DISTRICT COURT OF THE COUNTY OF NASSAU
FIRST DISTRICT : CRIMINAL TERM, Part C4

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

[redacted]

Defendant.

HON. ANDREW M. ENGEL

DECISION and ORDER

Docket No. 2009NA021505

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Papers Submitted:
Notice of Motion.....1
Affirmation in Support.....2
Affirmation in Opposition.....3

The Defendant is charged with Criminal Possession of a Controlled Substance in the Seventh Degree, in violation of Penal Law § 220.03.

The Defendant presently moves for an order dismissing the information as facially insufficient; directing the suppression of all evidence obtained from the stop and search of the car in which the Defendant was sitting at the time of his arrest; directing the People to provide information to the Defendant pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963); directing the People to provide the Defendant with a list of witnesses and all pertinent information about those witnesses; and, directing the People to provide the Defendant with a copy of his criminal history and prior uncharged crimes or immoral acts, and directing that a hearing be held pursuant to *People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974). The People oppose this motion, in part, and consent to some of the relief requested.

## FACIAL SUFFICIENCY

An information will be found facially sufficient where, in conformity with CPL §§ 100.15 and 100.40, it contains an accusatory part, designating the offense charged, CPL § 100.15(2), setting forth every element thereof, *People v. Hall*, 48 N.Y.2d 927, 425 N.Y.S.2d 56 (1979), and a factual part containing "a statement of the complainant alleging facts of an evidentiary character supporting or tending to support the charges[,]" CPL § 100.15(3) based upon either the complainant's personal knowledge or upon information and belief. CPL § 100.15(3) The factual part, taken together with any supporting depositions, must contain non-hearsay allegations which, if true, establish every element of the offence charged, *People v. Moore*, 5 N.Y.3d 725, 800 N.Y.S.2d 49 (2005); *People v. Thomas*, 4 N.Y.3d 143, 791 N.Y.S.2d 68 (2005) "provid[ing] reasonable cause to believe that the defendant committed the offense[.]" *People v. Alejandro*, 70 N.Y.2d 133, 517 N.Y.S.2d 927 (1987); CPL § 100.40(4)(b) "'Reasonable cause to believe that a person has committed an offense' exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it." CPL § 70.20

The factual allegations in the accusatory instrument and supporting depositions should be viewed in a light most favorable to the People, *People v. Martinez*, 16 Misc.3d 1111(A), 847 N.Y.S.2d 898 (Table), (Dist.Ct. Nassau Co. 2007); *People v. Delmonaco*, 16 Misc.3d 526, 837 N.Y.S.2d 869 (Dist.Ct. Nassau Co. 2007); *People v. Mendelson*, 15 Misc.3d 925, 834 N.Y.S.2d 445 (Dist.Ct. Nassau Co. 2007) and should not be given an overly restrictive

or technical reading, *People v. Casey*, 95 N.Y.2d 354, 717 N.Y.S.2d 88 (2000); *People v. Baumann & Sons Buses, Inc.*, 6 N.Y.3d 404, 813 N.Y.S.2d 27 (2006). They must be sufficient to serve the purpose of providing the Defendant with notice enabling him to prepare for trial and to distinguish the offense sufficiently to prevent him from again being tried for the same offense. *People v. McDermott*, 69 N.Y.2d 889, 515 N.Y.S.2d 225 (1987); *People v. McGuire*, 5 N.Y.2d 523, 186 N.Y.S.2d 250 (1959) "Paragraphs (b) and (c) of CPL 100.40(1), read in conjunction, place the burden on the People to make out their prima facie case for the offense charged in the text of the information." *People v. Jones*, 9 N.Y.3d 259, 848 N.Y.S.2d 600 (2007); *See also*: *People v. Henderson*, 92 N.Y.2d 677, 685 N.Y.S.2d 409 (1999); *People v. Alejandro*, *supra*.; Such a showing is not the same as the burden of proof beyond a reasonable doubt required at trial. *People v. Swamp*, 84 N.Y.2d 725, 622 N.Y.S.2d 472 (1995); *People v. Porter*, 75 A.D.2d 901, 428 N.Y.S.2d 63 (2nd Dept. 1980)

The People District Court Information herein, subscribed by P.O. Lucien Netus, Jr., alleges that on August 18, 2009, at about 6:00 p.m., in front of 89 Gates Avenue, Valley Stream, New York, the Defendant:

> "and co defendant Glenn Mccalla were in a 2002 Mercedes Benz bearing NY Lic# EVL 7385 which was being operated by defendant Williams. The defendants were in front of 89 Gates Ave , (*sic*) in Valley Stream and during a narcotic investigation were taken into custody and the 2002 Mercedes vehicle impounded and during inventory search a (*sic*) oxy cotton (*sic*) pill was recovered by Lt. Douglas on the front passenger floor."

The Defendant alleges that the information is facially sufficient for two reasons. First, the Defendant alleges that the information is devoid of any non-hearsay allegation that the Defendant possessed the pill in question. Second, the Defendant, with qualification, alleges that

there is no Forensic Evidence Bureau report ("FEB") annexed to the information. The court finds each of these arguments to be without merit.

The information alleges that the Defendant was operating a motor vehicle in which an oxycodone pill was discovered. Penal Law § 220.25(1) provides, in pertinent part, "The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found; ...." If the allegations in the information are true, this presumption properly applies to the Defendant herein.

As for the FEB, while a report dated August 24, 2009 was not annexed to the information at the time of the Defendant's original arraignment, the court's file indicates that on September 10, 2010 an FEB was annexed to the information and the Defendant was re-arraigned thereon. The information in the court's file does, in fact, have annexed to it an FEB of Det. Stephen Hoefenkrieg determining that material in his possession contains one oxycodone tablet..

The above notwithstanding, the information is facially insufficient, requiring the dismissal of same. There is no non-hearsay allegation that the pill in question was recovered from the vehicle in which the Defendant was sitting. As previously indicated, the information is subscribed by P.O. Lucien Netus, Jr., who alleges that the pill in question "was recovered by Lt. Douglas on the front passenger floor." While it is unclear whether Officer Netus made a first hand observation of the Defendant sitting in the vehicle in question, it is clear that Officer Netus does not allege that he has any personal knowledge of the location from which the pill in question was recovered. The allegation in the information concerning the discovery and location of the pill was provided to Officer Netus by a third person, presumably Lt. Douglas; and, is

hearsay. There simply is no non-hearsay allegation connecting the pill in question to the automobile in which the Defendant was allegedly sitting or to the Defendant himself.

Accordingly, the Defendant's motion to dismiss the information as being facially insufficient is granted; and, it is hereby

**ORDERED**, that the information is dismissed.

The remainder of the Defendant's motion is denied as moot.

This constitutes the decision and order of the court.

Dated: Hempstead, New York
September 28, 2010

ANDREW M. ENGEL
J.D.C.