**DISTRICT COURT OF NASSAU COUNTY**
**FIRST DISTRICT CRIMINAL PART 3**

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff(s)

against

[redacted]

Defendant(s)

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**DOCKET NO.** [redacted]

**Present:**

**Hon. SUSAN T. KLUEWER**

**The following named papers numbered 1 to 4 submitted on this motion on October 30, 2009**

| | papers numbered |
|---|---|
| Notice of Motion and Affidavits Annexed | 1-2 |
| Order to Show Cause and Affidavits Annexed | |
| Answering Affidavits | 3 |
| Reply Affidavits | 4 |

Defendant's motion for an order dismissing the accusatory instrument is granted.

Defendant is accused by information of petit larceny (*see* Penal Law § 155.25). By its factual part (*see* CPL 100.15[3]), the complainant (*see* CPL 100.15[1]), Nassau County Police Officer Thomas P. Schubert, attests "upon information and belief" that, on August 17, 2009, at a Target store in Valley Stream, New York, Defendant, acting in concert with Keith D. Alston, "selected two Sony PC3 games from a locked display case and place[d] these items in a plastic shopping bag," that the two then "passed all points of purchase without ever attempting to pay for said proceeds," and that the two "left the store and fled [the] scene" in a black Honda Accord with a specified plate number. A supporting deposition (*see* CPL 100.20) is annexed to the information. By it, Lori A. McBride attests that:

> "[o]n the 17th day of August 2009 at about 12:30 PM I was about to start my shift as Assets Protection Associate at Target located at 500 W. Sunrise Hwy, VS when I noticed 2 unknown male blacks loading 2 Sony PS 3 Game Consoles in a vehicle parked right next to me. The 2 male blacks

> look[ed] familiar to me because of past incident[s] where they took Sony games from Target previously without paying for them. Once I started my shift, I immediately started reviewing all the security tapes. The security tapes showed the 2 male blacks in the electronics Dept secure[]2 Sony PS 3 Games (Black) from [a] lock[ed] display case and then [pass] all [points of purchase] with making no attempt to pay for the products. The first male black is about 6'4" 230 lbs, bald headed, wearing a green short sleeve shirt and gray and black plaid shorts and about 30 years old. Second male black is about 5'7", 170 lbs, braided short hair, red t-shirt, grayish short set. Both male blacks while acting together took from store 2 PS 3 worth $499.99 each without paying for the items. I observed the 2 male blacks leaving the Target parking lot in a 4DSD Honda Accord with NY Reg DXN-2950. They then made a left turn on Sunrise Hwy and proceeded westbound toward New York City. I never gave them authorization or permission to take [the] merchandise, and I want them arrested if caught. I'm having P.O. Netus write this statement for me and it's the truth."

Defendant moves to dismiss the information on the ground that it is facially defective. Citing *People v. Allison*, (nor, 2008 NYSlipOp 52008U [Nassau Dist. Ct, 2008, Engel J.]), he urges that the allegations against him are "complete hearsay," and that the complaining witness merely attests to watching a security video. He also urges that, in any event, the information "is still insufficient because it does not contain any allegation implicating Defendant in this crime." The People in opposition urge that I not follow the *Allison* decision, asserting that a video recording cannot be "hearsay" because a video is not an out-of-court "statement," that a video recording is, instead, "circumstantial evidence," that a video recording is admissible at trial "so long as the proper foundation is laid," and that, according to them, there is no requirement that an evidentiary foundation be set forth in an accusatory instrument. Defendant in reply urges that I follow the *Allison* decision, and repeats that the information is in any event defective because the supporting deposition makes no mention of him, or of anyone who even looks like him.

A long form information is sufficient if it provides reasonable cause to

believe that the defendant committed the offense charged, and contains sworn, non-hearsay allegations supporting every element of that offense, and the defendant's commission thereof (*see* CPL 100.15, 100.40[1]). Concrete, non-hearsay factual allegations are sufficiently supportive of an element of the offense charged if they give rise to a reasonable inference that the named defendant committed that particular element or acted with the requisite mental culpability (*see People v. Henderson* 92 NY2d 677, 685 NYS2d 409 [1999]; *People v. Li*, 192 Misc2d 380, 745 NYS2d 683 [Nassau Dist Ct, 2002]), but conclusory statements, unsupported by "facts," are inadequate (*cf. People v. Dumas*, 68 NY2d 729, 506 NYS2d 319 [1986]; *see also Matter of Jahron S.* 79 NY2d 632, 584 NYS2d 748 [1992]). The information thus must demonstrate the existence of a *prima facie* case (*People v Henderson*, *supra*), but the *prima facie* case requirement "is not the same as the burden of proof beyond a reasonable doubt" (*id.* at 680, 685 NYS2d at 411). When ruling on the sufficiency of an information, a court must accept the factual allegations as true (*People v. Casey*, 95 NY2d 354, 717 NYS2d 88 [2000]; *People v Henderson*, *supra*), but it is limited to reviewing the facts as they are set forth in the four corners of the accusatory document (*see People v. Voelker*, 172 Misc2d 564, 658 NYS2d 180 [Crim Ct, New York County, 1997, Morgenstern, J.]; *cf.* CPL 100.40[1]).

I disagree with the People's assertions that a video cannot be "hearsay" because it is not a "statement" in the traditional sense (*see Corsi v. Town of Bedford*, 58 AD3d 225, 868 NYS2d 258 [2d Dept. 2008]; *see also People v. Allison*, *supra*). Nor can I agree with them that "evidentiary" foundations are never required in accusatory instruments (*see People v Burak d/b/a/ Beau Art Design*, nor, 2008 NYSlipOp 51883U [Nassau Dist Ct. September 8, 2008]; *People v. Clinkscales,* 3 Misc3d 333, 774 NYS2d 308 [Nassau Dist Ct, 2004]). Indeed, it appears from her attestations that Ms. McBride bases her accusation against Defendant on her review of "all" video "records" maintained by her employer. She makes her accusation, however, without specifying so much as the date the video of the two "unknown male blacks" wrongfully taking two Sony PS 3 games was made, let alone setting forth attestations demonstrating that the "records" she reviewed are reliable (*cf. Corsi v. Town of Bedford*, *supra*; *People v. Allison*, *supra*; *People v. Burak d/b/a/ Beau Art Design*, *supra*; *People v. Clinkscales*, *supra*). Moreover, even if that were not the case, the information

has a flaw — ignored by the People — that is more fundamental than the "video" issue on which both sides focus: nowhere in her supporting deposition does Ms. McBride state who the two "unknown male blacks" depicted in the video actually are. Since Officer Schubert's assertion that one of them is Defendant is classic hearsay, there is no non-hearsay attestation demonstrating that Defendant is the person who committed the crime set forth in the information. It is therefore defective and must be dismissed.

So Ordered:

DISTRICT COURT JUDGE

Dated: December 15, 2009

CC: Honorable Kathleen Rice, District Attorney
Sharifov & Russell, LLP

STK:blm