

<p>People v Dzubak</p>
<p>2019 NY Slip Op 34414(U)</p>
<p>August 14, 2019</p>
<p>County Court, Westchester County</p>
<p>Docket Number: Indictment No. 19-0179</p>
<p>Judge: Anne E. Minihan</p>
<p>Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u>(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.</p>
<p>This opinion is uncorrected and not selected for official publication.</p>

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

FILED
AND ENTERED
ON 8-14 2019
WESTCHESTER

-against-

MARK DZUBAK,

Defendant.

-----X
MINIHAN, J.

Defendant, charged by Westchester County Indictment Number 19-0179 with Driving While Intoxicated (Vehicle and Traffic Law § 1192[3]) as a felony¹, Driving While Intoxicated (Vehicle and Traffic Law § 1192[2]) as a felony, Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree (Vehicle and Traffic Law § 511[3][a][i]), Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law § 220.03) and Circumvention of an Interlock Device (Vehicle and Traffic Law § 1198[9][D]), has filed an omnibus motion which consists of a Notice of Motion and an Affirmation in Support. In response, the People have filed an Affirmation in Opposition together with a Memorandum of Law.

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~~ **FILED**  follows:

AUG 14 2019

A.

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

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

¹Informations filed with the indictment accuse defendant of being previously convicted of DWI on or about July 18, 2018 in the Fishkill Town Court, Putnam County, and on or about January 11, 2013, in Bronx County Supreme Court. Based on those convictions, defendant's driver's license was revoked on or about August 7, 2018, and on or about January 25, 2013, respectively. Defendant's license had also been revoked on or about May 11, 2010, during an arraignment for DWI in Bronx County Criminal Court, for failure to submit to a chemical test. The Informations further allege that the driver's license had not been restored as of January 2, 2019 [the date of the instant offense], and that defendant had reason to know of the convictions.

to the extent provided for in Criminal Procedure Law Article 240. If there are 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 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]). If the People are or become aware of any material which is arguably exculpatory and they are not willing to consent to its disclosure to defendant, they are directed to immediately disclose such material to the Court to permit an *in camera* inspection and determination as to whether such material must be disclosed to defendant.

Except to the extent that the 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]).

B.

**MOTION to STRIKE STATEMENT NOTICES and to
SUPPRESS NOTICED STATEMENTS**

The motion to strike the CPL 710.30 statement notices because they "provide neither the circumstances nor the identities minimally required" is denied. By moving to suppress the noticed statements, defendant, in effect, waived any claim of deficiency in the notices (*see CPL 710.30[3]; People v Lopez*, 84 NY2d 425, 428 [1994]). In any event, said notices are in conformity with the statutory requirements of CPL 710.30, since they inform defendant of the time and place of the oral statements and the sum and substance of the statements (*see People v Lopez*, 84 NY2d at 428)

The People served two notices of statements allegedly made by defendant at the scene of the offense, a Mobil Gas Station in Yorktown, to members of the Yorktown Police Department. Defendant moves to suppress the statements as the fruits of an unlawful arrest, made without a *Miranda* waiver, and involuntary. Defendant's motion is granted to the extent that a pre-trial *Huntley* hearing shall be held, on consent of the People, to determine whether the alleged statements were involuntarily made within the meaning of CPL 60.45 (*see CPL 710.20(3); CPL 710.60[3][b]; People v Weaver*, 49 NY2d 1012 [1980]). The hearing will also address whether the alleged statements were obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]), or his Sixth Amendment right to counsel.

C.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

Defendant moves to suppress any evidence seized from his allegedly unlawful arrest without probable cause. This branch of defendant's motion is granted solely to the extent of ordering a pre-trial *Mapp* hearing to determine the propriety of any search resulting in the seizure of evidence (*see Mapp v Ohio*, 367 US 643[1961]). The hearing will also address whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

D.

MOTION to INSPECT, 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, if accepted as true, is legally sufficient to establish every element of the 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]).

To the extent that defendant moves to dismiss the indictment in furtherance of justice, that motion is denied. The defendant has cited no persuasive or compelling factor, consideration or circumstances under CPL 210.40 warranting dismissal of this indictment. In reaching a decision on the motion, the court has examined the factors listed in CPL 210.40, which include, in relevant part, the seriousness and circumstances of the offense; the extent of harm caused by the offense; the evidence of guilt; the history, character and condition of the defendant; any exceptionally serious misconduct of law enforcement personnel; the purpose and effect of imposing upon the defendant a sentence authorized for the charged offenses; the potential impact of a dismissal on public confidence in the judicial system; the potential impact of dismissal upon the safety and welfare of the community; and other relevant facts suggesting that a conviction would not serve a useful purpose. Having done so, the court has discerned no compelling factor, consideration or circumstance which clearly demonstrates that further prosecution or conviction of the defendant would constitute or result in injustice.

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 (*see People v Jang*, 17 AD3d 693 [2d Dept 2005]; CPL 190.25[4][a]).

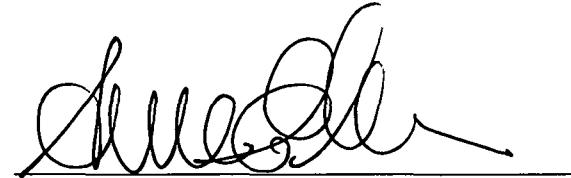
E.

MOTION for SANDOVAL and VENTIMIGLIA HEARINGS

On defendant's motion, and the People's consent, the court orders a pre-trial *Sandoval* hearing to determine the extent, if at all, to which the People may inquire into defendant's prior criminal convictions, and prior uncharged criminal, vicious or immoral conduct (*see 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 to impeach defendant's credibility if he elects to testify at trial (CPL 240.43). 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. The 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 is seeking a hearing pursuant to *People v Ventimiglia* (52 NY2d 350 [1981]) that branch of the motion is denied since the People have not indicated an intention to use evidence of any prior bad act or uncharged crimes of the defendant during its case in chief (*see People v Molineaux*, 168 NY2d 264 [1901]). If the People move to introduce such evidence, the defendant may renew this aspect of his motion.

Dated: White Plains, New York
August 14, 2019



Honorable Anne E. Minihan
A.J.S.C.

To:

HON. ANTHONY A. SCARPINO, JR.
District Attorney, Westchester County
111 Dr. Martin Luther King, Jr., Boulevard
White Plains, NY 10601
Attn: A.D.A. Virginia A. Marciano

CLARE J. DEGNAN, ESQ.
150 Grand Street, Suite 100
White Plains, NY 10601
Attn: MaryPat Long, Esq.
Attorney for defendant, Mark Dzubak