

People v Morales

2019 NY Slip Op 34110(U)

February 6, 2019

County Court, Westchester County

Docket Number: 18-0468-01

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

FILED
AND ENTERED
ON 2-6-2019
WESTCHESTER

-against-

HERIBERTO MORALES,

Defendant.

-----X
MINIHAN, J.

DECISION & ORDER
Ind No.: 18-0468-01

FILED

FEB - 6 2019

**TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER**

Defendant, by Westchester County Indictment No. 18-0468-01, is charged with Murder in the Second Degree (Penal Law § 125.25 [1]); Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03) (two counts); Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02); Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.03); Criminal Possession of a Controlled Substance in the Fifth Degree (Penal Law § 220.06 [5]); Tampering With Physical Evidence (Penal Law § 215.40 [2]); and Unlawful Possession of Marijuana (Penal Law § 221.05).

It is alleged that on March 1, 2018, the defendant fired a gun through his apartment window at 338 Ashburton Avenue, apartment 2, in the City of Yonkers, which struck the victim in the head killing him. The Yonkers Police responded and upon investigation recovered a shell casing on the ground, below a first floor apartment window at 338 Ashburton Avenue. The defendant exited the building and was stopped by police, questioned and they alleged that he was acting fidgety, looking down the alley (where the casing was recovered) and touching his waistband as if he was ready to flee. The defendant claimed he was returning from his grandmother's house on Seymour Street. The defendant was patted down by the police officers who recovered crack cocaine, marijuana and a spent shell casing in his pocket. Following the defendant's arrest, an officer placed the items on the hood of the police car and after the defendant complained that the handcuffs were too tight, the officer responded by positioning defendant over the vehicle's hood, adjusting the cuffs where the defendant ingested the shell casing from the hood. The defendant refused to comply with the officer's order to spit it out and eventually swallowed the shell casing after resisting and biting the officer's fingers. Later at headquarters, defendant complained about stomach pain and was transported to the hospital where an x-ray revealed a shell casing in his abdomen. Thereafter, the police returned the defendant to headquarters where he finally defecated and expelled the shell casing which was recovered by the police.

Defendant filed an omnibus motion on September 4, 2018 and a supplemental motion dated September 10, 2018, and by decision and order dated October 15, 2018 this court (Minihan, J) ordered several pre-trial hearings including a *Mapp/Dunaway* hearing. The court outlined the parameters of the *Mapp/Dunaway* hearing including to determine the propriety of any search resulting in the seizure of property from his person, including the initial recovery of the shell casing, and the recovery of the shell casing after defendant allegedly ingested it (*see*

Mapp v Ohio, 367 US 643 [1961]). The court's order also granted defendant's motion to unseal the search warrants, and provided a window of time in which to file future motions following its review of the search warrant applications. This court stated:

“If after a review of the search warrant applications, the defendant opposes the warrants and the items seized pursuant to the warrants, then defendant shall bring a motion not later than 7 days after the date of this decision and order and the court will determine as part of the *Mapp/Dunaway* hearing ordered, whether the defendant has standing to controvert the warrants” (Decision, October 15, 2018, p. 6-7).

By the instant order to show cause dated December 18, 2018, defendant moves to expand the *Mapp* hearing to include suppression of items recovered pursuant to three search warrants, including all property recovered from 338 Ashburton Avenue, Yonkers (his residence); 45 Seymour Avenue, Yonkers (his grandmother's residence); content recovered from 2 cell phone warrants as well as any items recovered from his person during the search. The defendant attacks the validity of the search warrants claiming that a surveillance video fails to demonstrate what the affiant stated it depicted and that therefore, the police lacked the probable cause to frisk the defendant which led to the seizure of the shell casing and the drugs. Defendant also argues that he has standing to controvert the search warrant at his grandmother's house because he is more than just a guest as he has a key and regularly sleeps over at 45 Seymour Avenue. Defendant attaches a notarized statement from his grandmother stating that he has a key to the apartment and stays there regularly. The People oppose the order to show cause with an affirmation in opposition and a memorandum of law arguing that defendant's application is untimely since his opportunity to challenge the search warrants expired 7 days after the court's prior decision, on October 22, 2018. The People argue that defendant's contention that the search warrant applications were lacking in probable cause and that all the physical evidence seized therefrom should be suppressed is without merit. By reply, defendant submits that he has standing to contest the search warrant at his grandmother's house as supported by his grandmother's statement. Defendant continues to argue that the officers did not have the probable cause to pat him down on Ashburton Avenue on March 1, 2018.

Although this motion to controvert the warrants is untimely as this court ordered that, following defense counsel's review, any motion related thereto be brought by October 22, 2018; in the interest of justice, this court will address the merits of defendant's application notwithstanding its untimeliness.

Defendant's application is moot to the extent that the court already ordered a *Mapp/Dunaway* to determine the propriety of any search resulting in the seizure of property from his person (the cocaine, marijuana, a shell casing and an LG cell phone), including the initial recovery of the shell casing from his pocket, and the recovery of the shell casing after defendant allegedly ingested it (*see Mapp v Ohio*, 367 US 643 [1961]). Notably, the People argue that his ingestion of the shell casing, an independent unlawful act, broke the taint from any alleged unlawful seizure in any event (*People v Boodle*, 47 NY2d 398, 404 [1979]). This court already ordered that the *Mapp* hearing address whether a visual cavity inspection was conducted in a reasonable manner and whether the police had a reasonable suspicion to believe that the shell casing was hidden inside the defendant's body (*People v Hall*, 10 NY3d 303 [2006]; *People v*

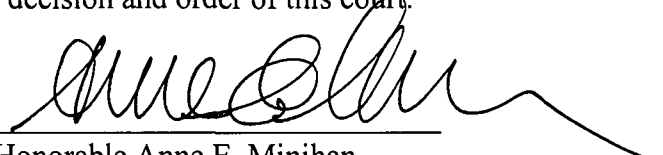
Clayton, 57 AD3d 557 [2d Dept 2008]). It was also ordered that the hearing will address whether any evidence was obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

Defendant's motion seeking to suppress evidence pursuant to the search warrant for the LG cell phone taken from his person as well as the warrant for 338 Ashburton Avenue, Yonkers (his residence) is denied. The results of a search conducted pursuant to a facially sufficient search warrant is not subject to a suppression hearing (*People v Arnau*, 58 NY2d 27 [1982]). Upon review of the four corners of the search warrant affidavit, the warrant for the LG cell phone was adequately supported by probable cause (*see People v Keves*, 291 AD2d 571 [2d Dept 2002]; *see generally People v Badilla*, 130 AD3d 744 [2d Dept 2015]; *People v Elysee*, 49 AD3d 33 [2d Dept 2007]). As to the search warrant for his residence at 338 Ashburton Avenue, the defendant fails to demonstrate that the warrants were based upon affidavits containing false statements made knowingly or intentionally, or with reckless disregard for the truth (*People v McGeachy*, 74 AD3d 989 [2d Dept 2010]). Defendant's argument that a review of a surveillance video depicts something different from what the affiant viewed falls short of demonstrating by a preponderance of the evidence, that the affiant knowingly made a material false statement (*Franks v Delaware*, 438 US 154, 15-156 [1978]). Defendant has failed to establish any substantial basis that the police included false statements in the warrant affidavits for either the residence at 338 Ashburton Avenue or the LG cell phone, much less that any allegedly false statements were necessary to the finding of probable cause (*Franks v Delaware*, 438 US 154, 15-156 [1978]).

Defendant's application to expand the *Mapp/Dunaway* hearing to include evidence seized at 45 Seymour Street is granted to contest the execution of the search warrant and/or to the extent he demonstrates standing at the hearing, to contest the consent search. Defendant argues that he has standing to challenge the seizure of evidence pursuant to the search warrant and submits a notarized statement by his grandmother stating that he has a key to the apartment and sleeps there regularly making him more than a guest. Ordinarily, the results of a search conducted pursuant to a facially sufficient search warrant is not subject to a suppression hearing (*People v Arnau*, 58 NY2d 27 [1982]). Here, the officers obtained a search warrant from the Yonkers City Court for 25 Seymour Street, Apt 1K; while also obtaining his grandmother's consent to search the apartment. On March 1, 2018, a search was executed at 45 Seymour Street, Apt 1K, not 25 Seymour Street. The search warrant return dated March 8, 2018 indicates that a black jacket and a cell phone marked "ZTE" were retrieved during the search at 45 Seymour Street, Apt 1K. An addendum dated March 8, 2018 filed by the Yonkers Police Department explains that 25 Seymour Street does not exist and rather it was 45 Seymour Street. As such, the *Mapp/Dunaway* hearing shall include whether the defendant has standing to challenge the consent search and/or to contest the execution of the warrant.

The foregoing constitutes the opinion, decision and order of this court.

Dated: White Plains, New York
February 6, 2019


Honorable Anne E. Minihan
Acting Supreme Court Justice

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