

People v Degree

2017 NY Slip Op 32574(U)

January 13, 2017

County Court, Westchester County

Docket Number: 15-1153

Judge: Barbara G. Zambelli

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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

FILED JR

DECISION AFTER HEARING

JAN 13 2017

Indictment No.: 15-1153

DONTAE DEGREE,

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER
Defendant.

-----X
ZAMBELLI, J.

The defendant has been indicted for the crimes of Murder in the Second Degree, Attempted Murder in the Second Degree, Assault in the First Degree and Criminal Possession of a Weapon in the Second Degree allegedly committed on or about August 25, 2015, in the County of Westchester.

By decision and order dated February 10, 2016, this Court granted defendant's motion suppress evidence solely to the extent of ordering Dunaway, Mapp and Huntley hearings.

The hearing was held on January 12, 2017 and January 13, 2017 wherein Detectives Sean Drain, Neal Cromwell and Police Officers Robert Santobello and Albert Hughes of the Yonkers Police Department gave testimony.

FINDINGS OF FACT

The credible testimony adduced at the hearing on this case established that on August 25, 2015 at approximately 1:36 p.m., Police Officer Hughes was in a barber shop on Lake Avenue waiting for a haircut when he heard 4-6 gun shots. He exited the shop

and went in the direction of the shots. As he approached Lake and Morningside Avenues he saw civilians running away from the location, taking cover. He radioed headquarters of shots fired in the area. He asked people if they knew where the shots had been fired and a man indicated down the street on Morningside Avenue toward Glenwood Avenue. Police Officer Hughes went in that direction whereupon he saw a man leave a Bar/Pub on Morningside Avenue. Police Officer Hughes arrived at the location of the shooting within 2 ½ minutes. He knew the man, as Mooch, or Perry Ortiz. Police Officer Hughes saw Ortiz go to a parked vehicle and look into the vehicle. Police Officer Hughes also went to the vehicle, a Hyundai, and saw two black males with gunshot wounds and observed blood all in the vehicle. Police Officer Hughes saw the passenger was dead. Police Officer Hughes spoke to another person from the pub, David Ponzerack, who told Police Officer Hughes he was watching the incident from the pub window. The perpetrator was a black male, wearing dark clothing, with a backpack and possibly wearing a red baseball cap. He saw the perpetrator go in the direction of Glenwood Avenue in a small car. Ortiz was sitting in his car, a white Cherokee, across the street when he saw a guy walk up and shoot through the back window of the Hyundai. Ortiz got the license plate of the car the perpetrator fled in. He had written the plate number down on a pad in the bar: GXT6474, yellow plate. The perpetrator was a male black wearing dark clothing. As the witnesses were telling Police Officer Hughes their observations, Police Officer Hughes was simultaneously placing the information over the air, to wit; Ponzerack's description of the perpetrator, the direction of flight, and the license plate of the car.

Police Officer Santobello heard Police Officer Hughes' transmissions. He was approximately ½ mile from the crime scene and began canvassing the area for the vehicle.

Records Management in headquarters had addresses associated with the vehicle and the registered owner, Melissa Frederique. The vehicle was a red Nissan Versa, four door. Headquarters radioed two addresses associated with the registered owner which turned out, after checking, not to be proper. Both addresses were on Midland Avenue in Bronxville. After checking, a third address, 11 Nassau Road in Yonkers was checked. This location is a garden apartment complex, approximately four miles from the crime scene. At approximately 3:24 p.m., Police Officer Santobello saw the vehicle they were looking for – the four door red Nissan Versa with a yellow NY plate of GXT6474. The vehicle pulled up in front of 11 Nassau Road, the female passenger exited, went into the building at 11 Nassau Road and returned within three minutes to the car. As the car pulled away, Police Officer Santobello followed and radioed the location of the vehicle which was traveling from Crisfield to Falmouth. Back up marked police units executed a felony stop on Falmouth. The uniformed officers approached with orders for the occupants not to move and to show their hands. Defendant was the driver. He was wearing a white tank top style t-shirt, blue jeans, black sneakers and a tan raiders hat with a black rim. Both individuals were taken into custody and placed in separate vehicles.

Approximately one hour after Police Officer Hughes' first transmission of shots fired, Detective Drain arrived at the crime scene and spoke briefly to Ortiz and another witness to the crime, a UPS driver, Ferreiras. Ortiz described the perpetrator as approximately 30 years old, 5'11", medium build, dark skinned male with a black backpack. Ortiz later went to the Detective Division and at approximately 3:14 p.m. gave a statement. Ferreiras gave a statement in the detective division at approximately 4:12 p.m. describing the perpetrator as 5'9-5'11", male black, 20-30 years old, dark skinned, wearing dark clothing,

bright t-shirt. He reported the suspect was trying to cover his face with some kind of clothing.

Detectives Cromwell and Farina were in the Detective Division kitchen when they heard Police Officer Hughes' broadcast at approximately 1:35 p.m. They went to the crime scene. They saw the victims. They spoke to Hughes. They went to the ER at St. John's Hospital where one of the victims was taken. They heard all the broadcasts, they went to 11 Nassau Road, saw the two individuals in custody. They went to Jacoby where one of the victims was taken and then returned to the Detective Division. In the Detective Division they spoke to Detective Drain about Ortiz's statement, reviewed Ortiz's statement, and Ferreiras' statement. Both statements were admitted in evidence. Defendant was being held in the holding cell in the Detective Division. He was cuffed in back. The cuffs were changed to the front because he was uncomfortable. At approximately 10:30 p.m. Detective Cromwell interviewed Frederique. She told them the Versa was her car, she was with defendant in the morning, he dropped her off at work and had the car for the day. He told her he was going to look for a job during the day. He picked her up after work at 3:00 p.m. and they returned to Yonkers. She gave them defendant's cell phone number.

At approximately 1:32 a.m., August 26, 2015, defendant was placed in the interview room with Detectives Farina and Cromwell. He was given a covering because he was cold. He was read each of his Miranda rights at 1:38 a.m. The audio/visual recording of the interview, Exhibit 1, along with the transcript, Exhibit 2, were placed in evidence. The interview concluded at approximately 3:30 -3:45 a.m. Defendant was free to go and left headquarters. He was thereafter arraigned on the indictment on October 27, 2015.

CONCLUSIONS OF LAW

At the outset, the defendant stipulated and agreed there was probable cause for his arrest on August 25, 2015. Thus, the issue as to whether defendant was illegally seized is moot.

With regard to the statement, the People agree and stipulated that the defendant exercised his right to remain silent at page 18 of the transcript and that all statements thereafter are inadmissible on their case in chief. They seek, without objection, to use his statement on the issue of credibility in the event the defendant testifies on his own behalf. The issues remaining for resolution are the statements defendant made after Miranda warnings and before page 18 of the transcript. Defendant contends the statements must be suppressed because defendant never waived his right to remain silent. The colloquy with the detectives, he argues, must be suppressed pursuant to People v Dunbar, 24 N.Y.3d 304.

The preliminary questions to the Miranda warnings in Dunbar were found by the Court to be “at best confusing and at worst misleading”. (Id. at 315-316). The statements made to the defendants “to give me as much information as you can”, “that this is your opportunity to tell us your story” and that “you have to tell us now” directly contradicted the later warning that they had a right to remain silent.” (Id. at 315). The Court further explained that the issue is not whether, under the totality of circumstances, the defendants’ Miranda waivers were valid but rather “whether or not they were ever “clearly informed” of their Miranda rights in the first place as is constitutionally required. (Id.)

Unlike the facts in Dunbar, the People have established beyond a reasonable doubt that defendant was clearly advised of his Miranda rights and knowingly, voluntarily and

intelligently waived his rights. Furthermore, the very brief colloquy prior to Miranda warnings did not vitiate the warnings themselves. The pre Miranda questions, including defendant's phone number, constituted routine administrative pedigree information which did not require Miranda warnings (See, People v. Callicut, 101 A.D.3d 1256). In any event, to the extent that the police obtained defendant's cell phone number, the same had already been provided by defendant's girlfriend. Immediately after asking pedigree information, defendant was told that before they got started, he would be read his rights so that he understood his rights. Defendant wanted to know if he was being arrested. Defendant's concerns were centered on whether he was free to go. This brief exchange between defendant and the detectives did not in any way erode or cause confusion with the subsequently issued warning of his right to remain silent. Defendant was clearly advised of his rights. Defendant acknowledged he understood his rights. He agreed to talk to them ("I don't mind talking about it...") He wanted to go home. Defendant implicitly waived his right to remain silent by speaking to the detectives after being advised clearly and unequivocally of his right to remain silent. An express waiver is not required (See, People v. Davis, 55 N.Y.2d 731) : Accordingly, the statements prior to page 18 of the transcript are admissible on the People's case in chief.

Moreover, his statements after he exercised his right to remain silent were voluntary and not the product of coercion which would preclude the use of the suppressed statements on the issue of credibility (See, People v Wilson, 28 N.Y.3d 67).

With regard to defendant's written consent for GSR swabbing and a buccal swab for DNA testing, "In deciding whether voluntary consent attenuated the taint of illegal police action, a court must give consideration to a variety of factors, including"the temporal

proximity of the consent to the [illegal police action], the presence or absence of intervening circumstances, whether the police purpose underlying the illegality was to obtain the consent or the fruits of the search, whether the consent was volunteered or requested, whether the defendant was aware he could decline to consent, and particularly, the purpose and flagrancy of the official misconduct” (People v. Borges, 69 N.Y.2d 1031, 1033, 517 N.Y.S.2d 914, 511 N.E.2d 58 [1987]; see Brown, 422 U.S. at 603–604, 95 S.Ct. 2254). Such factors enable the court to decide “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint” (Brown, 422 U.S. at 599, 95 S.Ct. 2254). (In re Leroy M., 16 N.Y.3d 243, 246–47) “Although the voluntariness of the consent is an important factor in the court's determination of attenuation, it is not dispositive (People v. Henley, 53 N.Y.2d 403, 407, 442 N.Y.S.2d 428, 425 N.E.2d 816).” (People v. Borges, 69 N.Y.2d 1031, 1033)

The video establishes defendant voluntarily consented to both. However, the People have not met their burden of establishing the consents were sufficiently distinguishable to be purged of the primary taint of failing to honor defendant's invocation of his right to remain silent. Accordingly, this evidence must be suppressed. (See, Wong Sun v. United States, 371 U.S. at 488, 83 S.Ct. 407).

The foregoing constitutes the decision and order of the court.

Dated: White Plains, New York
January 13, 2017



BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

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