People v Johnson
2020 NY Slip Op 34772(U)
December 11, 2020
County Court, Westchester County
Docket Number: Ind. No. 19-1037
Judge: David S. Zuckerman

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

JAMAL JOHNSON,

Defendant.

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DECISION & ORDER

Ind. No.: 19-1037

ZUCKERMAN, J.

Defendant stands accused under Indictment No. 19-1037 of five counts of Criminal Possession of a Forged Instrument in the Second Degree (Penal Law §170.25[1]) and Attempted Petit Larceny (Penal Law §110/155.25). As set forth in the Indictment, it is alleged that, on or about June 13, 2019, Defendant, in Westchester County, New York, while aiding and abetting and acting in concert with another, possessed five fraudulent credit cards and attempted to steal property from another. By Notice of Motion dated November 2, 2020, with accompanying Affirmation, Defendant moves to strike the prosecution's Certificate of Compliance and compel Discovery, arguing that the People have failed to provide him with all statutorily mandated discovery pursuant to CPL Article 245. In response, the People have submitted an Affirmation in Opposition dated November 18, 2020.

The motion is disposed of as follows:

A. CONTENTIONS OF THE PARTIES

Defendant moves, pursuant to CPL §245.50(4), "for an order finding the prosecution's certificate of compliance invalid and directing full compliance with [Criminal Procedure Law] §245.20." Notice of Motion, p. 1. Particularly, Defendant asserts that the People have not provided him with unspecified police disciplinary records, as defined by CPL §245.20(1)(k)(iv), in violation of the automatic discovery provisions of CPL §245.20(1). In support, Defendant asserts that the recent repeal of Civil Rights Law §50-a, which previously shielded police disciplinary records from disclosure, coupled with recent amendments to the criminal discovery statutes, mandates that the prosecution now automatically provide him with any and all disciplinary records of police officers who will be witnesses in his trial. Since the People have not complied with that obligation, he continues, their Certificate of Compliance is invalid.

The People oppose the motion, arguing that they have provided Defendant with all discovery materials. With respect to police disciplinary records, the People assert that they specifically inquired of police witnesses whether any exculpatory and/or impeachment material exists (see CPL §245.20(1)(k)) and were informed that there was none, other than that one of the three police witnesses had a 2005 unlawful possession of marihuana conviction (before he was a police officer) which was

sealed. The People assert that this is the only information that they know of which is defined under CPL §245.20(1)(k). Upon disclosing this information to Defendant, the People claim that they have fulfilled their CPL Article 245 disclosure requirements.

The People also argue that Defendant's motion to invalidate their Certificate of Compliance should be summarily denied as untimely. They assert that, almost one year ago, Defendant made the same application orally whereupon the court (Minihan, J.) scheduled a Compliance Conference (see CPL §245.35(2)). Since Defendant did not make the same arguments at the Compliance Conference, he is precluded from asserting them now.

Lastly, the People assert that CPL Article 245 does not specifically reference police disciplinary records. At a minimum, the statute does not impute possession of those records to the People nor require their production. Therefore, notwithstanding the repeal of Civil Rights Law §50-a, they are not required to provide them to Defendant.

CPL Article 245 sets no clear procedure for a defendant seeking to challenge a Certificate of Compliance. Pursuant to CPL §245.50(4), "[c]hallenges to, or questions related to a certificate of compliance shall be addressed by motion." As Judge Donnino points out in his Practice Commentary, the statute is silent regarding the timing of such motion and whether it need

be in writing. (William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Criminal Procedure Law §245.50.) There are, however, numerous reported decisions wherein courts have addressed defense motions seeking to strike a Certificate of Compliance on the grounds of what are asserted to have been deficiencies in discovery production. *See e.g., People v Randolph,* 2020 WL 5540201 (Supreme Court, Suffolk County, Cohen, J., September 15, 2020); *People v Knight,* 69 Misc3d 546 (Supreme Court, Kings County, 2020); *People v Gonzalez,* 68 Misc3d 1213(a) (Supreme Court, Kings County, 2020); *People v Lustig,* 68 Misc3d 234 (Supreme Court, Queens County, 2020); *see also People v Suprenant*, 130 NYS3d 633 (City Court, City of Glens Falls, 2020). Guided by those decisions and others, this court will address the asserted merits of Defendant's motion.

B. DISCOVERY UNDER CPL ARTICLE 245

In 2019, the New York State legislature dramatically amended the long-standing discovery provisions of the Criminal Procedure Law (L.2019, c. 59, pt. LLL, § 2ff, eff. Jan. 1, 2020). The legislation, *inter alia*, repealed former Article 240 (relating to discovery) and added a new discovery statute, Article 245. These changes not only mandated that the prosecution provide significantly more discovery. They also directed that the materials be provided at an earlier stage of the proceedings. In 2020, CPL Article 245 was amended with regard, *inter alia*, to the

timing of such disclosures (L.2020, c. 56, pt. HHH, § 1, eff. May 3, 2020).

Without question, the new CPL Article 245 evinces a clear legislative intent to expand the prosecutor's obligation to provide information to the defendant. In addressing any discovery disputes, the court is guided by a "presumption in favor of disclosure." CPL §245.20(7).

The legislation also added a new requirement that, upon providing all discovery materials, the prosecution must "serve upon the defendant and file with the court a Certificate of Compliance. CPL §245.50(1)." Here, Defendant asserts that the People's Certificate of Compliance is invalid because the prosecution has not provided him with unspecified "police disciplinary records." Defense counsel Affirmation, p. 2. He specifically cites CPL §245.20(1)(k)(iv) as support for his motion to strike the People's Certificate of Compliance. That statute requires disclosure of

> All evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to:
>
> (I) negate the defendant's guilt as to a charged offense;
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> (ii) reduce the degree of or mitigate the defendant's culpability as to a charged offense;
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> (iii) support a potential defense to a charged offense;
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> (iv) impeach the credibility of a testifying prosecution witness;

> (v) undermine evidence of the defendant's identity as a perpetrator of a charged offense;
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> (vi) provide a basis for a motion to suppress evidence; or
>
> (vii) mitigate punishment (emphasis added).

Defendant does not cite any case law in support of his motion.

The People point to CPL §245.55 and certain trial level decisions to argue that the new discovery provisions mandate that they only need to provide police reports related to the specific case. That section provides

> 1.Sufficient communication for compliance. The district attorney and the assistant responsible for the case, or, if the matter is not being prosecuted by the district attorney, the prosecuting agency and its assigned representative, shall endeavor to ensure that a flow of information is maintained between the police and other investigative personnel and his or her office sufficient to place within his or her possession or control all material and information pertinent to the defendant and the offense or offenses charged, including, but not limited to, any evidence or information discoverable under paragraph (k) of subdivision one of section 245.20 of this article.
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> 2. Provision of law enforcement agency files. Absent a court order or a requirement that defense counsel obtain a security clearance mandated by law or authorized government regulation, upon request by the prosecution, each New York state and local law enforcement agency shall make available to the prosecution a complete copy of its complete records and files related to the investigation of the case or the prosecution of the defendant for compliance with this article.

CPL §245.55, *emphasis added*. Similarly, CPL §245.20 provides

> 2. Duties of the prosecution. The prosecutor shall make a diligent, good faith effort to ascertain the

> existence of material or information discoverable under subdivision one of this section and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control; provided that the prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain. For purposes of subdivision one of this section, all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution. The prosecution shall also identify any laboratory having contact with evidence related to the prosecution of a charge. This subdivision shall not require the prosecutor to ascertain the existence of witnesses not known to the police or another law enforcement agency, or the written or recorded statements thereof, under paragraph (c) or (e) of subdivision one of this section.

CPL §245.20(2), *emphasis added*.

C. DISCUSSION

In rejecting Defendant's argument, another judge of this court has held that the new discovery statute does not mandate that the People provide all police records. Rather, the statutory amendments direct the prosecution to furnish the defendant with only those records

> ...*related to the prosecution of a charge*. Notably, the personnel records at issue were not created for the purposes of the prosecution of the underlying charges, but for the purposes of the police department's administrative duties. Indeed there could very well be documents contained in the personnel records that long predate the incident leading to this indictment.

Matter of the Application of Certain Police Officers to Quash a So-Ordered Subpoena Duces Tecum, et al., 67 Misc3d 458, 469-70

(County Court, Westchester County, 2020, emphasis in original)(Blackwood, J.). Thus, the court held, the People's duty under that statute is only to undertake a good faith effort to identify items not within their control that might be discoverable, guided by the admonition of CPL §245.20(2), that "...the prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain." *Id.*

Other courts have similarly held that the prosecution is not obligated, under CPL Article 245, to obtain police disciplinary records (specified in CPL §245.20(1)(k)) which are not in their possession. *Knight, supra; Lustig, supra; People v Davis*, 67 Misc3d 391 (Criminal Court, Bronx County 2020); *Suprenant, supra*. In *People v Gonzalez, supra*, the court held that, pursuant to CPL §245.20(2), once the prosecution discloses the existence of police disciplinary records, they have satisfied their discovery obligations related thereto.

Defendant does not cite any contrary case law. Rather, he argues that the New York State legislature's June, 2020 repeal of Civil Rights Law §50-a mandates that, pursuant to CPL §245.20(1)(k)(iv), the prosecution provide him with all disciplinary materials related to any law enforcement officers involved with the case (Civil Rights Law § 50-a; repealed by L.2020, c. 96, § 1, eff. June 12, 2020). In the past, Civil

Rights Law §50-a had acted as a shield to prevent access to police disciplinary records. *People v Gissendanner,* 48 NY2d 543 (1979). Upon its repeal, both sides now have equal access to them.

In response, the People argue that Defendant provides no support for his bald assertion that the legislative repeal necessarily made the formerly protected disciplinary records discoverable under CPL Article 245. To the contrary, they argue that, because repeal of Civil Rights Law §50-a now enables the public to acquire those records, they assuredly are not now more within the prosecution's control than before. The People also argue that the legislature, upon repeal of Civil Rights Law §50-a, did not explicitly provide for application of CPL Article 245 to the now available records. Therefore, the court cannot impute such application.

One court has examined these arguments and held that determination of whether the People have complied with the new discovery mandate turns on whether the alleged police misconduct was found to be "substantiated," "unsubstantiated," "exonerated," or "unfounded." In *People v Randolph,* 2020 WL 5540201 (Sup Ct Suf Co. 2020), the court analyzed the new legislation and determined that the People were required to provide the defendant with police records from "substantiated" and "unsubstantiated"

misconduct complaints.[1]

In contrast, several other courts addressing the prosecution's discovery obligations have found that they are required to provide the defendant with all police disciplinary records. Particularly instructive is *People v Rosario*, 2020 NY Slip Op 20322 (County Court, Albany County, Carter, J., November 20, 2020), where the court held, regarding CPL §245.20(1)(k) discovery, that such information

> shall be disclosed whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information. The prosecutor shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure in subdivision one of section 245.10 of this article.

Rosario, supra.

Further, CPL §245.20(2) provides

> The prosecutor shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under subdivision one of this section and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control; provided that the prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain. <u>For purposes of subdivision one of this section, all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution.</u>

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[1]The court invited the parties to apply to the trial court for an *in limine* ruling on whether the defendant could use any of the information during cross examination.

Rosario, supra, emphasis added. And CPL §245.55(2) provides

> Absent a court order or a requirement that defense counsel obtain a security clearance mandated by law or authorized government regulation, upon request by the prosecution, each New York state and local law enforcement agency shall make available to the prosecution a complete copy of its complete records and files related to the investigation of the case or the prosecution of the defendant for compliance with this article

Rosario, supra, citing CPL §245.55, *emphasis added*.

The Rosario court went on to hold that, given the broad statutory framework requiring open disclosure by the People (most particularly "the presumption in favor of disclosure" in CPL §245.20(7), the presumption of possession "by the People of all items and information related to the prosecution of a charge," and the requirement that all State and local police agencies shall "provide complete records and files related to the investigation of the case or the prosecution of the defendant")

> a prosecutor must make a diligent, good faith effort to ascertain the existence of all automatic discovery, but particularly pertinent to the People's CPL 245.20 (1)(k)(iv) Brady/Giglio discovery obligations, the prosecution is deemed to have in its possession all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency (CPL 245.20 [2]).

Rosario, supra.

The Rosario court also rejected the prosecution's continued reliance on *People v Garrett* (23 NY2d 878 [2014]) regarding such material, asserting that

> if the People intend to call a member of law enforcement as a witness at trial, they must disclose all evidence and information, including that which is known to police or other law enforcement agencies acting on their behalf in the case, that impeaches the credibility of that law enforcement witness irrespective of whether they credit the information pursuant to CPL 245.20 (1)(k). There is simply no law enforcement exception to these requirements and as stated above, "law enforcement witnesses should be treated in the same manner as any other prosecution witness for purposes of cross-examination " (People v Smith, 27 NY3d 652 [2016]).

Rosario, supra.

As a result, the *Rosario* court held the Certificate of Compliance invalid and scheduled a hearing to consider discovery sanctions. *See also People v Porter*, NYLJ 12/4/2020, page 21 (Criminal Court, Bronx County, Stone, J., November 4, 2020)(directing the People to provide police disciplinary records but declining to impose sanctions after finding no prejudice to the defendant and

that the People's filing of Certificate of Compliance and Statement of Readiness were made in good faith).

Nonetheless, the cited decisions are not determinative in deciding Defendant's motion. Similarly, both parties' arguments are flawed. That is because they address an inapplicable statute. Defendant argues that he is entitled to relief for the People's failure to comply with CPL §245.20(1)(k)(iv). The People respond that Defendant's motion should be denied because they have fully complied with that statute. That statute, however, is wholly inapplicable. CPL §245.20(1)(k) requires production of

> (k) All evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to: (i) negate the defendant's guilt as to a charged offense; (ii) reduce the degree of or mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) impeach the credibility of a testifying prosecution witness; (v) undermine evidence of the defendant's identity as a perpetrator of a charged offense; (vi) provide a basis for a motion to suppress evidence; or (vii) mitigate punishment. Information under this subdivision shall be disclosed whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information. The prosecutor shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure in subdivision one of section 245.10 of this article.

The material at issue here (a police witness's pre-employment Unlawful Possession of Marihuana conviction), however, is instead

addressed by CPL §245.20(1)(p). That section requires the People to provide

> (p) A complete record of judgments of conviction for all defendants and all persons designated as potential prosecution witnesses pursuant to paragraph (c) of this subdivision, other than those witnesses who are experts.

First, it is clear that the police officer/witness' conviction of Unlawful Possession of Marihuana is not "disciplinary material" since it occurred before the witness became a police officer. Therefore, CPL §245.20(1)(k)(iv), the statute relied upon by Defendant and argued by the People, does not apply. Moreover, notwithstanding that it appears that the offense of "conviction" was only a violation (see Penal Law §221.05), subsequently sealed, the information was disclosed to Defendant on December 17, 2019, nearly one year ago.

In sum, the discovery material at issue, a law enforcement witness's pre-employment, sealed marihuana violation conviction, is not a disciplinary record. It is addressed by CPL §245.20(1)(p), not CPL §245.20(1)(k)(iv). Moreover, the People satisfied their obligations under CPL §245.20(1)(p) by disclosing the prior conviction to Defendant. Thus, Defendant's motion to strike the Certificate of Compliance for failure to provide him with police witness disciplinary records must be denied.

Finally, there also is much to be said for the People's

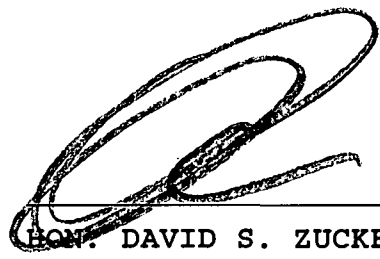
argument that Defendant waived his right to litigate this issue. As noted above, in early 2020, Defendant orally challenged the People's Certificate of Compliance whereupon the court (Minihan, J.) scheduled a Compliance Conference for February 4, 2020. CPL §245.35(2) provides for such a conference to facilitate compliance with CPL Article 245's directives. The People argue that Defendant did not make the same arguments at the Compliance Conference and therefore is precluded from asserting them nine months later. The People, however, have neither provided the minutes of the February 4, 2020 conference nor produced an order, pursuant to CPL §245.35, that recounts the arguments of counsel and/or a decision on the merits. Rather, the prosecutions simply asserts that the court "accepted the people's declaration of readiness when defendant failed to proceed" with the hearing. Notably, the court's records do not reflect any argument; only that the People asserted that they were ready.

As noted above, the newly enacted discovery statute is unclear as to the proper procedural steps to challenge the People's filing of subsequent (i.e. after the initial) Certificates of Compliance. Certainly, pursuant to CPL §245.50(4), "[c]hallenges to, or questions related to a certificate of compliance shall be addressed by motion." On the other hand, Defendant's nine month delay in filing his motion coupled with his failure to proceed during the discovery

conference certainly supports a determination that he waived his objection. Given a year when the court was effectively closed for four months, however, and most deadlines have been tolled for even longer, coupled with the lack of a statutory deadline for a motion to challenge, the court will not preclude Defendant's motion on the grounds that counsel failed to move more promptly. Nonetheless, as detailed above, Defendant's motion has no merit.

Accordingly, Defendant's motion is in all respects denied.

Dated: White Plains, New York
December 11, 2020



HON. DAVID S. ZUCKERMAN, A.J.S.C.

HON. ANTHONY A. SCARPINO, JR.
District Attorney, Westchester County
111 Dr. Martin Luther King Jr. Blvd.
White Plains, New York 10601
BY: Adrian Murphy, Esq.
Assistant District Attorney

DOUGLAS G. RANKIN, ESQ.
Attorney for Defendant
26 Court Street, Suite 714
Brooklyn, NY 11242