People v Brown
2017 NY Slip Op 31537(U)
June 6, 2017
County Court, Wayne County
Docket Number: 16-73
Judge: Daniel G. Barrett

At a Term of the County Court held in and for the County of Wayne at the Hall of Justice in the Town of Lyons, New York on the 10th day of April, 2017.

PRESENT: Honorable Daniel G. Barrett
County Court Judge

STATE OF NEW YORK
COUNTY COURT COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

GEORGE D. BROWN,

Defendant

WADE, HUNTLEY AND MAPP HEARING DECISION AND ORDER
Ind. No. 16-73

Appearances - Wayne County District Attorney-
Acting District Attorney Christopher Bokelman, Esq.
Defendant - Eric P. Smith, Esq.

The Defendant is subject to Indictment on three counts of Burglary 3rd, one count of Attempted Petit Larceny, two counts of Petit Larceny and one count of Criminal Mischief 3rd. On the above date a Wade, Huntley and Mapp hearing was held. The Court reserved decision. The Decision is set forth below.

There was identification of the Defendant by one witness with regard to one of the Burglary 3rd charges. The Defendant was identified pursuant to a photo array which will be set forth in more detail below. The People have the burden of going forward to establish both reasonableness of police conduct and the lack of suggestiveness in the identification procedure, People v Ortiz, 90 N.Y. 2d 533. Assuming the People meet their burden of going forward then the defense has the ultimate burden of proving that the identification procedure was unduly suggestive, People v Chipp, 75 N.Y. 2d 327.

The issue involves the identification of the Defendant by witness, Mark Krause, pursuant to a photo array, see Exhibit 17. This relates to the following counts of the Indictment: Count 5, Burglary in the Third Degree, Count 6, Petit Larceny and Count 7, Criminal Mischief in the third Degree. A photo array in general is not suggestive however it may become suggestive if there is some characteristic of an individual's picture that draws the viewers attention to it, indicating that the police have made a particular selection or the police make suggestive remarks to the witness, or one photo stands out in particular due to size, color or if the witness is shown repeated photo arrays, People v Curtis, 71 A.D. 3d 1044, People v Bourne, 46 A.D. 3d 1101, People v Shea, 54 A.D.2d 722.

In this particular case Investigator Shyehm Rivazfar testified. She was investigating a burglary on Finewood Road in Arcadia as alleged in Counts 5, 6 and 7. The complainant, Terry Clark filed a complaint regarding missing tools, a grill, an engine crane, also known as a cherry picker. Investigator Rivazfar received word that the Defendant was trying to sell these items to Mark Krause at the Tire Spot in Newark. She prepared a photo array of six photos. She explained to Mr. Krause the procedure. She handed the photos to Mr. Krause and turned her back. Mr. Krause verbally indicated that he identified the Defendant and marked his initials on the photo array. In addition Mr. Krause identified the Defendant in court as the person he was speaking to and the person he picked out in the photo array. The procedure testified to by Investigator Rivazfar was appropriate and according to procedure. Since the People proved there was no suggestiveness in the photo array presentation, the burden then shifted to the Defendant to show that in some way there was suggestiveness on behalf of the police. The only issue that was brought up on cross was Mr. Krause indicated that he believed he saw more than six photos. Other than that there was no other deviance between the testimony of Investigator Rivazfar and Mark Krause. Therefore the Court finds that the People have proven for the purpose of this hearing the photo array procedure was not suggestive and the identification of the Defendant by Mark Krause was appropriate and therefore available to be used by the prosecution at trial.

The second issue involved statements made by the Defendant as to whether they are in violation of the Defendant's rights and therefore inadmissible. In this case the Defendant was read his rights as testified to by Investigator LaClair and as shown by the DVD, Exhibit 4. The Defendant acknowledged his Miranda rights and agreed to waive those rights and talk to the police. Exhibit 4 was exhibited in court and it is plain to see that the Defendant voluntarily waived his Miranda rights and voluntarily talked to the police. The police made no threats or promises. The statements as shown on the 710.30 Notice and as set forth in Exhibit 4 are admissible at trial.

The Defendant at the hearing raised the issue that more than one police agency talked to the Defendant at the Sheriff's Department as shown on the disk and therefore each time a separate police officer and/or agency spoke to the Defendant the Defendant had to be re-mirandized. However pursuant to case law that is not in fact the case. Where a person in police custody has been issued Miranda warnings involuntarily and intelligently waives those rights, it is not necessary to repeat warnings prior to subsequent questioning within a reasonable time thereafter, as long as the custody remains continuous. Here the Defendant remained in the interview room during his detention. He was at the Sheriff's Department for several hours. However he did leave the police station to voluntarily show items that he had stolen and had dumped along Fink Road. The Defendant's comments and responses to the police officers' questioning clearly indicate that he understood his Miranda rights, the purpose of his questioning and the consequences and affects of his making inculpatory statements to the police officers throughout the day.

Therefore the Court finds the statements as indicated by the 710.30 Notice and Exhibit 4 were voluntarily made by the Defendant and are admissible at trial.

The third portion of the hearing involved a Mapp Hearing. The government has the initial burden of going forward to establish the legality of the police conduct. The defense has the burden of proving the illegality of the search and seizure, Mapp v Ohio, 367 U.S. 643, People v Milinsky, 15 N.Y. 2d 86. In addition when the issue is whether consent was given for the search, the prosecution has the burden of proving voluntariness by clear and convincing evidence, People v Zimmerman, 101 A.D. 2d 294. To meet its burden the prosecution must present witnesses with first hand knowledge of the police conduct, People v Ortiz, 90 N.Y. 2d 533. The search must be pursuant to the defendant's consent or pursuant to a Search Warrant. However, someone else with the apparent authority to give consent may give it such as another resident of the dwelling or a landlord, People v Love, 152 A.D. 925.

The Defendant may challenge the Search Warrant. In this case the Search Warrant involved the placing of a GPS on the Defendant's truck, pursuant to a Search Warrant signed by Judge Miller of the Arcadia Town Court as shown by Exhibit 2 and an Application for said Warrant as shown by Exhibit 1. The validity of a Search Warrant depends in large measure on the sufficiency of the underlying Affidavit, People v Roberts, 195 A.D. 2d 1018.

The Court finds that the issuance and execution of the Search Warrant as shown by Exhibits 1 and 2 were pursuant to CPL 690. Probable cause for the placing of the GPS unit on the Defendant's truck is supported by a particularized Affidavit by a person with knowledge. In any event the Defendant did not challenge the legality of the Warrant or execution of the same. Therefore Exhibit 6, which contains the GPS data is admissible at trial.

In addition the search of the residence at 305 Madison Street, apt. 4, Newark, New York is found to be lawful. Investigator Jay Warren of the Newark Police Department testified to obtaining consent from the tenant of that apartment, Kim L. DeJesus. Exhibit 8 shows her consent. The red plastic gas can was taken pursuant to said search as shown by Exhibit 12 and described by Exhibit 13 is admissible into evidence.

The items shown by Exhibit 22, property received for items contained in the Fink Road ditch, that is the pressure washer and the red line bow, was pursuant to the Defendant's consent and therefore said property was properly seized and is admissible. Said property was shown to the Sheriff's Department by the Defendant and as seen in Exhibits 20 and 21.

The property seized in Exhibit 14 were given to the police by the owner of the premises, Wayne LaPlant, 10 Garfield Street, Newark, New York 14513. Investigator Ryndock testified that those items were voluntarily given to the Sheriff's Department by Wayne LaPlant, who explained that those items were given to him by the Defendant.

In addition the hat as shown by Exhibit 9 was properly seized.

The Defendant in actuality raised no issues with regard to any of the property seized as referred to above. The Court finds the People have met their burden of proof with regard to said items and that said items are admissible at trial.

This constitutes the Decision and Order of the Court.

Dated: June 6, 2017
Lyons, New York

Daniel G. Barrett
Family Court Judge