People v Alicia
2018 NY Slip Op 32896(U)
October 11, 2018
County Court, Westchester County
Docket Number: 17-0384
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

JOSE ALICIA,

Ind. No. 17-0384

Defendant.

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Minihan, J.,

An indictment has been filed against the defendant charging him with Criminal Possession of Stolen Property in the Third Degree (Penal Law § 165.50[3]), Unauthorized Use of a Vehicle in the Second Degree (Penal Law § 165.06), Possession of Burglar's Tools (Penal Law § 140.35) and Attempted Petit Larceny (Penal Law §§ 110/155.25). The allegations are that on or about March 26, 2017 at approximately 3:15 p.m., in the parking lot of the Cross County Shopping Center at 800 Central Park Avenue in the City of Yonkers, the defendant, while in possession of a flat head screwdriver, attempted to open the doors of parked vehicles in order to steal property from them and that he then got into a stolen 2014 Ford Explorer, knowing that he did not have the consent of the owner, turned it on, and started to back out of a parking space before he was stopped by police.

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 scene at approximately 3:15 p.m. on March 26, 2017 to Yonkers Police Officer Frank Califano wherein they contend that the defendant told the officer, in substance, that his friend said he could drive the vehicle. The defendant, in turn, has moved to suppress this statement on the ground that it was involuntary and made without benefit of Miranda warnings.

The defendant also seeks the suppression of certain items of physical evidence, particularly the screwdriver and the GPS device that were found on his person, contending that they were seized pursuant to an unlawful arrest that lacked probable cause.

Pursuant to the Decision and Order of this court, dated August 7, 2017, which granted so much of the defendant's suppression motion as sought suppression of the noticed statement and suppression of physical evidence to the extent that *Huntley*, *Mapp/Dunaway* and *Sandoval/Ventimiglia* hearings were directed to be held prior to trial, these hearings commenced and were concluded on October 10, 2017. Pursuant to the combined *Huntley*, *Mapp/Dunaway* hearing, I give full credence to the testimony of the People's sole witness Police Officer Frank

Califano whose testimony I found to be candid, plausible and fully credible. The People's exhibits in evidence were comprised of one aerial photograph of the Cross County mall and parking lots, three photographs of the Cross County parking lots, a screwdriver and a GPS device. The defense called no witnesses and presented no evidence.

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

FINDINGS of FACT

Yonkers Police Officer Frank Califano, a veteran officer with 9 years experience, was assigned to the Pattern Crime Task Force, a unit operating city-wide to review the patterns of certain crimes occurring within Yonkers and to devise strategies to solve them. He recalled having made some 50 arrests related specifically to auto stripping and larcenies of and from vehicles and he testified that commonly, thieves would gain access to vehicles by lifting the door handles of unlocked vehicles or by breaking windows of vehicles both with and without tools. Among the tools typically used in such break-ins are pliers, flashlights, window punches and screwdrivers. Screwdrivers were often used because they are strong, easily concealed and useful for prying doors and punching out windows.

On March 26, 2017, Officer Califano was working 9:00 a.m. to 9:00 p.m. along with five other officers on an investigation targeting auto break-ins at the Cross County Shopping Center in Yonkers. Cross County Shopping Center is an outdoor shopping mall with Sears and Macy's as anchor stores. There are parking areas on the north, south and west sides of the mall and the New York State Thruway on the east side. Officer Califano testified that the decision was made to conduct their surveillance at the Cross County Shopping Center because there had been reports of larcenies in locked and unlocked vehicles parked in the lots during the previous two weeks. On that day, Officer Califano and his partner, Officer David Fraszka were in an unmarked vehicle in the north end of the lot, two other officers were un an unmarked vehicle closer to Macy's and a third unmarked vehicle, with two other officers, was parked in an elevated parking area near Sears. There were also "bait cars" parked in the lot.

At approximately 3:15 p.m., Officer Califano observed a man wearing a white winter coat with the hood pulled up over a gray and red cap. He and his partner watched the man weave in and out through rows of parked vehicles, stopping to check handles on vehicles. The man, who was directly in front of him when he first observed him, never approached any of the stores, but rather moved on to other cars in that row, and then to other cars in other rows, checking door handles as he walked. He recalled making these observations from about 30 feet away and that he was able to actually see the man's hands as he checked door handles. Officer Califano radioed his observations to the unmarked car on the elevated parking area so that those officers could also watch the man while Officers Califano and Fraszka and the other officers in their unmarked car followed the man. They observed the man zigzag through and among the rows of cars, trying door handles for about ten to fifteen minutes until the man approached a 2014 Ford Explorer with a broken rear passenger side window. The man then got into the Ford Explorer and started to back out of the parking spot.

Suspecting that the Ford Explorer was a stolen vehicle, Officers Califano and Fraszka engaged the lights and sirens and positioned their unmarked vehicle behind the Explorer, blocking it in. They got out of their car, identified themselves as police officers and directed the man, whom Officer Califano identified as the defendant, to exit the vehicle. The officer observed that, while there was no glass on the ground, there was broken glass in the frame of the rear passenger window. When the defendant complied with the order to exit the car, Officer Califano asked him to whom the vehicle belonged and the defendant responded that he had borrowed it from a friend. The officers detained the defendant while they radioed the plate number of the Ford Explorer and, when they received the response that it had been reported stolen from Yonkers earlier that day, they arrested the defendant. A search incident to the defendant's arrest resulted in a gray-handled screwdriver and a TomTom GPS device being found in the defendant's pocket. The officer later learned that the GPS device belonged to the registered owner of the 2014 Explorer.

CONCLUSIONS of LAW

On a motion by a defendant to suppress physical evidence, "the People have the burden of going forward to show the legality of the police conduct in the first instance" (*People v Whitehurst*, 25 NY2d 389, 391 [1969], emphasis omitted; *see People v Blinker,* 80 AD3d 619 [2d Dept 2011]; *People v Hernandez*, 40 AD3d 777, 778 [2d Dept 2007]; *People v Thomas,* 291 AD2d 462, 463 [2d Dept 2002]). The defendant, however, "bears the ultimate burden of proving, by a preponderance of the credible evidence, that the evidence should not be used against him" (*People v Thomas,* 291 AD2d at 463; *see People v Berrios*, 28 NY2d 361, 367 [1971]; *People v Whitehurst,* 25 NY2d at 391).

In *People v De Bour,* 40 NY2d 210 [1976], the Court of Appeals established a graduated four-level test for evaluating the propriety of police encounters when a police officer is acting in a law enforcement capacity (*see People v Moore,* 6 NY3d 496, 498-499 [2006]). The first level permits a police officer to request information from an individual, and merely requires that the request be supported by an objective credible reason, not necessarily indicative of criminality (*see People v De Bour,* 40 NY2d at 223; *People v Moore,* 6 NY3d at 498). The second level, known as the "common-law right of inquiry," requires a founded suspicion that criminal activity is afoot, and permits a somewhat greater intrusion (*see People v Moore,* 6 NY3d at 498-499). The third level under *De Bour* permits a seizure, meaning that a police officer may forcibly stop and detain an individual. Such a seizure, however, is not permitted unless there is a "reasonable suspicion" that an individual is committing, has committed, or is about to commit a crime (*see People v De Bour,* 40 NY2d at 223; *see also People v Moore,* 6 NY3d at 499). Finally, the fourth level under *De Bour* authorizes an arrest based on probable cause to believe that a person has committed a crime (*see People v De Bour,* 40 NY2d at 223; *see also People v Moore,* 6 NY3d at 499).

"Confining the occupants of a parked vehicle to their car, even temporarily, is the constitutional equivalent of a stop. Thus, 'before the police can forcibly or constructively stop an individual as was done here . . . there must be some articulable facts, which . . . establish

reasonable suspicion that the person is involved in criminal acts or poses some danger to the officers'" (*People v Creary*, 61 AD3d 887, 889 [2d Dept 2009], *citing People v Harrison*, 57 NY2d 470 [1982]). Here, the police conduct in blocking in the Ford Explorer, preventing the defendant from pulling out of the parking space "constituted a stop, which required reasonable suspicion that the defendant [was] either involved in criminal activity or posed some danger to police" (*People v Lopez*, 75 AD3d 610, 612 [2d Dept 2010]); *see People v Jennings*, 45 NY2d 998 [1978]; *People v De Bour*, 40 NY2d 210 [1976]). "Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*People v Cantor,* 36 NY2d 106, 112-113 [1975]). "To justify such an intrusion, the police officer must indicate specific and articulable facts which, along with any logical deductions, reasonably prompted that intrusion" (*People v Cantor*, 36 NY2d at 113). The defendant's later conduct "cannot validate an encounter that was not justified at its inception" (*People v Moore,* 6 NY3d at 498).

Officers Califano and Fraszka clearly had specific and articulable reasons for stopping the vehicle that the defendant was driving to request information concerning the ownership of the vehicle (*People v Hollman*, 79 NY2d 181, 191 [1992]; *People v De Bour*, 40 NY2d 210 [1976]; *People v Creary*, 61 AD3d 887 [2d Dept 2009]; *People v Wright*, 8 AD3d 304 [2d Dept 2004]). They were in the Cross County Shopping Center parking lot, on an investigation initiated as a result of a number of vehicle larcenies over the previous weeks at the mall, and they observed the defendant, over the course of ten to fifteen minutes zigzagging among rows of parked vehicles, trying the handles. During the course of their surveillance, the defendant never ventured towards any of the stores and, when he eventually got into a vehicle, it had a broken passenger window. Upon this factual predicate, and the logical deductions Officer Califano derived from them, the officers' objectively reasonable belief that there was criminal activity at hand was entirely justified and consequently, their decision to block the vehicle into the parking spot to prevent it from leaving until they had the opportunity to determine whether the vehicle was stolen or had been broken into, was appropriate.

After observing that there was no glass on the ground, having been told that the vehicle belonged to a "friend," and confirming that the license plate on the vehicle came back to a car that had been reported stolen that very day in Yonkers, police possessed probable cause to arrest the defendant. Probable cause to arrest requires the existence of facts and circumstances which, when viewed as a whole, would lead a reasonable person possessing the same expertise as the arresting officer to conclude that an offense has been or is being committed and that the defendant committed or is committing the offense (*People v Bigelow*, 66 NY2d 417, 423 [1985]; *People v McRay*, 51 NY2d 594 [1980]; *People v Wright*, 8 AD3d 304 [2d Dept 2004]). The seizure of the screwdriver and the GPS device were incident to the defendant's lawful arrest. Accordingly, that branch of the defendant's omnibus motion which is to suppress physical evidence is denied.

Inasmuch as the People represented at the hearing that they will not, on their case in chief, use the statement attributed to the defendant in which he allegedly told police that the vehicle

belonged to a friend, the court deems their CPL 710.30 notice withdrawn and the defendant's motion to suppress moot.

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 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 Marable,* 33 AD3d 723, 726 [2d Dept 2006]; *see People v Sandoval,* 34 NY2d 371[1974]). 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 three of the defendant's four prior felony convictions and six of his twenty-one misdemeanor convictions. They do not seek to use his prior youthful offender adjudication but would inquire as to the factual predicate of an offense for which the defendant was arrested and charged but which was later satisfied by his plea of guilty in another case.

As to the defendant's June 26, 2014 felony conviction for Unauthorized Use of a Vehicle in the Second Degree, they ask that they be permitted to inquire whether the defendant was convicted of a felony, the date of the felony and the sentence imposed (one and one-half to three years in State Prison). As to the defendant's November 18, 2010 felony conviction of Criminal Possession of Stolen Property in the Fourth Degree, they ask that they be permitted to inquire whether the defendant was convicted of a felony on February 3, 2010, the facts underlying the conviction, specifically that he was driving a stolen car at a high rate of speed at a police officer who had to jump out of the way and that he refused to get out of the car and fought with police and that he was on parole at the time of this offense for a separate felony conviction. As to the defendant's July 11, 2008 felony conviction for Unauthorized Use of a Vehicle in the Second Degree, the People ask that they be permitted to inquire whether the defendant was convicted of a felony and that, 12 days after his arrest, while at liberty on bail awaiting disposition on this

matter, he was re-arrested. As to the defendant's December 21, 2001 felony conviction for Grand Larceny in the Fourth Degree, the People make no application seeking leave to inquire.

As to the defendant's November 10, 2016 misdemeanor conviction for Criminal Contempt in the Second Degree, they ask that they be permitted to inquire whether the defendant was convicted of that offense, the date of the conviction and whether he intentionally violated an order of the court. As to the defendant's October 1, 2012 misdemeanor conviction for Petit Larceny, the People ask that they be permitted to inquire as to whether the defendant was convicted of that offense and that the complaining witnesses saw and confronted the defendant while he was in their car, that the car had a broken window, that the defendant claimed that the vehicle was his and that he stole two cellular phones from the car. As to the defendant's April 18, 2005 arrest, but not conviction, for False Personation, the People ask that they be permitted to inquire whether the defendant gave the alias "Jose Gomez" to police on one occasion. As to the defendant's July 27, 2005 misdemeanor conviction for Unauthorized Use of a Vehicle in the Third Degree, the People ask that they be permitted to ask whether the defendant has been convicted of a misdemeanor on that date. As to the defendant's June 13, 2006 misdemeanor conviction for Criminal Mischief in the Fourth Degree, the People ask that they be permitted to inquire whether the defendant was convicted of this offense and whether he damaged a 1990 Honda with metal tool which he inserted into the driver's side lock. As to the defendant's November 2, 1998 misdemeanor conviction for Criminal Mischief in the Fourth Degree and Petit Larceny, the People ask that they be permitted to inquire whether the defendant was convicted of that offense and sentenced to probation and whether he violated the terms and conditions of probation by failing to report. As to the defendant's July 3, 1996 misdemeanor conviction for Criminal Mischief in the Fourth Degree, the People ask that they be permitted to inquire whether the defendant was convicted of that offense and that he broke the passenger side window of a vehicle. As to the defendant's 14 other misdemeanor convictions, most of which involved auto-related thefts and damage, the People do not seek leave to inquire.

The People contend that they should be permitted to inquire as to these convictions, as set forth above, because they primarily involve thefts and damage incurred during the course of thefts and that as such they demonstrate the defendant's willingness to place his own interests above that of society and directly bear upon the defendant's testimonial credibility. In light of the relative age of many of these prior convictions, they argue that they are not remote inasmuch as the defendant's cumulative period of incarceration in the years between the older ones and this trial is such that he has been in jail or prison for the better part of sixteen of the last twenty-one years.

Defendant opposes the People's application in its entirety and maintains that they should not be permitted to cross examine him as to any of his prior convictions or bad acts because prejudice would inure to him. Specifically as to those convictions occurring earlier than 2000, they argue that these are too remote in time.

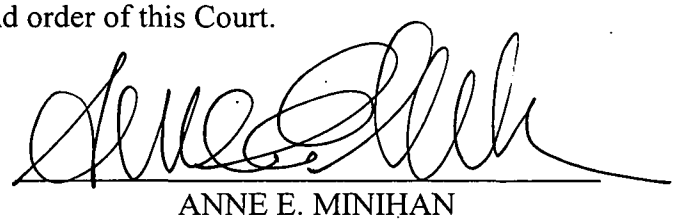
In order to properly balance the probative value of the defendant's prior convictions against any potential for undue prejudice, and to permit the defendant the opportunity to make an informed and meaningful decision as to whether he should testify at the trial, the court directs a *Sandoval* compromise pursuant to which the People will be permitted to inquire on cross examination of the defendant, should he choose to testify, as to whether he has been convicted of three felonies and four misdemeanors. They are precluded from questioning the defendant as to the specific offenses, the underlying facts, the sentences imposed or violations of probation or parole. By limiting impeachment questioning in this way, any undue prejudice which could result from the factual similarity of many of the defendant's prior convictions to the instant offense is obviated. While the People correctly argue that the age of the convictions does not necessarily mandate preclusion, two of the misdemeanor convictions are approximately twenty years old and, in my view, are too remote in time to justify their probative value as impeachment evidence.

Lastly, the use of a false name in identifying oneself to police is indicative of dishonesty which is entirely germane to, and goes to the heart of, an individual's testimonial credibility. This is so because one who would falsely identify himself under those circumstances is generally motivated by the desire to avoid apprehension or punishment or to gain unwarranted benefit (*see People v Walker*, 83 NY2d 455, 461-462 [1994]). The defendant, however, was not convicted of False Personation. He was arrested and charged with this offense but no conviction was obtained and his plea of guilty in another matter satisfied this charge. The People may not inquire as to whether the defendant provided a false name to police.

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 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). 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
October 11, 2017



ANNE E. MINIHAN
COUNTY COURT JUDGE