People v Barden

2011 NY Slip Op 34192(U)

October 11, 2011

Supreme Court, New York County

Docket Number: 2448/2010

Judge: Juan M. Merchan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION AND ORDER
Ind. No. 2448/2010

SCOTT BARDEN,

Defendant.

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JUSTICE JUAN M. MERCHAN:

On October 6, 2011, this court conducted a *Dunaway/Mapp/Huntley/Wade* hearing. The People called one witness at the hearing, Sergeant Patrick Romain, whom this Court found to be credible. The defense did not present any evidence.

Findings of Fact

Sergeant Patrick Romain, shield #5132, has been employed by the New York City Police Department ("N.Y.P.D.") for approximately six and a half years and is currently assigned to the 112th Precinct in Queens. At the time of the incident, Sergeant Romain was assigned to the 7th Precinct on the Lower East Side of Manhattan. During the course of his career with the N.Y.P.D., Sergeant Romain has effectuated over 200 arrests and participated in approximately 200 others.

On May 14, 2010, Sergeant Romain and his partner, Officer Bader, responded to a complaint directing them to the Thompson Les Hotel, located at 190 Allen Street, after being informed that someone who was staying at the hotel was not able to pay the bill. Upon

arriving at the hotel, Sergeant Romain was informed by Catherine Angulo, the hotel manager, that a person by the name of Scott Barden, had been staying at the hotel for about three months and had not paid the hotel bill, which was for the amount of approximately $50,000 dollars. Ms. Angulo then showed Sergeant Romain the paperwork that corroborated that Defendant has been staying at the hotel for approximately three months and the unpaid amount owed to the hotel for the services provided to the Defendant. Ms. Angulo further informed Sergeant Romain that Defendant had attempted to pay the bill with two credit cards but that such payments had been rejected by the respective banks.

After being informed that the Defendant was still at the hotel, the police officers, along with the hotel manager, knocked on Defendant's hotel room door. After Defendant opened the door, Sergeant Romain observed that two other persons were in the room with the Defendant. He explained to the Defendant that the hotel had made complaints about his failure to pay the hotel bill and directed the Defendant to make such payment immediately. Defendant then stated, in substance, that there had been a big misunderstanding and that he was going to contact some friends who could pay the bill.

Upon Defendant's request, Sergeant Romain and his partner gave the Defendant the opportunity to make some phone calls to friends who allegedly were going to pay the bill on his behalf. Defendant called at least two people but was not able to reach any of them. Shortly thereafter, Sergeant Romain's supervisor, Sergeant Iris Perez, arrived at the scene and the Defendant was once again given the opportunity to pay the bill. After approximately 25 to 30 minutes and the unsuccessful attempts to obtain payment, Sergeant Romain placed Defendant under arrest, gathered Defendant's belongings located in the hotel room and

turned them over to one of Defendant's friends who was present.

Upon arrest, Sergeant Romain recovered Defendant's wallet from the hotel room and vouchered it for safekeeping. Catherine Angulo, the hotel manager, identified the Defendant as the person whom she was referring to when she made the initial complaint to the police. Defendant's friends were allowed to leave the hotel room at the same time Defendant was leaving the hotel with the police officers. Defendant was then transported to the 7th Precinct.

While Defendant was being driven to the 7th Precinct, Defendant spontaneously stated, in substance, that there had been a big misunderstanding, that the bill would get paid by someone else and that the hotel should just give him more time. At the precinct, the contents of Defendant's wallet were inventoried. At that time, Sergeant Romain found Defendant's driver's license, three credit cards under Defendant's name and one credit card under the name of Rosario DeMedici. Defendant refused to provide any information with regard to the credit card under the name of Rosario DeMedici and did not explain whose credit card it was or why it was in his possession. Sergeant Romain thus proceeded to voucher the items as arrest evidence. At the precinct, Defendant stated, in substance, that he was going to get the bill paid and that he needed to contact a person named Joey, who was the president of a company, and J.D., who was the CFO of the company. The Defendant was only given notice of the statement made at the precinct.

Conclusions of Law

CPL 140.10(1)(b) provides that "a police officer may arrest a person for ... [a] crime when he has reasonable cause to believe that such person has committed such crime,

whether in his presence or otherwise." Initially, the People have the burden of commencing a suppression hearing by presenting evidence of such reasonable, or probable, cause to show the legality of the police conduct. *People v. Baldwin,* 25 N.Y.2d 66 (1969); *People v. Malinsky,* 15 N.Y.2d 86 (1965). Once the People have met this burden, the defendant bears the responsibility of proving any illegality of the police conduct. *People v. Berrios,* 28 N.Y.2d 361 (1971); *Baldwin,* 25 N.Y.2d at 66.

Reasonable cause 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 [or is being] committed and that such person committed it." CPL 70.10(2).

In other words, "it must appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator." *People v. Carrasquillo,* 54 N.Y.2d 248, 254 (1981). Such a determination is based upon an objective standard such that a reasonable person possessing the same level of expertise as the arresting officer would arrive at the same conclusion. *People v. Carter,* 49 A.D.3d 377 (1st Dept. 2008); *People v. Cooper,* 38 A.D.3d 678 (2nd Dept. 2007).

In view of the facts and circumstances presented in this case, this Court is not persuaded by Defendant's argument that the police lacked probable cause to effectuate his arrest. Sergeant Romain and his partner arrived at the Thompson Les Hotel after being informed that Defendant had been staying at the hotel for approximately three months and owed about $50,000 dollars for services provided by the hotel. The officers were also informed that the hotel manager had

given the Defendant several opportunities to pay the bill but that the credit cards presented by Defendant were rejected. The hotel provided sufficient evidence of the services provided to the Defendant and the amount that Defendant was owing to the hotel.

In addition, the police proceeded to further investigate the allegations made by the hotel by going to the hotel room where Defendant was staying. After Sergeant Romain explained the situation, Defendant did not dispute the allegations made by the hotel but instead tried to call some friends who were allegedly going to pay the bill on his behalf. Indeed, Sergeant Romain testified that he and his partner remained in the Defendant's room for approximately 25 to 30 minutes, in part, to provide him the opportunity to pay his bill and, upon Defendant's request, to call other persons who would pay his bill.

After being given the opportunity to pay the bill himself or by a third person, Defendant stated that he was not able to pay the bill and that he was unable to reach any of his friends. These circumstances provided the officers with probable cause to believe that Defendant had committed, at a minimum, the crime of Theft of Services, in violation of Penal Law §165.15, in that he was intentionally avoiding the payment of the services provided by the hotel and indeed failed to pay for such services after being given the opportunity by the hotel manager and the police officers.

In this case, Defendant argued that there was no basis to arrest him and that therefore, as the arrest was unlawful, any statements made by Defendant and any property recovered from him are the fruit of the poisonous tree and must thus be suppressed. Defendant conceded that if this Court were to find that there was probable cause to effectuate Defendant's arrest, then the recovery of Defendant's property and the introduction of Defendant's statements were valid.

(Tr. 44-47). However, even after concluding that the police had probable cause to arrest Defendant, this Court will address the remaining issues.

Regarding the tangible property recovered from Defendant, it is well settled that the People have the initial burden of going forward to show the legality of the search and seizure of the property recovered. *People v. Berrios*, 28 NY2d 361 (1971); *People v. Malinsky*, 15 NY2d 86 (1965). As a general principle, to satisfy its burden, the prosecution must present credible testimony. *People v. Quinones*, 61 A.D.2d 765 (1st Dept. 1978); *People v. Carmona*, 233 A.D.2d 142 (1st Dept. 1996). Once the prosecution satisfies its burden, the defendant bears the ultimate burden of establishing the illegality of the police conduct by a fair preponderance of the evidence. *People v. DiStefano*, 38 N.Y.2d 640 at 652 (1976); *People v. Pettinato*, 69 N.Y.2d 653 at 654 (1986); *People v. De Frain*, 204 A.D.2d 1002 (4th Dept. 1994). "[A]ny inquiry into the propriety of police conduct must weigh the interference it entails against the precipitating and attending conditions." *People v. De Bour*, 40 N.Y.2d 210 at 223 (1976).

In the case at bar, this Court finds that the tangible property recovered from Defendant, to wit, his wallet containing four credit cards and his driver's license, was lawfully seized from Defendant as incident to a lawful arrest. The credit cards and Defendant's driver's license were vouchered as arrest evidence only after the police discovered that one of the credit cards was not under Defendant's name and that Defendant was unwilling or unable to provide an explanation for his possession of it. Initially, the credit cards and Defendant's driver license were properly vouchered pursuant to an inventory search. See *People v. Velasquez*, 267 A.D.2d 64 (1st Dept. 1999).

Defendant's Statements.

"In deciding whether a defendant was in custody prior to receiving his warnings, the subjective beliefs of the defendant are not to be the determinative factor. The test is not what the defendant thought, but rather what a reasonable man, innocent of any crime, would have thought had he been in the defendant's position." *People v. Yukl,* 25 N.Y.2d 585, 589 (1969). *See also People v. Rodney P.,* 21 N.Y.2d 1 (1969); *People v. DeJesus,* 32 A.D.3d 753 (1st Dept. 2006); *People v. Robins,* 236 A.D.2d 823 (4th Dept.), lv denied 90 N.Y.2d 863 (1997); *People v. Lynch,* 178 A.D.2d 779, 781 (3rd Dept. 1991), lv denied 79 N.Y.2d 949 (1992).

In making such an assessment, courts must consider the "totality of the circumstances." *People v. Centano,* 76 N.Y.2d 837 (1990). *See also Minnesota v. Murphy,* 465 U.S. 420 (1984). Among such circumstances is whether questioning is conducted in a non-coercive atmosphere. *People v. Acquaah,* 167 A.D.2d 313 (1st Dept. 1990), app denied 78 N.Y.2d 961 (1991); *People v. Davis,* 161 A.D.2d 395 (1st Dept.), app denied 76 N.Y.2d 955 (1990).

Based on this Court's findings of fact, it is axiomatic that the Defendant was not in custody at the time he made the statement at the hotel. The evidence presented at the suppression hearing established that Defendant was informed of the allegations made by the hotel manager and that the questions posed by the officers were investigative rather than accusatory. *See People v. Matos,* 83 AD3D 529 (1st Dept. 2011) (where the court denied suppression of statements made by the Defendant to police officers in connection with investigation into death of her two-year-old child. The court held that such statements were not the product of custodial interrogation because officers "did not restrain defendant in any

way or do anything to convey that they had decided to make an arrest", and that although officers "instructed the defendant to go or remain somewhere, these statements reasonably appeared, in context, to be the kind of requests that would be made to a mother of an injured child who is cooperating in an investigation, rather than directions given to a person in custody"). *Id.* at 532.

In the case at bar, Defendant was permitted to move around his hotel room and to make some phones calls for the purpose of reaching out to friends who were supposedly able to help him pay his bill. Defendant's friends were also free to move around the hotel room to gather their belongings and were allowed to leave at the same time Defendant was leaving the hotel room after his arrested.

As to the statements made by the Defendant in the patrol car and at the precinct, this Court finds that both statements were spontaneously made and not the product of interrogation or its functional equivalent as there is ample evidence to support the finding that Defendant was not questioned in any way and that he was not threatened, coerced or otherwise induced to make these statements. Indeed, after Defendant made the statement at the precinct and once police officers read the Defendant his Miranda rights, Defendant stated that he wanted to consult with an attorney, at which point the officers ended the interview.

In addition, although the statements made at the hotel and in the patrol car were not the subject of CPL 730.10 notice, this court finds that those statements are essentially identical to the statement made at the precinct. In any event, the fact that defense counsel moved to suppress such statements as an alternative to the motion to preclude "afforded him [defendant] the same opportunity to have the court pass upon the admissibility of the

statement as he would have had if timely notice had been given." People v. Merrill, 87 N.Y.2d 948 (1996).

As Defendant waived his claim with regard to the Wade portion of the hearing and conceded that there was not an illegal identification, this court will not address this issue.

Accordingly, Defendant's motion to suppress is denied in its entirely.

This constitutes the decision and order of the Court.

Juan M. Merchan
Judge of the Court of Claims
Acting Justice - Supreme Court

Dated: October 11, 2011
New York, NY