People v Ramirez
2017 NY Slip Op 33033(U)
December 5, 2017
County Court, Westchester County
Docket Number: 17-0562
Judge: Anne E. Minihan

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION AND ORDER
Indictment No. 17-0562

EDWARD RAMIREZ,

Defendant.

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Minihan, J.,

An indictment has been filed against the defendant charging him with Criminal Possession of a Weapon in the Second Degree (Penal Law §§ 265.03[1], 265.03[3]), Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02[1]), Criminal Possession of a Firearm (Penal Law § 265.01-b[1]) and Menacing in the Second Degree (Penal Law § 120.14[1]). The allegations are that on or about May 22, 2017 at approximately 10:46 p.m. at 138 Franklin Avenue in the City of Mount Vernon, that the defendant possessed a loaded and operable .38 special caliber Smith & Wesson revolver and that this possession did not take place in his home or place of business and that he, having the intent to use this firearm unlawfully against another, did possess, brandish and display it by pointing it at another person, and, by so doing, did intentionally place that person in fear of physical injury, serious physical injury or death.

The People filed a timely notice of their intent to introduce an oral statement they attribute to the defendant which they allege to have been made at the Mount Vernon Police Department on May 23, 2017 at approximately 2:36 a.m. and they filed timely notice of their intent to introduce testimony regarding the observation of the defendant by a complaining witness who has previously identified the defendant from a photographic array. By omnibus motion, the defendant sought suppression of his noticed statement, the noticed identification and suppression of physical evidence, particularly the .38 caliber Smith & Wesson revolver which the People maintain was seized from 138 Franklin Avenue.

Pursuant to the Decision and Order of this court, dated October 19, 2017, which granted so much of the defendant's omnibus motion as sought suppression of the noticed statement attributed to the defendant, suppression of the noticed identification of the defendant and suppression of physical evidence to the extent that *Huntley*, *Wade/Rodriguez* and *Mapp/Dunaway* were directed to be held prior to trial. On November 29, 2017, immediately prior to commencement of pre-trial hearings, the People withdrew the CPL 710.30 notice as to the statement attributed to the defendant and, upon their representation that they no longer intend to use this statement in their case in chief, the need for a *Huntley* hearing was obviated.

Pre-trial hearings thereafter commenced and were concluded on November 30, 2017. Pursuant to the combined *Wade/Rodriguez* and *Mapp/Dunaway* hearings, I give full credence to the testimony of the People's sole witness Detective Nicholas Smith whose testimony I found to be candid, plausible and fully credible. The People's exhibits in evidence were comprised of a photographic array and the sworn statement of a complaining witness, Dante Wheeler. The defense called no witnesses and presented no evidence.

I make the following findings of fact and conclusions of law.

FINDINGS of FACT

Detective Nicholas Smith, a 9 year veteran of the Mount Vernon Police Department, testified that on May 22, 2017, he had been assigned to the Major Case Unit for about a year and was tasked with investigating primarily homicides, bank robberies and kidnappings. At approximately 12:15 a.m., he spoke with Dante Wheeler at police headquarters. He recalled that Mr. Wheeler told him that he had known the defendant, Edward Ramirez, for about a year and that the defendant was his sister's boyfriend. In Mr. Wheeler's sworn statement, admitted in evidence without objection, he described the defendant as "[l]ight skin, about 6'1, short haircut, about 32-33 years old."

Mr. Wheeler told Detective Smith that, while he was upstairs at 138 Franklin Avenue, which he characterized as his grandmother's house, he heard a commotion downstairs and, upon hearing his sister yell and the sound "like something was being banging up against the wall," he kicked the door open. When he did, his sister ran to him for help and he "looked [the defendant] dead in the face" as "[h]e was standing next to the couch with a towel on" and observed the defendant with a gun. In response to Detective Smith's question as to whether the defendant lived at 138 Franklin Avenue, Mr. Wheeler replied that the defendant did not but also testified that he could not recall whether it was a one family home or whether Mr. Wheeler had been visiting his grandmother in a separate apartment in the house or not.

In Mr. Wheeler's sworn statement, he told police that, after he kicked open the door, he heard his sister, Danielle Byrd say "he has a gun" as she held on to him and tried to push him back out of the doorway. Mr. Wheeler's stated that he pushed Ms. Byrd away as the defendant, gun in hand, walked over to him and said "you know I'm not a bad person, I'm not tryna [sic] do this." Mr. Wheeler, who indicated that he was in fear for his life, described the firearm as a silver revolver with a black handle and he stated that the defendant held the gun in his right hand and that, in the presence of Ms. Byrd, their mother and him, the defendant waved the gun at them.

Detective Smith testified that he prepared a photographic array using a program called e-justice to find people of similar appearance. The array, which was admitted into evidence without objection, contains the photograph of the defendant in the third position and the photographs of five other men of similar age and appearance. Detective Smith recalled that

Detective Griffin placed the array in front of Mr. Wheeler who selected the photograph of the defendant, circled it, initialed the circle, wrote on the bottom of the array "Eddie pointed the gun at me and was flashing it around like he was scared" and then signed it, placing the date and time below his signature.

Detective Smith interviewed the defendant at the Mount Vernon Police Department at approximately 2:42 a.m. on May 23, 2017. At the hearing, Detective Smith identified the defendant and testified that the defendant told him that he lived on Warburton Avenue in the City of Yonkers and that he was at 138 Franklin Avenue the previous evening to visit his girlfriend and have sex with her.

CONCLUSIONS of LAW

Inasmuch as the People withdrew their CPL 710.30 notice of a statement attributed to the defendant and represented prior to the commencement of the hearings that at the hearing that they will not, on their case in chief, use that statement, that branch of the defendant's motion which seeks suppression of the statement is moot.

The defendant also seeks suppression of physical evidence, particularly the loaded .38 caliber Smith & Wesson revolver which the People maintain was seized from 138 Franklin Avenue. In granting the defendant's motion insofar as it sought a hearing, the Court's decision and order, dated October 19, 2017, indicated that, as a threshold issue, a determination would be made as to whether the defendant had standing to challenge the allegedly unlawful search of 138 Franklin Avenue, where the firearm was recovered.

The exclusionary enforcement of a defendant's right to be secure against unreasonable search and seizure requires that he have, and demonstrate, personal standing to challenge police action (NY Const, Art. I § 12; US Const, 4th Amendment and 14th Amendment; *see Rakas v Illinois*, 439 US 128 [1978]; *Alderman v United States*, 394 US 165 [1969]; *Mapp v Ohio*, 367 US 643 [1961]; *Weeks v United States*, 232 US 383 [1914]; *People v Rodriguez*, 69 NY2d 159, 161 [1987]; *People v Ponder*, 54 NY2d 160 [1981]). Inasmuch as Fourth Amendment rights are personal, the burden to establish legal standing falls upon the defendant (*People v Wesley*, 73 NY2d 351 [1989]; *People v Gonzalez*, 68 NY2d 950 [1986]). To that end, a defendant who seeks suppression of physical evidence may not rely on the mere fact that he is charged with a possessory offense to confer standing, but rather must provide sworn allegations of fact sufficient to establish that he has a legitimate expectation of privacy in the area searched or the item seized (CPL 710.60[1]; *People v Wesley*, 73 NY2d 351 [1989]; *People v Ponder*, 54 NY2d 160 [1981]). Once granted a hearing, the defendant is still required to demonstrate standing to challenge the seizure of property, but he may sustain his burden with evidence adduced at the hearing, even if he does not testify.

In considering whether the defendant may properly claim a personal, legitimate expectation of privacy, the court must determine whether that claim is "reasonable in light of all

the surrounding circumstances" which may include the demonstration of some combination of facts demonstrating personal or proprietary interest in the residence itself such as whether the status of the defendant as resident, visitor or overnight guest, the length, purpose and frequency of the defendant's stays at the residence, whether he is in possession of a key, the presence or absence of personal belongings suggestive of residency and whether he contributes to household expenses (*see Rakas v Illinois*, 439 US 128 [1978]; *People v Rodriguez*, 69 NY2d 159 [1987]).

Despite defendant's failure to provide objective facts in his motion to suppress from which the court could make a legal determination as to whether there was a factual issue as to whether he has standing to challenge the seizure of the handgun, the court nonetheless ordered a *Mapp/Dunaway* hearing with the understanding that the defendant would still have to sustain his burden to establish standing. On this record, under all of the surrounding circumstances, the defendant has failed to meet his burden to establish that he had a legitimate expectation of privacy in the apartment of his girlfriend, Danielle Byrd. The sole witness at the hearing testified credibly that the defendant himself stated that he lived on Warburton Avenue in the City of Yonkers and that he was at 138 Franklin Avenue in the City of Mount Vernon the previous evening to visit his girlfriend and have sex with her. Moreover, Detective Smith testified that Dante Wheeler, the brother of the defendant's girlfriend, told him that he did live at 138 Franklin Avenue but that the defendant did not. Under these circumstances, including but not limited to the defendant's own statement admitting to residence elsewhere, the defendant has failed to satisfy his burden.

When the defendant challenges an identification procedure as unduly suggestive, the People have the initial burden of going forward to establish the reasonableness of police conduct and the lack of undue suggestiveness (*see People v Coleman*, 73 AD3d 1200, 1203 [2d Dept 2010]). At a *Rodriguez* hearing, the People bear the burden to demonstrate that the police-arranged identification procedure was merely confirmatory as a result of the defendant been known to the witness to such a degree so as to be impervious to police suggestion (*People v Rodriguez*, 79 NY2d 445, 452 [1992]). The confirmatory identification exception requires a case-by-case analysis which "rests on the length and quality of prior contacts between [the] witness and [the] defendant, but always requires a relationship which is more than 'fleeting or distant'" (*People v Waring*, 183 AD2d 271, 274 [2d Dept 1992], quoting *People v Collins*, 60 NY2d 214, 219 [1983]).

Although no single factor is determinative, under the totality of the circumstances, I find that the People sustained their burden to establish that the defendant was so well known to Mr. Wheeler as to have made Mr. Wheeler impervious to police suggestion. Prior to the incident, the defendant had been known to Mr. Wheeler, for the period of about a year, as Mr. Wheeler's sister's girlfriend. Mr. Wheeler, who lived in the same house as his sister, knew that the defendant did not live there, referred to the defendant by a nickname (Eddie) and, prior to the identification procedure, he provided a detailed physical description of the defendant to police. Such is sufficient evidence that the length and quality of the defendant's prior interactions with Mr. Wheeler were such that they were known to each other to such a degree so as not be subject to police suggestion.

Sandoval/Ventimiglia

Like every other witness in a civil or criminal matter, a defendant who chooses to testify on his own behalf at a criminal trial may be cross examined regarding those of his prior crimes and bad acts which bear upon his credibility, veracity or honesty (*see People v Hayes*, 97 NY2d 203, 207 [2002]; *People v Bennett*, 79 NY2d 464, 468 [1992]; *People v Sandoval,* 34 NY2d 371[1974]; *People v Marable,* 33 AD3d 723, 726 [2d Dept 2006]). Although the questioning about prior crimes and past conduct is not automatically precluded simply because the crime or conduct inquired about is similar to the crime charged (*see People v Hayes,* 97 NY2d at 208; *People v Walker,* 83 NY2d 455, 459 [1994]; *People v Pavao,* 59 NY2d 282, 292 [1983]), "cross-examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial, in view of the risk, despite the most clear and forceful limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility" (*People v Sandoval,* 34 NY2d at 377; *see People v Brothers*, 95 AD3d 1227, 1228-1229 [2d Dept 2012]). Thus, "a balance must be struck between, on the one hand, the probative worth of evidence of prior specific criminal, vicious or immoral acts on the issue of the defendant's credibility, and, on the other, the risk of unfair prejudice to the defendant, measured both by the impact of such evidence if it is admitted after his testimony and by the effect its probable introduction may have in discouraging him from taking the stand on his own behalf" (*People v Sandoval,* 34 NY2d at 375). By so doing, the defendant may make an informed decision as to whether or not to testify at his trial (*People v Sandoval*, 34 NY2d at 375).

Here, the People seek to use a number of the defendant's prior arrests and/or convictions. Particularly, they ask that they be permitted to inquire as to a November 2000 arrest related to an incident wherein he was accused of grabbing the wallet of the complaining witness and of pointing a gun at when the complaining witness gave chase. This matter was dismissed in the Mount Vernon City Court in June 2001 when the complaining witness failed to appear for a felony hearing. In addition to the underlying facts, the People ask that they be permitted inquire regarding that this was a theft-related offense. The defendant opposes, pointing out that there was no trial or plea and that he was not convicted. He argues that use of this event would be highly prejudicial.

The People also seek to inquire as to an April 2001 incident wherein Mount Vernon police responded to a report of two men throwing items out of a recently stolen vehicle and observed the defendant flee upon their arrival. The defendant was eventually apprehended in the detached garage of a residence not his own. On June 5, 2001, the defendant pled guilty to Trespass as a violation and received a sentence of time-served incarceration. The People ask that they be permitted to inquire as to both the facts and disposition of this matter. The defendant opposes the People's application and maintains that there is no probative purpose for impeachment purposes and that use of this prior conviction, which does not implicate his credibility, would be highly prejudicial.

As to a February 2002 arrest in the City of Yonkers, and subsequent conviction in the Westchester County Court in May 2002 for Criminal Possession of Stolen Property in the 4th Degree, which arose from an incident wherein the defendant was apprehended in a stolen Toyota Corolla (with a kitchen knife under the driver's seat), was without a driver's license and had a folding knife in his pants pocket, the People seek to inquire as to the underlying facts, conviction and sentence imposed (one year in the Westchester County Penitentiary). The defendant opposes and argues that this prior conviction does not impact his testimonial credibility, has no probative value and would be highly prejudicial.

Additionally, the People would inquire as to the disposition, conviction and sentence, imposed following the defendant's February 2003 plea of guilty to Criminal Mischief in the 4th Degree in Mount Vernon City Court which arose from a November 2002 incident wherein the defendant threw a brick at the home of a complaining witness, intentionally denting and cracking the vinyl siding of the structure. The defendant opposes this application, arguing that allowing the People to so inquire would be highly prejudicial and would be viewed by the jury as tending to demonstrate propensity to criminal conduct.

The People ask that they be permitted to inquire as to an incident which occurred in November 2002 in the City of Mount Vernon wherein he tried to grab a gold chain from the neck of a complaining witness and, when this individual resisted, then slashed at him with a razor blade after taking not only the chain and a gold medallion (which had fallen to the ground) but the individual's coat as well. The defendant was later apprehended wearing the chain and medallion and, in July 2003, pleaded guilty under indictment to Criminal Possession of Stolen Property in the 4th Degree and was sentenced to one year incarceration. Specifically, they seek to inquire as to the underlying facts and the conviction and they argue that these are directly related to the defendant's credibility. The defense opposes and maintains that this would be highly prejudicial.

The People seek to inquire about an incident on October 1, 2007 at 20 North 9th Avenue in the City of Mount Vernon wherein the defendant was arrested and accused of having displayed what appeared to be a handgun and of stealing car keys from an individual whom he allegedly pistol whipped. When the complaining witness failed to appear for the felony hearing on April 11, 2008, the matter was dismissed. Particularly, the People seek to inquire as to the underlying facts. The defendant opposes use of this matter, which he contends would be used solely to show propensity.

The defendant argues this as well with respect to another October 1, 2007 Mount Vernon incident, this one on South 7th Avenue and West 3rd Street, wherein the defendant pointed what appeared to be a black handgun at a complaining witness and yelling at her, "Bitch, I'll shoot you. I'll murder all of you." In April 2008, the defendant pleaded guilty to the class B misdemeanor, Menacing in the 3rd Degree in Mount Vernon City Court and was sentenced to time served incarceration. As to this conviction, the People seek to use both the underlying facts, the conviction and the sentence.

Additionally, the People seek to inquire as to Federal convictions, related to separate incidents, for conspiracy to commit robberies from 2009 to 2011 wherein he and 6 others committed armed robberies of suspected narcotics traffickers. In addition to a conspiracy conviction, he was also convicted of robbery and possession and use of a shotgun (involving an April 30, 2010 attempted robbery of suspected narcotics dealers in Yonkers wherein one of the co-defendants discharged a shotgun); robbery (involving a May 15, 2010 Mount Vernon robbery of individuals believed to be narcotics dealers during which he and co-defendants possessed and discharged firearms); and conspiracy to sell marihuana, crack and ecstacy. The defendant was sentenced in May 2014 to time served incarceration. Specifically, the People seek to inquire as to the underlying facts, convictions, and sentences imposed. The defendant opposes and argues that the fact that he faces allegations that he possessed a gun in the instant case, would cause the jury to view this as propensity evidence and thus that the prejudice would outweigh any probative value.

Finally, the People seek to inquire as to a September 28, 2016 incident in the City of Mount Vernon in which Mount Vernon Police observed the defendant and attempted to apprehend him on an outstanding violation of probation warrant on behalf of the US Marshals' Office. As police were pursuing the fleeing defendant, he threw a quantity of marihuana to the ground and thereafter, on May 11, 2017, pleaded guilty in Mount Vernon City Court to the misdemeanor of Criminal Possession of Marihuana in the 5th degree and was sentenced to time served incarceration. As to this, the People seek only to inquire as to whether the defendant was convicted of a misdemeanor on May 11, 2017. The defense opposes the application and maintains that this conviction does not relate to the defendant's truthfulness or credibility and that the prejudice would inure to him if the People were permitted to so inquire.

In order to properly balance the probative value of the defendant's prior convictions against any potential for undue prejudice, and to permit the defendant the opportunity to make an informed and meaningful decision as to whether he should testify at the trial, the court directs the following *Sandoval* compromise. Pursuant to this compromise, the People will not be permitted to inquire at all about either of the Mount Vernon matters that were dismissed at the felony hearing stage and never prosecuted further (November 2000 incident/June 2001 dismissal and October 2007 incident/April 2008 dismissal).

Additionally, the People shall be precluded from impeaching the defendant, should he choose to testify, with the following convictions: Trespass (June 5, 2001, Mount Vernon City Court), Criminal Possession of Stolen Property in the 4th Degree (May 14, 2002, Westchester County Court), Criminal Mischief in the 4th Degree (February 5, 2003, Mount Vernon City Court), and Criminal Possession of Stolen Property in the 4th Degree (July 2, 2003, Westchester County Court). These convictions are all remote in time and, in my view, do not bear sufficiently upon the defendant's credibility, honesty or veracity so as to permit inquiry at the risk of unduly deterring the defendant from testifying on his own behalf if he is otherwise inclined to do so or of inviting the jury to view these convictions as demonstrative of the defendant's propensity to engage in criminal activity.

Turning to the defendant's April 2008 conviction for Menacing in the 3rd Degree, the incident itself and the subsequent conviction are factually very similar to the alleged events giving rise to this incident and is not sufficiently probative of the defendant's credibility however, the event is demonstrative of the defendant's willingness to place his own interests above those of society and thus is relevant to the defendant's honesty and integrity. Accordingly, should the defendant testify on his own behalf, the People will not be permitted to inquire as to this conviction at all except as to whether he was convicted of a misdemeanor in 2008 in Mount Vernon City Court.

With respect to the defendant's Federal convictions, these are all relatively recent convictions, they relate to matters which inarguably demonstrate the defendant's decisions to deliberately further his own interests in derogation of the interests of others and as such they go to the heart of honesty and integrity and thus may be indicative his readiness to again do so when on the witness stand. The court will permit People to inquire on cross examination of the defendant, should he choose to testify, as to whether he has been convicted of felony offenses, the number of such offenses, the dates of the convictions and the sentences imposed. They are precluded from questioning the defendant as to the names of the crimes and the underlying facts. By limiting impeachment questioning in this way, any undue prejudice which could result from the fact that these offenses, like those charged here, involved firearms, is obviated.

Lastly, as to the defendant's arrest and subsequent conviction for Criminal Possession of Marihuana in the 5th Degree, the People may, as they request, inquire as to whether the defendant was convicted of a misdemeanor on May 11, 2017 as this offense is not only recent in time, but demonstrative of the defendant's willingness to place his own interests above those of society and is germane to his veracity and testimonial credibility.

The defendant may not use the *Sandoval* ruling as both a sword and a shield (*see People v Marable*, 33 AD3d at 725). If the defendant chooses to testify and then deny or equivocate as to having been convicted, or should he contend that in prior cases that he has never engaged in the sort of behavior of which he is accused here or that, on prior occasions, he pleaded guilty because he was in fact guilty, and that he did not plead guilty here because he is not guilty, he will have opened the door to cross examination exploring his true motivation for the prior guilty pleas and the People will, upon their application to the court, be permitted to impeach his credibility with questions about the underlying facts of his prior criminal convictions (*People v Fardan*, 82 NY2d 638, 646 [1993]; *People v Thomas*, 47 AD3d 850 [2d Dept 2008]; *People v Mirable*, 33 AD2d at 725). Particularly, the People have represented that, while they do not ask to be permitted to inquire on cross examination as to a November 8, 2003 incident wherein Mount Vernon police observed the defendant sell crack cocaine and thereafter found crack cocaine on his person and then took a statement from the defendant in which he admitted possessing an AK 47 and other firearms, they would seek to inquire as to this incident, which was superceded by Federal indictment, should he open the door. If the defendant testifies and opens the door, the People may make their application, outside the presence of the jury, and the court will make a determination at that time.

The defendant is thus cautioned not to misuse the protection afforded him under this ruling. If the People believe that the defense has opened the door, and seek either a curative instruction or for leave to use prior convictions, violations of probation or uncharged crimes that were limited by this decision and order they shall raise the issue outside the presence of the jury and the matter will be addressed at that time.

This constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
December 4, 2017

ANNE E. MINIHAN
COUNTY COURT JUDGE

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