

**People v Cox**

2020 NY Slip Op 34911(U)

May 27, 2020

Supreme Court, Westchester County

Docket Number: Indictment No. 19-1143

Judge: Susan M. Capeci

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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

-against-

TARIQ COX,  
-----X  
Defendant.

**FILED**  
**AND**  
**ENTERED**  
ON 6-18 2020  
WESTCHESTER  
COUNTY CLERK

DECISION AND ORDER

1143  
Ind. #19-~~1438~~

**FILED**<sup>TR</sup>  
JUN 18 2020

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

In this matter where the defendant has been charged by indictment with two counts of criminal possession of a weapon in the second degree (P.L. 265.03 (3); 265.03(1)(b)), assault in the second degree (P.L. 120.05 (2)), criminal mischief in the third degree (P.L. 145.05 (2)), unlawful imprisonment in the first degree (P.L. 135.10), criminal mischief in the fourth degree (P.L. 145.00 (4)), menacing in the second degree (P.L. 120.14 (1)), assault in the third degree (P.L. 120.00 (1)), endangering the welfare of a child (P.L. 260.10 (1)), and criminal contempt in the second degree (P.L. 215.50 (3)), the defendant has submitted objections in writing to the People's Certificate of Compliance, indicating outstanding discovery materials<sup>1</sup>.

The People and defense counsel were heard on the record on February 25, 2020, on this issue. The People maintain that they have complied with their discovery obligations. No application for a protective order has been made in this case.

The People filed their Certificate of Compliance and accompanying Discovery Disclosure Index ("DDI") as of January 17, 2020, and filed Supplemental Certificates of

<sup>1</sup> The defendant's counsel submitted letter objections dated February 5, 2020, March 5, 2020 and March 11, 2020.

Compliance dated January 30, 2020, February 25, 2020, February 28, 2020, March 4, 2020, and March 6, 2020.

The outstanding discovery materials sought by the defendant in the written submissions will be addressed as follows.

Disclosure of Expert Opinion Evidence, DNA Testing, Medical Records

With regard to the victim's medical records, the People respond that they have turned over all of the records pertaining to this case, immediately upon their receipt of them. The People in fact subpoenaed these records, which were received by the Court on February 27, 2020, and March 2, 2020, and forwarded to the People for disclosure to the defendant. As the People indicate they disclosed these medical records of the victim to the defendant, this obligation has been met. The People have not indicated they are in possession of any other expert opinion evidence to be disclosed.

As for DNA test results, the defendant argues that the Certificate of Compliance should be stricken since the People have not as yet provided the results of a DNA exemplar taken from the victim for exclusionary purposes on October 29, 2019, and the results of defendant's DNA buccal swab testing. In the initial Certificate of Compliance, the People consented to inspection of DNA evidence but stated the information was not yet available.

As the People note in their March 11, 2020 letter, since the defendant objected to the taking of a buccal swab, they moved for this relief as of January 23, 2020. The buccal swab was authorized by this Court's Order dated February 26, 2020, and the swab was obtained from the defendant on March 9, 2020. The People assert that the

forensic lab is not under their control, and that this information will be provided to the defense as soon as it is received.

Since the People have disclosed the existence of this evidence and have demonstrated due diligence in promptly obtaining the buccal swab following the court's order and in seeking the lab results, the Certificate should not be stricken on this basis. "No adverse consequence to the prosecution or the prosecutor shall result from the filing of a certificate of compliance in good faith" (CPL § 245.50). Moreover, the People have indicated their trial readiness in the absence of the DNA evidence.

Compliance with §245.20 (1)(k)

The defendant argues that the People have failed to comply with their obligations for disclosure under CPL 245.20(1)(k) regarding testifying police witnesses, as their overall response consisted of broad inadequate statements. In their initial Certificate dated January 17, 2020, the People stated only that the "police witnesses have declined to answer impeachment questions." In their one-page addendum to their Supplemental Certificate dated January 30, 2020, the People stated they have inquired of the police department and individual officers, and "The police witnesses have answered all questions except about complaints contained in their personnel file relying on Civil Rights Law 50-A." There was no indication of what questions were asked, what police officers they were asked to, and what the officers' individual responses were.

The People's Certificate of Compliance states that; pursuant to CPL 245.50 (1), after exercising due diligence and making reasonable inquiry to ascertain the existence of material and information subject to discovery, the People have disclosed and made

available to defendant all known material and information subject to discovery. CPL

245.20 (1)(k) requires disclosure 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"

CPL § 245.20(1)(k).

The Court finds that the People's response constituted an inadequate disclosure with respect to the testifying police witnesses and the substance of section 1 (k). In this Court's view, the defendant is entitled to a separate, clear statement for each officer involved as to what questions were posed to them to satisfy the disclosure required under section 1 (k) (i-vii), and their individual response to each question. Moreover, Civil Rights Law 50-A does not shield police witnesses from having to answer questions posed to them under section 1(k), as Civil Rights Law 50-A protects records, not information (see People v Chisholm, Westchester Co. Ct [Blackwood, J.], decided 2/21/2020 citing Patrolmen's Benevolence Association of the City of New York v DeBlasio, 171 AD3d 636 (1<sup>st</sup> Dept 2019)). Further, the disclosure of such information is consistent with the purpose of the legislation to promote openness, fairness and efficiency, as well as the free flow of information between the police and prosecutor's office, set forth in CPL 245.55. Accordingly, the People are directed to submit a

supplemental Certificate of Compliance pursuant to CPL 245.60, expeditiously, with a separate addendum form for each officer involved, indicating what questions were posed to them to satisfy the disclosure required under section 1 (k) (i-vii), and their individual responses to each question. There is no statutory requirement for the form to be notarized or signed.

With respect to the defendant's request for disclosure of police personnel records, the Court does not read CPL 245.20 to mean that all police personnel records are deemed to be in the custody and control of the People, as such records are not all related to the prosecution of the charge at issue (CPL 245.20 (2)). Absent any indication in the 1(k) form answers that such impeachment or disciplinary material exists, the Court will not direct production of police personnel files as part of the People's discovery obligations. Thus, the issue of disclosure of such records must await the People's submission of the Supplemental Certificate of Compliance with the disclosure required under section 1 (k) (i-vii).

#### Disclosure of Lawsuits Against Officer D'Amore

The defendant seeks disclosure of the case names, dates of commencement and termination, and type of cases filed against Officer D'Amore. The People indicate by letter with their Supplemental Certificate dated January 30, 2020, that Rye Brook Police Officer Paul D'Amore has been "named in lawsuits" in the past when he was a member of the City of Mount Vernon Police Department. The People assert that Officer D'Amore believes they were settled, and is unaware of the dispositions. In their Supplemental Certificate dated February 25, 2020, the People state they have inquired

of the Mount Vernon Corporation Counsel's office who refused to disclose any information on these lawsuits against the officer without a FOIL request, and that they are unauthorized to file such request as a government agency. The People later indicate, in their Supplemental Certificate dated March 6, 2020, that upon further discussion with the Corporation Counsel's office, that office has now agreed to research and produce the results of any such lawsuits involving Officer D'Amore. They are awaiting that information. The People have disclosed information to the defendant based upon internet research, on one lawsuit filed and later terminated against Officer D'Amore, noting the name, case number, dates of commencement and termination, and nature of the case.

CPL 245.20 (2) requires the prosecution to "make a diligent, good faith effort to ascertain the existence of material or information discoverable under [CPL 245.20 (1)] 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" (CPL 245.20 [2]). However, the "prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain" (Id.).

The Court finds that by disclosing the existence of the lawsuit against the officer that they are aware of, the People met their obligations for disclosure of this information under 245.20 (1) (k) (iv). The People are not required to obtain documents that are not in their possession or control that the defense can just as easily obtain, so there is no requirement they disclose the contents of the files on the lawsuit (see People v Lustig, 2020 WL 2047434, Sup. Ct, Queens Co., decided April 28, 2020). The People have a

continuing to duty to disclose the existence of any further lawsuits they become aware of pursuant to CPL 245.60 (see also People v Garrett, 23 NY3d 878 (2014) [civil allegations against officer deemed favorable to defendant as Brady material, to the extent they are in the prosecutor's knowledge]).

#### Disclosure of Body Cam Videos/ Taser gun Videos

The defendant asserts that the People have failed to turn over any police body cam videos that depict him getting tased, and any video from the taser gun itself.

The People respond by letter dated March 11, 2020, that they have turned over all body cam videos, including the one that captures the moment the defendant was tased. However, since he was tased through a crack in the hotel room door, they contend it was impossible to see the probes strike him in the video. They further indicate that the taser guns used by the Rye Brook Police Department do not have video cameras attached.

Since the People indicate they have produced and turned over all body cam videos that exist, they have met their obligation to disclose this evidence.

#### Production of Police Manuals

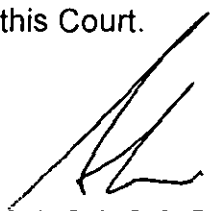
The defendant seeks production and disclosure of police manuals for all involved police agencies, as well as training manuals used to train all officers involved.

This application is denied. While the People are required to disclose "all items and information which relate to the subject matter of the case..." (CPL 245.20(1)), they have not stated any basis for the Court to conclude that disclosure of these manuals has any bearing on the subject matter of this case.



This constitutes the Decision and Order of this Court.

Dated: May 27, 2020  
White Plains, New York



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HON. SUSAN M. CAPECI  
A.J.S.C.

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