People v Desir
2017 NY Slip Op 30684(U)
January 30, 2017
County Court, Westchester County
Docket Number: 16-0351
Judge: Barry E. Warhit

[* 1]

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

STIVENSON DESIR,

Defendants.

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DECISION & ORDER

Indictment No.: 16-0351

FILED

JAN 30 2017

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

WARHIT, J.

Defendant Stivenson is charged under the within indictment with Murder in the second degree and two counts of Criminal Possession of a Weapon in the second degree. Defendant moved for Omnibus relief. By Decision and Order, dated July 22, 2016, this court (Zambelli, J.) ordered that *Rodriguez, Wade, Payton,* and *Huntley* hearings be held prior to trial for the purpose of determining the admissibility of in-court identifications of Defendant by two witnesses and of certain property recovered from Defendant's person after he was seized and of a statement he made to law enforcement officials. Said hearings commenced before this Court on January 24, 2017, continued on January 25, 2017 and concluded on January 27, 2017.

For purposes of the hearing, the People called three witnesses: Detective Claudio Carpano ("Det. Carpano"), Detective Envangelos Geralis ("Det. Geralis") and Detective Michael O'Rourke ("Det. O'Rourke"), each of the City of New Rochelle Police Department. For purposes of the hearing, Defendant called Gina Onayiga, Through their collective testimony, the following exhibits were received in evidence: two (2) color

copies of a page of a yearbook and two packets each containing copies of seven (7) color photographs, 11 yearbooks, a copy of a Search Warrant Application and three (3) photographs of Defendant's residence .

Throughout the hearing, this Court had the unique opportunity to observe each witness' and to judge the testimony adduced. Upon such observations, this Court finds each witness testified credibly in all respects. Accordingly, and upon the record adduced, this Court makes the following findings of fact and reaches the following conclusions of law.

FINDINGS OF FACT

During the early morning hours of April 3, 2016, a homicide occurred in the vicinity of the baseball field in Lincoln Park within the confines of the City of New Rochelle. Detectives Carpano, Geralis and O'Rourke were each recalled to duty and assigned to assist in investigating Brandon Lawrence's death.

Det. Carpano, an approximately twenty year veteran of the New Rochelle Police Department, arrived at police headquarters at about 4:00 a.m. and was tasked with interviewing potential witnesses. The witnesses, Justice Bridges ("Bridges"), Malik Testamark ("Testamark") and Abashante Tonge, were already present at police headquarters and had been placed in separate spaces. Upon arriving at headquarters, Det. Carpano spoke separately to each of them.

His conversation with Bridges occurred in an interview room. Bridges informed Det. Carpano that he had seen an individual, named Steven, whom he had known for a couple of years and who had been at a party at his house earlier that evening,

discharge three (3) rounds from a weapon in Lincoln Park. Bridges further advised Det. Carpano that the individual he knew as Steven had attended school in New Rochelle and was about 20 years old. Outside of the presence of Bridges, Testamark informed the detective that he was a witness to the shooting in Lincoln Park. Testamark did not know the name of the individual who committed the homicide.

Based upon the information shared by Bridges and Testamark, Det. Carpano located eleven (11) yearbooks from the local high school and middle schools. In particular, Det. Carpano gathered four (4) yearbooks from the Isaac Young Middle School for the years 2009, 2010, 2011 and 2012, four (4) yearbooks from the Albert Leonard Middle School for the years 2009, 2010, 2011 and 2012 and three (3) yearbooks from the New Rochelle High School for the years 2013, 2014 and 2015.

Det. Carpano gave Testamark roughly half of the yearbooks. Prior to Testamark viewing same, Det. Carpano advised him to look through them and let him know whether the individual he had observed discharge a weapon in Lincoln Park was depicted. Det. Carpano specifically informed Testamark that the individual in question may or may not be depicted in any of the yearbooks and advised him not to feel pressured to make an identification. Det. Carpano did not remain in the room with Testamark while he viewed the yearbooks. Rather, the detective went to another office, where Bridges was waiting, and provided the remainder of the yearbooks to him. The detective testified that, prior to Bridges having viewed any yearbook, he informed him that the individual he had seen at Lincoln Park may or may not be depicted in any of the yearbooks and advised him not to feel pressured to make an identification. Det. Carpano did not remain in the room with Bridges while he looked at the yearbooks.

Det. Carpano testified that he did not recall the exact number of yearbooks he had given to either Testamark or to Bridges and, further, that he did not know which yearbooks had been given to each witness except that he was certain the 2011 Isaac Young Middle School Yearbook was given to Bridges first. Det. Carpano based this conclusion upon the fact that, within minutes of having given yearbooks to Bridges, Bridges alerted Det. Carpano that he had made an identification from the 2011 Isaac Young Middle School. Bridges identified a photograph, under which it is printed, "Stivenson Desir", as the individual "who shot my boy". The record is silent as to whether Bridges had looked at any other yearbook. Det. Carpano made a color copy of the yearbook page on which this individual's photograph appeared. Bridges circled the photograph of the individual he had identified and wrote his initials next to it. This color copy was preserved and was admitted into evidence for purposes of this pre-trial suppression hearing.

Det. Carpano testified that, upon viewing the yearbooks which had initially been provided to him, Testamark indicated he had not made an identification. Det. Carpano then provided him with the yearbooks which had originally been given to Bridges. According to the detective, shortly thereafter, Testamark advised him that he had made an identification from the 2011 Issac Young Middle School yearbook. Det. Carpano testified that Testamark selected the photograph of Defendant, Stivenson Desir, and identified him, in substance, as the "one who had shot". Det. Carpano made a color copy of the yearbook page and presented it to Testamark who, at the detective's request, circled the photograph and signed his name and the date beneath it. This color copy was preserved and has been admitted into evidence for purposes of this pre-trial

suppression hearing.

Det. Carpano did not remain in the room with either Bridges or Testamark as they separately reviewed the yearbooks. The record is silent as to how many books each witness viewed and is further silent as to which books they viewed prior to identifying Defendant in the 2011 Isaac Young Middle School yearbook.

Nevertheless, subsequent to Bridges and Testamark each having identified Defendant using the yearbooks, while they remained in separate spaces and without having been given the opportunity to communicate with one another, Det. Carpano presented each of them with a packet of seven (7) 8x11 color copies of photographs downloaded from Facebook. Each packet contained the same photographs; however, the photographs were arranged in distinct orders. The packets, which were preserved and which have been admitted into evidence at this hearing, contain photographs of Defendant and eight (8) other men of similar skin tone and age[1].

Det. Carpano testified that, prior to allowing Bridges and Justice to view the packet, he instructed each of them that a photograph of the individual responsible for the shooting in Lincoln Park may or may not be included. According to the detective, upon looking at the packet of photographs, Bridges selected the photograph of Defendant, which was located on page 2 of his packet. Further, Det. Carpano testified that when Testamark was shown the packet, he also selected the photograph of Defendant. It was located on page 3 of his packet. Each witness signed his name on the photograph he had selected. Det Carpano conceded he was unaware whether any

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[1]Although each packet only contained seven (7) photographs, the defendant and eight fillers were depicted as two of the photographs included were of two men.

of the men depicted in the photographs was known to either Bridges or Testamark.

Based upon the above indicated identifications and also upon surveillance videos which depicted Defendant at relevant locations proximate to the Lincoln Park shooting, members of the New Rochelle Police Department proceeded to his residence located at 759 Main Street, apartment 7, New Rochelle. Prior to this time, the police had not obtained an arrest warrant for Defendant or a search warrant for his home.

According to Det. O'Rourke's testimony, he knocked on the door of Defendant's apartment at about 1:45 p.m. The door was opened by a male he believed to be Defendant who stepped into the hall. However, this male turned out not to be Defendant so Det. O'Rourke knocked on the apartment door again. This time, a young female opened the door. Det. O'Rourke testified that, through the open doorway, he observed Defendant, made eye contact with him and observed Defendant turn and proceed deeper into the apartment. Thereupon, according to Det. O'Rourke, with his gun drawn, he and other police personnel entered the apartment. Once inside, they located Defendant on the top bunk in a bedroom. Defendant, who was wearing a tank top and boxer shorts, was pulled from this bunk and handcuffed.

Det. O'Rourke testified that the police permitted Defendant to select clothing to wear to the police station. Defendant chose jeans, a shirt, jacket and sneakers. As Defendant was handcuffed, the officers assisted him in dressing.

Defendant was transported to the New Rochelle Police Department. He arrived at that location at about 2:15 p.m. and, at approximately 2:40 p.m., Detectives Carpano and O'Rourke began speaking to him in a conference room equipped with audio and video capability. Defendant was read *Miranda* warnings and, thereafter, proceeded to

engage in conversation with the detectives for approximately 45 minutes. At the end of the discussion, the detectives directed Defendant to give them the jacket and sneakers he had worn to the police station. Defendant complied. Det. O'Rourke testified that, had Defendant not been home when the police went to his residence, the police would have gotten a warrant to seek the clothing Defendant had been seen wearing in surveillance videos.

Contemporaneous to the interview of Defendant, Det. Geralis was writing a search warrant to permit a search of Defendant's residence. In particular, the application sought a search warrant to permit police entry into Defendant's residence for the purpose of seizing "handguns, bullets, holsters, wallets, identification, blood evidence, clothing (specifically dark colored jacket, dark colored hoodie, dark colored pants, and red sneakers/shoes with a white stripe)"[2]. Det. Geralis testified that his application for the search warrant was based upon the above discussed identifications of Defendant as the shooter at Lincoln Park as well as upon surveillance video which depicted Defendant at relevant locations at a time proximate to the Lincoln Park shooting. Det. Geralis specifically denied having received any information from Detectives Carpano or O'Rourke while drafting his application and, in particular, denied that these detectives or any others had shared information with him concerning the clothing which had been taken from Defendant. Detectives Carpano and O'Rourke testified consistently with this representation. The Search Warrant granting access to Defendant's residence to search for the above named items was signed at

[2]A copy of the Search Warrant Application he drafted was received into evidence for purposes of the hearing.

approximately 6:00 p.m. on April 3, 2016.

CONCLUSIONS OF LAW

Application for Suppression of In-court Identification Evidence

It is well settled that a suggestive or otherwise improper identification procedure violates due process and is not admissible to determine the guilt or innocence of a defendant (*U.S. v. Wade*, 388 US 218). Consequently, the People are required to establish the reasonableness of police conduct with respect to any identification procedures employed and the lack of any undue suggestiveness with regard to same (see, *People v. Chipp*, 75 NY2d 327 [1990]). Upon the People meeting this initial burden, a defendant who seeks suppression of an in-court identification by a witness, is required to establish, by a preponderance of the evidence, that the identification procedure employed in his case is impermissibly suggestive and conducive to an irreparably mistaken identification (*Id.*). Under the circumstances presented by this case, the Court finds the People have met their burden and that Defendant has not met his.

At issue in this case are photographic identifications of Defendant by two witnesses made from an array of school yearbooks and from photographs downloaded from social media. It bears note that, although an identification was made from a single yearbook, each of the witnesses was given a number of yearbooks to review. Even

assuming, for the sake of argument, that the 2011 Isaac Young Middle School yearbook was the only one viewed, that book contains, *inter alia*, photographs of approximately 370 "graduates". Of these photographs, 183 depicted males. 62 of the 183 males were African-Americans of a similar skin tone and age as Defendant. It is notable that, on the page with Defendant's photograph, there were 59 other photographs, 9 of which depicted black youth. Defendant's argument, that the witnesses' viewing of the yearbooks, was unduly suggestive is without merit. There is no evidence that the yearbook displayed defendant's photo in an unduly suggestive manner or that the detective engaged in any suggestive behavior. Consequently, the identifications made from the yearbooks do not give rise to a basis to suppress the in-court identifications of the witnesses (*see*, *People v.* Anaya, 206 AD2d 380 [2d Dept. 1994, citing, *People v. Burris*, 171 AD2d 668 [2d Dep't 1991].

Similarly, the arrays of photographs in packet form were not so "impermissibly suggestive as to give rise to a substantial likelihood of ... misidentification" (*see*, *Neil v. Biggers*, 409 US 188 [1972]; *and see*, *People v. Ragunauth*, 24 AD3d 472 [2005], *lv. denied* 6 NY3d 779 [2006). The law does not require that a defendant be surrounded by people nearly identical in appearance to him (*see*, *Chipp,* 75 NY2d at 336). Each of the photographic arrays at issue consisted of a defendant and eight other similarly aged young black males and, moreover, the fillers bear a sufficient likeness to Defendant in age and general appearance such that there is little likelihood that Defendant was singled out based upon any particular characteristic (*see*, *People v. Campbell*, 149 AD2d 719 [2d Dept. 1989]; *People v. Rolston,* 109 AD2d 854 [2d Dept. 1985]; *and see*,

People v. Avent, 29 AD3d 601 [2d Dept. 2006], *appeal denied* 9 NY3d 1004 [2007]; *see* also, *People v. Flores*, 102 AD3d 707 [2d Dept. 2013]). Moreover, and significantly, the record is devoid of any evidence that the police implied Defendant's identity to either witness or made attempts to prompt a particular identification. Further, the testimony adduced demonstrates that each witness was cautioned that the suspect may or may not be included in the photographs contained in their packet. Accordingly, the People have met their burden of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness in the pre-trial identification procedures. Defendant has not offered proof, by a preponderance of the evidence, that the identification procedures at issue were unduly suggestive and conducive to an irreparably mistaken identification. Consequently, this Court need not determine whether an independent basis exists for the witness' in-court identification of Defendant (*see*, *Chipp*, 75 NY2d at 335).

It bears note, in any event, that as to Bridges, the identification procedures were confirmatory in nature. Prior to viewing any yearbook or the photographic packet, Bridges informed Det. Carpano that he had known the person who committed the homicide in Lincoln Park for two years, that this individual had been at a party at his home earlier that evening, that he was named "Steven" and had attended the New Rochelle School (*see*, *Anaya,* 206 AD2d at 380, citing, *People v. Michael P.*, 169 Ad2d 738 [2d Dept. 1991]).

Upon the foregoing, Defendant's application for suppression of in-court identifications by Bridges and Testamark is denied.

Application for Suppression of Statements and Physical Evidence

Defendant was subjected to a warrantless arrest within his home. In the absence of exigent circumstances, a warrantless and nonconsensual entry into a person's home is illegal (*Payton v. New York*, 445 US 573 [1980]). In the present case, the People concede the illegality of Defendant's warrantless arrest and do not contend that the police entered his home upon consent or in the face of exigent circumstances[3]. The exclusionary rule bars "from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion" (*People v. Stith*, 69 NY2d 313 [1987] citing *Wong Sun v. United States*, 371 US 471 [1963]).

The herein Defendant was subjected to a warrantless arrest at his home at approximately 1:45 p.m. Detectives Carpano and O'Rourke commenced an interview of Defendant at approximately 2:30 p.m. This Court finds, and the People do not dispute, that the temporal proximity of the unlawful police conduct in addition to a lack of any intervening interruption between the two events requires that Defendant's statements be suppressed (*Id.; and see, People v. Minley*,112 AD2d 712, aff'd, 68 NY2d 952 [1986].

Although Defendant's statements shall not be admissible during the People's case in chief, this Court finds they may be utilized for impeachment purposes as there is no evidence that the police employed coercive tactics rendering Defendant's statement involuntary (*see*, *Harris v. US*, 401 US 222 [1971]). Defendant's claim, that

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[3]Although the People asserted the existence of exigent circumstances in response to Defendant's Omnibus Motion, this theory was not advanced during the within hearing.

his statements should be deemed involuntary on grounds that, after having been advised of *Miranda* warnings, he did not expressly indicate a willingness to speak to the detectives is without legal merit. Where, as here, a defendant is advised of his *Miranda* rights and immediately thereafter willingly answers questions posed, "no other indication prior to the commencement of interrogation is necessary to support a conclusion that the defendant implicitly waived those rights" (see, *People v Goncalves*, 288 AD2d 883, 884 [2001], lv denied 97 NY2d 729 [2002], quoting *People v Sirno*, 76 NY2d 967, 968 [1990]).

The Court now turns its attention to the question of whether the clothing taken from Defendant during the statements he made to the police does or does not constitute admissible evidence. The People contend such evidence is admissible under the inevitable discovery exception to the exclusionary rule.

The inevitable discovery doctrine provides that, where it can be shown by a "very high degree of probability" that evidence obtained as a result of information derived from an unlawful search or other illegal police conduct would have been discovered in the normal course of police investigation regardless of the unlawful police conduct, the evidence is admissible despite the exclusionary rule (*see, Stith*,69 NY2d at 317; *see*, *People v Garcia*, 101 AD.3d 1604 [4th Dept 2012]).

In this case, there is ample evidence that the police had information, separate and apart from their illegal entry to Defendant's home, which would have led them to seek the dark colored jacket and sneakers Defendant wore on April 3, 2016. The record establishes that, prior to having entered Defendant's residence, the police had

already acquired video surveillance footage which depicted Defendant wearing such articles of clothing. Moreover, contemporaneous to Detectives Carpano and O'Rourke speaking to Defendant and taking these items of clothing from him, Det. Geralis was engaged in writing a search warrant, which was ultimately signed, for these very same items.

Nevertheless, the doctrine of inevitable discovery does not apply merely because there is proof that law enforcement could have and likely would have come upon the incriminating evidence regardless of the intervening illegal police conduct. The doctrine applies only to secondary evidence and is not applicable where, as in this case, the evidence sought to be suppressed is the very evidence obtained in the illegal search (*see*, Stith, 69 NY3d at 318; *and see*, *People v.* Fitzpatrick, 32 NY2d 499 [1973]; *see also*, *Garcia*, 101 AD3d at 1604). Said another way, the evidence saved from suppression by the inevitable discovery rule must not have been obtained during or as the immediate consequence of the challenged police conduct (*Id.; and see*, *People v. Watson*, 591 NYS2d 61, 62 [2d Dep't 1992]). In this case, the items sought to be suppressed, Defendant's jacket and sneakers, constitute primary evidence. Defendant was wearing these items at the very time he was unlawfully arrested in his home and removed therefrom. Accordingly, Defendant's application for suppression of these items is granted.

Based upon the foregoing, the People shall be permitted to elicit in-court identifications from Bridges and Testamark but shall not be permitted to introduce evidence of Defendant's statement on their direct case. The People may utilize said statement for purposes of cross-examination or other impeachment of Defendant.

Finally, the tangible evidence consisting of Defendant's jacket and sneakers is suppressed as are the results of any testing performed or conclusions drawn with respect to the condition of same upon their seizure.

The foregoing constitutes the decision, order and judgement of the Court.

Dated: White Plains, New York
January 30, 2017

HON. BARRY E. WARHIT
Westchester County Court Judge

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