People v Townsend
2011 NY Slip Op 34315(U)
August 4, 2011
County Court, Monroe County
Docket Number: 2011-0062
Judge: Vincent M. Dinolfo

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STATE OF NEW YORK
COUNTY COURT COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

-VS- Ind. No. 2011-0062

MATTHEW A. TOWNSEND

APPEARANCES: JULIE HAHN, ESQ.
Assistant District Attorney
for the People

PAUL VACCA, ESQ.
Defense Attorney
for the Defendant

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DECISION AND ORDER

VINCENT M. DINOLFO, J.

A Huntley hearing was conducted in this case which began on June 10, 2011 and concluded on June 24, 2011. The People presented three witnesses; Ret. Inv. Charles J. Dominic, Sgt. Anthony J. Perez and Sgt. Norma Marchetti-Smith. A *Miranda* Card and a CD of Defendant's interview were also placed in evidence.

Ret. Inv. Dominic ("Dominic") testified that he was working in the capacity of a Rochester Police Department Investigator on January 11, 2011 at approximately 11:AM, when he was going through the cell phone records of the homicide victim. During this process, he noticed a phone number with a Florida area code and he

decided to call that number. A male answered the call. Dominic identified himself as a Rochester police officer and asked the male if the male knew why his number came up on that phone. The male was not sure, but did state that he had been getting prank "hangup" calls on his phone. The male denied knowing a person in Rochester named either "Savannah" or "Toccara Harmon". He advised Dominic that his wife was from Rochester and Dominic was able to determine that the male was currently in Rochester with his wife. Dominic did not mention the particular circumstances of the investigation.

Dominic's testimony was then directed to January 20, 2011 at approximately 6:56 PM, and he stated that at that time and on that date, he had an occasion to interview Matthew Townsend. He identified the Defendant in court as the person whom he interviewed. Dominic testified that he first saw Defendant at 522 Jay Street at around 4:30 that afternoon but did not come into contact with him at that point. He did come into contact with him at approximately 5:15 or 5:30 PM at one of the Fourth Floor Interview rooms within the Public Safety Bldg. He testified that the interview process was videotaped. A CD of the interview was subsequently placed into evidence without objection.

He continued that he and Inv. Cassidy went into the room, introduced themselves and obtained "pedigree" information from Defendant. Dominic testified that upon hearing Defendant's voice, he concluded that it was the same voice which he heard during the January 11, 2011 telephone call which he referenced earlier. Dominic stated that Inv. Cassidy read Defendant his *Miranda* rights at approximately

7:05 PM, and that he was present during the process. The *Miranda* rights card was received in evidence at this juncture. Dominic asserted that rights were read to Defendant just as they are contained in the card. He opined that Defendant did not look sick or injured or suffering from the effects of either drugs or alcohol. He continued that Defendant could read and write at an 11th grade level. He also maintained that no threats or promises were given or extended to Defendant in order to induce him to waive his rights. He also testified that no force was used upon Defendant and he was given food and drink during the interview process. Dominic testified that the interview ended at approximately 11:30 PM when Defendant requested an attorney. He asserted that the were no requests for counsel prior to that time.

Dominic was then cross-examined by defense counsel. Dominic told counsel that the January 11, 2011 phone call only lasted five minutes . He also testified that after the phone call but prior to the interview, he learned that Defendant had a "recent" charge from "the year before" which he understood was still pending. He also admitted that he learned during the time prior to the interview, that Defendant had been found incompetent in Florida. Dominic testified that Defendant "was taken into custody" at his home and that there was no arrest warrant for him at that time. He further testified that to his knowledge, no one had advised Defendant of his *Miranda* Rights prior to their recitation by Cassidy at the PSB. He also agreed that he did not seek any paperwork from the state of Florida in order to learn definitively about the incompetency. He testified that Defendant had sat alone in the

Interview Room for approximately one hour and twenty minutes before the interview started. He also agreed that Defendant had maintained that he had trouble reading and writing. However, Dominic also testified that Defendant's answers and/or inquiries were responsive to that which had been posed to him.

The second witness was Sgt. Anthony J. Perez. He testified that he had 24 years experience with the Rochester P.D., the last 12 or which were as an sergeant. He testified that he was at 552 Jay Street on January 20, 2011 and was there to execute a search warrant at that location. [Note: there is some discrepancy in the testimony regarding what address is germane to this case, 522 Jay or 552 Jay. It is not material since there is no issue at this hearing that the police were at the wrong house.] He stated that he had contact with a male in the "back bedroom" and identified that male as this Defendant. He testified that Defendant was handcuffed during the execution of the warrant which was routinely done for safety and security purposes. He asserted that he had no other interaction with Defendant other than this. On cross-examination, Perez testified that Defendant's hands were cuffed behind his back. Further, he admitted that Defendant was a "suspect" in the subject homicide . He also testified that he did not read Defendant his *Miranda* rights.

The remaining witness was Sgt. Marchetti-Smith who testified as a 19- year veteran of the Rochester Police Department. She testified that at around 5:18 PM on January 20, 2011 she was at "522 Jay Street" to help in the execution of a search warrant at that site. She advised the Court that she came into contact with a person inside the house during the execution of the search warrant and the person was

handcuffed and on the floor in the back bedroom of the residence. She identified that person as this Defendant. She testified that she was aware that Defendant would be taken outside and that he had no footwear on. She stated that it was icy and cold outside so, because Defendant would be taken outside, she asked him if he had a pair of boots or something that he would want to put on. He responded that his boots were up by the front door. She said words to the effect of "let's go put them on," but Defendant basically said "never mind" and indicated that he would "just throw on his sneakers", which were located in the room. The Sergeant testified that she then proceeded to help him put on the sneakers which he had referenced. The witness later observed a pair of tan boots up by the front entrance of the location. She testified under cross-examination that she did not administer Defendant his *Miranda* rights and she did not observe any other person do so.

That concluded the People's proof. Defendant offered no proof. Both parties chose to submit closing arguments by letter and both did so in a timely and reasonable fashion. The foregoing is the Court's findings of fact.

Conclusions of Law

Defendant's argument for the suppression of all of Defendant's statement, and "any durative evidence obtained, such as the boots, the items obtained within the house and DNA samples and comparisons taken from the Defendant at the time of his interrogation," consists of two principle elements. The first assertion is that because Defendant was found unfit or incompetent to proceed on a charge in Florida, the People cannot sufficiently establish in the present case that Defendant was

mentally competent to understand his rights and knowingly waive them thereafter. The second assertion is that since the investigating officers knew that Defendant had charges pending in the state of Florida, his right to counsel had attached and, in sum and substance, Defendant could not waive his right to counsel without his counsel present.

The People oppose defense counsel's arguments, posturing that the statements made over the phone on January 11,2011are admissible because, inter alia, they are non-custodial. Counsel further argues that the statement about the shoes made to Sgt. Marchetti-Smith should be admissible because they were not the product of police interrogation. Lastly, counsel submits that the statements made during the interview with Inv. Cassidy and Dominic are admissible because they were voluntary within the meaning of *Miranda* and its progeny, and the right to counsel had not indelibly attached as the result of the charge or charges pending in Florida.

Generally speaking, a confession or admission is admissible at trial only where its voluntariness is established by the People beyond a reasonable doubt. People v. Huntley, 15 N.Y.2d 72 (1965). Statements resulting from custodial interrogation are admissible only upon a showing that the procedural safeguards provided in Miranda v. Arizona, 384 US 436 (1966) were complied with. *Miranda* warnings are required whenever a defendant is taken into custody or otherwise deprived of his freedom of action in any significant way and is subjected to interrogation. Id AT 444.

With respect to the statements which Defendant made to Dominic over the telephone on January 11, 2011, they are not the subject of custodial interrogation and are therefore admissible. The standard to be applied by the Court is whether a reasonable person would have believed under the circumstances that Dominic's conduct was a significant limitation on his freedom. People v. Ocasio, 85 N.Y.2d 982 (1995). Moreover, where statements occur over the telephone during the investigatory stages of a case and a person does not indicate that he has counsel on the matter under investigation, the statements are considered voluntary and noncustodial. People v. Garland, 177 A.D.2d 410 (1st Dept. 1991). In the present case, there is no reasonable view of the circumstances that would lead a reasonable person to conclude that this was a custodial situation, nor was there any evidence that Defendant had an attorney on these charges. Thus, the conversation from January 11, 2011 is admissible.

The response which Defendant gave to Sgt. Marchetti-Smith regarding his boots is similarly admissible. Based upon the testimony of the Sargent, it is clear that the question she asked about footwear was not asked to elicit an incriminating answer, but rather to inquiry what he wanted to put on his feet befoe he went out of doors on a cold and icy day in January in Rochester, New York. Since the inquiry was not made to illicit an incriminating response, it does not take on the character of an interrogation and the response about the tan boots is admissible. People v. Gibson, ___ N.Y.3d ___, 2011 WL 2313812 (June 14, 2011); People v. Long, 27 A.D.3d 1053 (4th Dept. 2006).

The statement given during the interview is not deemed inadmissible because Defendant may have had outstanding charges in Florida.

> Because Defendant was not in custody on the pending unrelated charge when he was questioned by police herein, there was no derivative right to counsel, even though the police knew that Defendant was represented by counsel on that charge when they questioned him.

People v. Scaccia, 6 A.D.3d 1105, 1106 (4th. Dept. 2004), *citing*, People v. Steward, 88 N.Y.2d 496, 499-500 (1996). *See also,* People v. Campbell, 275 A.D.2d 984 (4th Dept. 2000); People v. Little, 259 A.D.2d 1031 (4th Dept. 1997). [even though defendant represented by two attorneys on unrelated charges in another jurisdiction, he could waive his right to counsel on unrelated homicide investigation.] Here, Defendant did not invoke his right to counsel until approximately 11:30 PM, when it was respected by the police. The right to counsel had not indelibly attached as the result of what may have occurred in Florida. Prior to the invocation of his right to counsel, Defendant had knowledgeably and intelligently waived his right to counsel and did not have the protection of any derivative rights from Florida.

Finally, with respect to the interview itself, as contained in the CD in evidence, the Court finds that Defendant knowingly, intelligently and voluntarily waived his *Miranda* rights. In addition, no force or coercion, or threats thereof, or evidence of other improper conduct or undue pressure were exercised upon Defendant in order to induce him to waive his rights. No promises were made to

Defendant that created a risk that he might falsely incriminate himself. His answers to inquires were reasonable and responsive and there was no indica that he was ill or suffer from a medical condition which would make his cooperation involuntary. When the facts are viewed in their totality, it is clear beyond a reasonable doubt that of the Defendant's statements were voluntarily made.

Defendants' motion to suppress is in all respects denied. Defendant's derivative motion to preclude evidence is also denied.

This constitutes the Decision and Order of the Court.

Dated this 4th day of August 2011 at Rochester, New York.

Hon. Vincent M. Dinolfo
County Court Judge

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