People v Highsmith
2018 NY Slip Op 33766(U)
October 9, 2018
County Court, Westchester County
Docket Number: 18-0021
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 -

COTY HIGHSMITH,

Defendant.

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Minihan, J.,

DECISION AND ORDER
Indictment No. 18-0021

The defendant, Coty Highsmith, has been indicted for robbery in the second degree (PL § 160.10[2][a]) and assault in the second degree (PL § 120.05[6]) in connection with an incident which allegedly occurred on November 28, 2017 at approximately 12:55 p.m. at 14 Highland Avenue in the City of Yonkers wherein he beat a man in the lobby of the man's apartment building and stole the man's wallet from him.

The People filed timely notice of their intent to introduce testimony regarding an observation of the defendant by his cooperating co-defendant from a single photograph on December 5, 2017 at 11:39 p.m. at the Yonkers Police Department on 104 South Broadway as well as a later observation by this same woman wherein she viewed a surveillance video during her grand jury testimony on or about February 15, 2018. The People also provided notice regarding two post-arrest statements attributed to the defendant. The first of these was a video recorded statement made at the Yonkers Police Department on December 5, 2017 and the second was allegedly made by the defendant to his parole officer on December 8, 2017 at the Westchester County Jail when the defendant was served with a notice of parole violation. By omnibus motion, the defendant sought suppression of the noticed identifications and statements as well as a *Sandoval/Ventimiglia* hearing.

By decision and order dated June 26, 2018 this court (Schwartz, J.,) granted so much of that branch of the defendant's motion for omnibus relief as seeks suppression of the noticed identifications and statements to the extent of ordering pre-trial *Wade* hearing and *Huntley* hearings and the court also directed that a pre-trial *Sandoval/Ventimiglia* hearing be held. On October 4, 2018, prior to commencement of hearings, the People withdrew the CPL 710.30 notice as to the video recorded statement.

Pre-trial hearings commenced and concluded on October 4, 2017. The People called as witnesses Westchester County Probation Officer Julio Diaz and retired New York State Parole Officer Christopher Jones. The defendant initially elected to testify but, upon his refusal to

answer a question posed to him by the People on cross examination, elected to have his testimony stricken rather than continue with cross examination. This Court gives full credence to the testimony of the People's witnesses, whose testimony I found to be candid, plausible and fully credible.

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

FINDINGS of FACT

Probation Officer Julio Diaz has worked for Westchester County's Department of Probation as an officer for approximately fifteen years and, towards the end of 2016, was assigned to supervise Shaunte Aponte who had been designated by the department as a high risk probationer because of her mental health and substance abuse issues.

During the two years that he supervised her, Ms. Aponte was required to report to him at the office in Yonkers once a week and Officer Diaz conducted a residence check approximately once a month. In that capacity, Officer Diaz came to know Ms. Aponte and became familiar with her, with her four children and with the defendant whom he characterized as her boyfriend or partner and whom he believed to be the father of three of her children.

Officer Diaz testified that on one occasion in 2017 the defendant accompanied Ms. Aponte to her probation office visit at the Yonkers office and that he had personally seen the defendant, whom he identified in court, in Ms. Aponte's apartment several times when he was there to conduct residence checks. Particularly, he recalled that when he visited Ms. Aponte in her home on June 7, 2017, on September 27, 2017 and on October 18, 2017, that the defendant was physically present, although he had minimal contact with him on those occasions. He recalled having had more than one discussion with Ms. Aponte about the defendant and that they discussed the defendant's involvement with the children.

Retired New York State Parole Officer Christopher Jones testified that he had been assigned to the New Rochelle area office, located at 3 Cottage Place, during his twenty-five year, five month tenure at the Department of Parole and that, following the defendant's April 2017 release from State Prison, he had been assigned to supervise the defendant, whom he knew well and whom he identified at the hearing. Mr. Jones recalled having conducted home visits on several occasions when he encountered Shaunte Aponte who identified herself as the defendant's significant other and who informed him that she was the mother of two of the defendant's children and of the infant she had just had.

On December 6, 2017, the office received an internal notification through the command center that on Tuesday, December 5, 2017, the defendant had been arrested by the Yonkers

Police Department and that he was currently incarcerated. Mr. Jones testified that this is how he learned of the defendant's arrest, that the defendant had not notified him of his arrest and incarceration and that such was a violation of the express terms of the defendant's parole agreement. Such internal notifications were generally issued within 24 hours following the rearrest of a parolee. In response, Mr. Jones conferenced with his supervisor as to whether there was sufficient probable cause to issue a parole violation and he testified that once he conducted an investigation, which included contacting the Yonkers City Court to obtain a copy of the accusatory instrument charging the defendant with robbery, he drafted a notice of violation and warrant at which time he was instructed to serve and file a parole violation and to lodge the parole warrant at the Westchester County Jail.

Inasmuch as serving parolees under his supervision with notices of violation was part of his assigned duties, Mr. Jones went to the Westchester County Jail on Friday, December 8, 2017, alone, met with the defendant, and served him with the notice of the violation of parole. He recalled meeting with the defendant in a small interview room and, because they were separated from each other by a piece of plexiglass, he gave the notice of violation of parole to a corrections officer who handed it to the defendant. Mr. Jones instructed the defendant to read the notice he had just been given. Defendant took in hand the notice of parole violation and appeared to read it. The notice listed both the rearrest and the failure to notify as the bases for parole violation and instructed him that he could either request a preliminary hearing or could opt to waive the preliminary hearing and request a final hearing. Although the defendant was, of course, incarcerated and thus not free to leave, he was not otherwise further restrained or restricted during their meeting which Mr. Jones characterized alternatively as "an interview" or "a meeting."

While the defendant appeared to be reviewing the notice of violation which he had just been handed, Mr. Jones heard the defendant say, in substance, "I didn't rob this guy. I just beat him up." Surprised to hear the defendant say such a thing, Mr. Jones told him that if he requested a preliminary hearing, the only charge he would go forward with would be the defendant's failure to notify him of his arrest, which was, he testified, considered a technical violation. The defendant claimed that he had not been able to contact him because he could not get to a phone to call him, to which Mr. Jones responded that it was not a valid reason not to contact parole and that he could dispute this and the other charges by requesting a hearing, which the defendant did. Mr. Jones testified that during this entire encounter with the defendant at the jail on December 8, 2017, he asked the defendant no questions whatsoever except whether he was requesting a hearing. He stated that he did not engage the defendant in conversation, he did not give the defendant *Miranda* warnings, he did not contact the defendant's criminal defense attorney on the new charge, and he categorically denied questioning him in any way whatsoever about his involvement in the November 28, 2017 robbery at 14 Highland Avenue.

On cross examination, Mr. Jones explained that his role in this encounter was administrative and thus that he did not give *Miranda* warnings. He acknowledged that he was a law enforcement officer with the power to arrest but said that he was a peace officer.

CONCLUSIONS of LAW

Wade / Rodriguez

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 being 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 Shaunte Aponte to have made Ms. Aponte impervious to police suggestion. The defendant and Ms. Aponte were in an intimate relationship, he accompanied her to a probation office visit and was present in her home during a number of residence checks. Probation Officer Diaz not only saw the two in each other's company on several occasions, he had spoken with Ms. Aponte about the defendant and, to some extent, their relationship. Similarly, during the period of time leading up to the November 28, 2017 incident, Mr. Jones, as the defendant's parole officer, had conducted residence checks with respect to the defendant's parole supervision and recalled seeing Ms. Aponte present with the defendant. Ms. Aponte self-identified as the defendant's significant other and offered that she and the defendant had children in common. Such is ample evidence that the length and quality of the defendant's prior interactions with Ms. Aponte were such that they were known to each other to such a degree so as not to be subject to police suggestion. Thus, defendant's motion to suppress is denied.

Huntley

Unwarned custodial statements made by a parolee to his parole officer are compelled when they are prompted by, or responsive to, the parole officer's questions about the parolee's suspected involvement in a crime (*see People v English*, 73 NY2d 20 [1989]). In *People v Parker*, (82 AD2d 661 [2d Dept], *aff'd* 57 NY2d 815 [1982]), the Second Department considered two separate grounds for suppression of admissions made by a parolee defendant to his parole officer, namely that *Miranda* warnings had been required but not given and that the

parolee defendant was represented by counsel in connection with the crime which was the subject of the inquiry after which it suppressed on both bases (*see People v Parker*, 82 AD2d at 662). The Court concluded that "statements made to a parole officer in response to questions the parolee must truthfully answer at the risk of parole revocation necessitate *Miranda* warnings" (*People v Parker*, 82 AD2d 661 [2d Dept 1981]). Despite that the Court of Appeals affirmed "for reasons stated in the opinion . . . at the Appellate Division," in *People v English*, the Court acknowledged that, as to such statements made by parolees to parole officers, there are "categories when *Miranda* warnings are and are not required," (*People v English*, 73 NY2d at 23-24). In considering the issue, the Third Department concluded that the nature of the relationship between parolee and parole officer is not such that a parole officer's routine questioning must be preceded by *Miranda* warnings, even when the questioning relates to possible criminal activity (*see People v Edwards*, 154 AD2d 150 [3d Dept 1990]).

The Court of Appeals has specifically declined to impose a single rule to cover all types of encounters between a parolee and his officer (*see People v English*, 73 NY2d 20, 23 [1989]). Rather, "a parole officer may function both as counselor and as law enforcement agent in questioning a parolee about possible criminal activity and, if he acts as the former, he does not assume his role as "'law enforcement' officer within the spirit or meaning of *Miranda v Arizona* (*People v English*, 73 NY2d at 23; *see People v Ronald W.*, 24 NY2d 732, 735 [1969]). If, on the other hand, the parole officer acts in the capacity as an agent of law enforcement, a parolee's unwarned statements should be suppressed (*see People v Parker*, 57 NY2d 815 [1982]). Notably different than the scenario presented herein, in *Parker*, the parolee's unwarned statements were made in direct response to questions posed to him by his parole officer who had asked him about the circumstances of his arrest.

The test for whether a statement is truly spontaneous is whether it was spoken by a defendant "without apparent external cause" (*People v Stoesser*, 53 NY2d 648, 650 [1981]). That is, courts look to whether the defendant spoke with true spontaneity and not as the result of "inducement, provocation, encouragement or acquiescence, no matter how subtly employed" (*People v Maerling*, 46 NY2d 289, 302-303 [1978]; *see People v Lanahan*, 55 NY2d 711, 713 [1981]; *People v Stoesser*, 53 NY2d at 650).

Here, the record supports the conclusion that the defendant's unwarned statement was truly spontaneous and, as there was no questioning which preceded it, did not implicate the defendant's right to counsel. That is, that it was not prompted, encouraged or triggered by law enforcement questioning or conduct, or its functional equivalent, which could reasonably have been expected to elicit a statement from him. Although Mr. Jones testified that he asked the defendant only whether he was requesting a preliminary hearing or would waive the preliminary hearing in favor of a final hearing, which would not, in any event, constitute inducement, provocation or encouragement to make a statement, the credible testimony adduced at the hearing was that, at the time the defendant blurted out a statement in which he denied robbing the victim, Mr. Jones had yet to pose even this inquiry to the defendant. In fact, following the defendant's statement, Mr. Jones interjected that if the defendant elected to move forward with the

preliminary hearing, the only basis would be the failure to notify parole of his new arrest, which appears to have been an attempt to prevent the defendant from further commenting on the events which led to his new arrest. Mr. Jones was present at the jail in a purely administrative capacity and did not, by word or action, assume the function of law enforcement agent during the entirety of his encounter with the defendant. Rather, he was present at the jail under a duty to take action toward the revocation of parole on the grounds that the defendant, his parolee, allegedly breached the terms of his parole both by his rearrest and his failure to notify parole of this change in circumstance. In furtherance of this end, Mr. Jones did not, by word or action, encourage or prompt the defendant to do anything beyond read the notice of violation in anticipation of asking him whether he sought or would waive a preliminary hearing with respect to his parole violation.

Accordingly, as the People established at the suppression hearing that the defendant's statement was spontaneous and was not triggered by any law enforcement questioning or other conduct which reasonably could have been expected to elicit a statement from him, his motion to suppress is denied.

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 three of the defendant's prior convictions. Particularly, they ask that they be permitted to inquire as to a September 11, 2008 conviction for attempted robbery in the second degree wherein the defendant and a co-defendant forcibly stole $100, 2 pizzas and a ring from the victim whom they kicked and punched repeatedly in the face. The People ask that

they be permitted to inquire as to the criminal conviction, the date, the jurisdiction and the fact that the defendant received a state prison sentence. They withdrew their request for permission to inquire as to the underlying facts. The defendant opposes, pointing out that the charge to which he pled guilty is too similar to the charges he faces here and will prejudice him unduly in the eyes of the jurors.

The People also seek to inquire as to an August 23, 2005 conviction for petit larceny in Yonkers City Court. They represent that they would not seek to impeach the defendant with respect to the underlying facts or sentence. 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 would be highly prejudicial as he faces a theft-related charge herein.

Finally, as to the defendant's May 9, 2005 conviction for attempted robbery in the second degree to which he pled guilty and was sentenced to shock incarceration and probation, the People would seek to inquire as to the jurisdiction (Yonkers), the charge to which he pled guilty and the date but not the underlying facts or sentence. The defendant opposes and argues that he was just 17 years old when this event occurred, that the underlying facts and charge is too similar to those he faces here and that impeachment would result in undue prejudice.

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 be permitted to inquire as to whether the defendant has had two prior felony convictions and one misdemeanor conviction, that all were theft-related convictions and the dates and jurisdictions. Inasmuch as these convictions each involve theft of property, they bear sufficiently upon the defendant's testimonial credibility, honesty and veracity so as to permit inquiry and, with the compromise, will not unfairly prejudice him before the jury if he decides to testify. Indeed these convictions are demonstrative of the defendant's willingness to place his own interests above those of society and thus are relevant to his honesty and integrity. Since the names of the actual convictions themselves will not be before the jury, 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 this particular type of criminal activity will be mitigated.

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). 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 which shall be sealed pursuant to the protective order.

Dated: White Plains, New York
October 9, 2018

Hon Anne E. Minihan, A.J.S.C.

TO:

HON. ANTHONY A. SCARPINO
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