stemming from a witness' identification of him from a photo array that branch of the motion is denied as the People point out that no such identification procedure was conducted. The People noticed pursuant to CPL 710.30(1)(b) the identification of defendant from two surveillance photos, by a witness testifying at the Grand Jury. As to that identification testimony, defendant's motion to suppress is granted to the limited extent of directing that a pre-trial hearing be held as to whether the identifying witness had a sufficient prior familiarity with defendant as to render the witness impervious to police suggestion (*see People v Rodriguez*, 79 NY 2d 445 [1992]). If the court finds that there was not a sufficient prior familiarity with defendant on the part of the witness, the court will then consider whether or not the noticed identification was unduly suggestive (*United States v Wade*, 388 US 218 [1967]). Specifically, the court shall determine whether the identification was so improperly suggestive as to taint any in-court identification. If the identification is found to be unduly suggestive, the court shall then go on to consider whether the People have proven by clear and convincing evidence that an independent source exists for such witness' proposed in-court identification.

E.

MOTION for *SANDOVAL* and *VENTIMIGLIA* HEARINGS

Defendant moves for a pre-trial hearing to permit the trial court to determine the extent, if at all, to which the People may inquire into defendant's prior criminal convictions, prior uncharged criminal, vicious or immoral conduct. On the People's consent, the court directs that

a pre-trial hearing be conducted pursuant to *People v Sandoval* (34 NY2d 371 [1974]). At said hearing, the People shall be required to notify defendant of all specific instances of his criminal, prior uncharged criminal, vicious or immoral conduct of which they have knowledge and which they intend to use in an attempt to impeach defendant's credibility if he elects to testify at trial (CPL 240.43).

At the hearing, defendant shall bear the burden of identifying any instances of his prior misconduct that he submits the People should not be permitted to use to impeach his credibility. Defendant shall be required to identify the basis of his belief that each event or incident may be unduly prejudicial to his ability to testify as a witness on his own behalf (*see People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

To the extent that defendant's application is for a hearing pursuant to *People v Ventimiglia* (52 NY2d 350 [1981]), it is denied since the People have not indicated an intention to use evidence of any prior bad act or uncharged crimes of defendant during its case in chief (*see People v Molineaux*, 168 NY2d 264 [1901]). If the People move to introduce such evidence, defendant may renew this aspect of his motion.

F.

MOTION to SUPPRESS PHYSICAL EVIDENCE

Subsequent to the defendant's arrest, a shell casing was allegedly recovered from his person (in his pocket), placed on the hood of the car and subsequently ingested by the defendant after he removed it from the hood of the car. While in police custody, the defendant was transported to the hospital, after he complained of stomach pain, according to the People and an x-ray confirmed that an object, appearing to be a shell casing, was ingested. The police waited for the defendant to expel the shell casing, and the casing was reacquired at the police station and after the defendant was discharged from the hospital, without a body cavity search.

Defendant moves to suppress the shell casing claiming that his right to privacy to go to the bathroom was violated because police did not first seek and obtain a search warrant. The defendant argues that the police did not have a basis to believe that he ingested the shell casing especially since the video demonstrates that the police searched the hood of the car and the surrounding area as if the shell casing had fallen. Defendant contends that the subsequent x-ray taken at the hospital was intrusive and that his rights were violated.

A strip search must be founded on a reasonable suspicion that an individual is concealing evidence underneath clothing and the search must be conducted in a reasonable manner (*People v Hall*, 10 NY3d 303 [2006]). As to a visual cavity inspection, the police must have a specific factual basis supporting a reasonable suspicion to believe that the individual secreted evidence inside a body cavity and the visual inspection must be conducted reasonably (*People v Hall*, 10

NY3d 303 [2006]). If an object is visually detected or other information provides probable cause that an object is hidden inside an individual's body, then a warrant must be obtained before conducting a body cavity search in the absence of exigent circumstances (*People v Hall*, 10 NY3d 303 [2006]).

Here, defendant has failed to demonstrate that there was a physical intrusion of his body cavity to reacquire the shell casing (that was initially recovered by police after his arrest) so that a search warrant would be necessary (*see People v Clayton*, 57 AD3d 557 [2d Dept 2008]). The police conduct in this case is akin to a visual cavity inspection not necessitating a warrant (*see People v Clayton*, 57 AD3d 557 [2d Dept 2008]). As such, this branch of defendant's motion is granted solely to the extent of conducting a *Mapp* hearing prior to trial to determine the propriety of any search resulting in the seizure of property from his person, including the initial recovery of the shell casing, and the recovery of the shell casing after defendant allegedly ingested it (*see Mapp v Ohio*, 367 US 643 [1961]). The hearing will address whether a visual cavity inspection was conducted in a reasonable manner and whether the police had a reasonable suspicion to believe that the shell casing was hidden inside defendant's body (*People v Hall*, 10 NY3d 303 [2006]; *People v Clayton*, 57 AD3d 557 [2d Dept 2008]). The hearing will also address whether any evidence was obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

G.

MOTION for a *FRYE* HEARING

Defendant has failed to establish that the particular type of analysis employed by the expert was significantly different from standard techniques for analysis of gunshot residue that are generally accepted (*see People v Serrano*, 219 AD2d 508, 509 [1st Dept 1995], *lv denied* 87 NY2d 907 [1995]).

H.

MOTION to UNSEAL the SEARCH WARRANTS

Defendant's motion to unseal the search warrant applications related to 22 Ashburton Avenue, Yonkers, NY and 45 Seymour Avenue, Yonkers, NY is granted on consent. The People do not concede that defendant has standing to contest the warrant for 45 Seymour Avenue (the defendant's grandmother's house), and do not consent to any further motions to controvert the warrants. If after a review of the search warrant applications, the defendant opposes the warrants and the items seized pursuant to the warrants, then defendant shall bring a motion by order to show cause, no later than 7 days after the date of this decision and order, and the court will

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determine, as part of the *Mapp/Dunaway* hearing ordered, whether the defendant has standing to controvert the search warrants.

I.

## MOTION to SEVER COUNTS

Defendant moves to sever counts 1-4 and 5-7 from each other, creating, in effect, two separate indictments. A strong public policy favors joinder because it expedites the judicial process, reduces court congestion, and avoids the necessity of recalling witnesses (*People v Mahboubian*, 74 NY2d 174, 183 [1989]). The court finds that the counts were properly joined pursuant to CPL 200.20(2)(c), which authorizes joinder of charges that are based upon different criminal transactions when those charges are defined by the same or similar statutory provisions and consequently are the same or similar in law. The court finds that defendant has not demonstrated that he would be unfairly prejudiced by a trial on all the joined charges so his motion to sever the counts is denied.

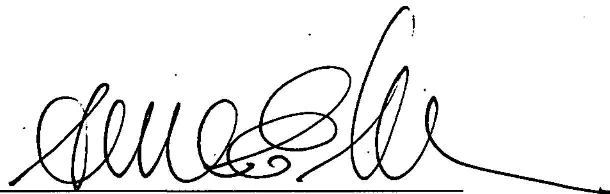
J.

## MOTION for LEAVE to FILE FUTURE MOTIONS

This motion is denied. Should defendant intend to bring further motions for omnibus relief, he must do so by order to show cause setting forth reasons as to why his motion was not and could not have been brought in conformity with CPL 255.20.

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

Dated: White Plains, New York
October 15, 2018



Honorable Anne E. Minihan
Acting Supreme Court Justice

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