

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM : PART K-19

P R E S E N T :

HON. SEYMOUR ROTKER,
Justice.

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

- against-

Indictment No.: 03837-2002

LARRY D. BARTON

Motion: Suppression of
Physical Evidence,
Identification Testimony
and Statements.

Defendant.

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RUSSELL NEUFELD, ESQ

BY: TEJINDER BAINS, ESQ.
For the Defendant

RICHARD A. BROWN, D.A.

BY: BRIAN STAVRIDES, A.D.A.
Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied in part and granted in part. See the accompanying memorandum this date.

Dated: April 14, 2003
Kew Gardens, New York

/s/
SEYMOUR ROTKER, J.S.C.

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-19

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THE PEOPLE OF THE STATE OF NEW YORK BY: SEYMOUR ROTKER.

- against -

LARRY D. BARTON,

Indictment No.: 03837-2002

Defendant.

-----X

The following constitutes the opinion, decision and order of the Court.

An indictment has been filed against the defendant accusing him *inter alia* of the crime of Robbery in the first degree. The charge is that on November 17, 2002, the defendant acting in concert with another, forcibly stole a sum of United States currency from John Leath by threatening him with a box cutter.

Defendant claiming that improper identification testimony may be offered against him, has moved to exclude the pre-trial identification as well as the prospective identification testimony by John Leath, on the ground that they are inadmissible because the prior identification of the defendant by the prospective witness was improper.

Defendant also claiming to be aggrieved by an unlawful or improper acquisition of evidence has moved to suppress statements made by him on November 17, 2002, to Police Officer Joseph Cordova and Detective Frank Tofano on the ground that they were involuntarily made in the meaning of CPL 60.45.

Defendant also claims to be aggrieved by an unlawful search and seizure and has moved to suppress a quantity of United States currency seized from his person by Police Officer Joseph Cordova on November 17, 2002.

Defendant argues that there was no basis to detain or otherwise arrest him prior to his being placed under arrest after allegedly being identified by John Leath. His contention is that the identification and seizure of currency from his person were constitutionally impermissible. Defendant claims that he did not knowingly and freely waive his rights against self-incrimination prior to making any alleged statements. In sum, defendant claims that because of his illegal detention the arrest and all further action against him must fail.

The People have the burden of going forward to show that the pre-trial identification procedure was not constitutionally impermissible. The defendant, however, bears the burden of establishing by the preponderance of the evidence that the procedure was impermissible. If the procedure is shown to be improper, the People then have the burden of proving by clear and convincing evidence that the prospective in-court identification testimony, rather than stemming from the unfair pre-trial confrontation, has an independent source.

A confession or admission is admissible at trial in this State only if its voluntariness is established by the People beyond a reasonable doubt.

In this case, the People assert that the seizure of the currency from defendants' person was incident to a lawful arrest. The People have the burden, in the first instance of going forward to show the legality of police conduct. Defendant, however, bears the ultimate burden of proving by a preponderance of evidence that the physical evidence be suppressed.

A pre-trial suppression hearing was conducted before me on March 31 and April 1, 2003. Testifying at this hearing were Police Officers Joseph Cordova, Michael Neff and Detective Frank Tofano.

I find their testimony to be credible.

I make the following findings of fact:

On November 17, 2002 while working an 8:00A.M. to 4:00P.M.. tour of duty as a uniformed officer in a radio motor patrol car, Police Officer Joseph Cordova of the 113th Precinct received a 911 call to go the Executive Motor Inn located at 151st Street and North Conduit Avenue, Queens, New York. He arrived there at approximately 9:00A.M. At the front desk there was a female clerk. She advised Officer Cordova there had been a fight between two males and referred him to Room #2. Officer Cordova knocked on the door of Room #2 and it was opened by a person who later identified himself as John Leath. Officer Cordova observed Leath sweating, his clothes were torn and he had blood on his hands. Mr. Leath lifting up his shirt exhibited a laceration across his abdomen. Mr. Leath said he had been robbed by two people giving descriptions of them as one being a male, black, wearing a black jacket, in his thirties, approximately five foot ten inches to six feet tall. The other was a female, black, wearing a blue denim outfit. Leath stated that he was slashed by the female and that \$120.00 odd dollars was taken from him. Officer Cordova put the information he received out on the police radio.

Police Officer Michael Neff while operating a motor patrol car for his sergeant, received a communication concerning a robbery that had taken place at the Executive Motor Inn. Neff in his the vehicle conducted a canvass of the area and at Baisley Park observed a person later identified as the defendant, Larry Barton, lying under a bench in the area. Barton matched a general but not specific description of someone who could have been a perpetrator of the robbery. Neff asked Barton what he was doing and Barton responded he was there” doing push-ups”.

The defendant was not detained and began to jog around the park area. Officer Neff in his vehicle, followed the defendant and radioed to Officer Cordova asking him whether the person they were seeking had on “cargo pants” (pants with large pockets on the side). After a brief pause, Officer Cordova, having asked Leath whether or not one of the persons who had

robbed him was wearing those type of pants, responded affirmatively. That information was transmitted to Officer Neff. Neff detained defendant.

The complaining witness was brought to the Baisley Park area within minutes and without suggestive conduct by Officer Cordova identified defendant as one of the perpetrators.

Defendant was taken to the 113th Precinct and searched, he possessed three hundred five dollars and thirty-nine cents which was confiscated and vouchered..

During the course of processing the arrest, defendant without provocation stated in words or substance "He didn't know why he was arrested when the female was responsible".

Thereafter, defendant was interviewed by Detective Frank Tofano of the 113th Robbery Squad.

After introducing himself Detective Tofano in words of substance advised defendant that he had the right to remain silent; anything he said could be used against him in a court of law; he had the right to an attorney at that stage and all stages of the proceedings; that if he could not afford an attorney, one would be provided for him. Defendant did not respond to any of the admonitions. Defendant was asked whether he would be willing to answer any questions, defendant stated he would not sign anything or put anything in writing but would make a statement. In words of substance defendant said he went to the hotel with "Black"(the female). He said she was going with another guy(identified as John Leath) but she was afraid of the other guy and she wanted him to accompany her. When they arrived at the hotel they checked in and he left the female with the male. When he came back, he found the male and female fighting and he tried to intercede to break up the fight. During the course of this incident, after being attacked, he hit the male. He said that the female slashed the male and took a wallet from his pocket. He said he fled the location because he was afraid.

I make the following conclusions of law.

THE STOP OF THE DEFENDANT

All encounters between citizens and the police in the course of a criminal investigation are subject to Fourth Amendment analysis, People v. Cantor, 36 NY2d 106 (1975). In measuring the lawfulness of police conduct the court must strike a balance between the citizen's inestimable right to personal liberty and security—his right to be “let alone” (Olmstead v. US, 277 US 438, 478((1928))—and the degree to which police intervention is necessary to advance the public interest in the detection of crime and the apprehension of criminals, People v. Howard, 50 NY2d 583 (1980), People v. Cantor, *supra*.. In weighing these interests the standard to be applied is that of reasonableness, the touchstone of the Fourth Amendment, People v. Chestnut, 51 NY2d 14 (1980). The Constitution does not forbid all searches and seizures. It forbids only “unreasonable” searches, Elkins v. US, 364 US 206, 222 (1960).

The reasonableness standard contemplates and permits a flexible set of escalating police responses, provided only that they remain reasonably related in scope and intensity to the information that the officer initially has, and to the information he or she gathers as his or her encounter with the citizen unfolds, People v. DeBour, 40 NY2d 210 (1976). The greater the specific and articulable indications of criminal activity, the greater may be the officers intrusion upon the citizen's liberty.

Applying this standard to the facts of this case, the analysis begins when Officer Neff, received a radio communication that a robbery had just occurred in his immediate vicinity. This communication contained a fairly general description of a suspects. Armed with this information Officer Neff began a canvass of the area in and around Baisley Park.

In the course of the canvass, he observed the defendant, who happened to be wearing “cargo pants”, lying under a bench in the park. This observation, while not indicative of criminality provided a sufficient predicate for the officer to approach the defendant and, in a non adversarial manner, request information. The officer asked the defendant what he was doing. He replied that he was doing pushups. His inquiry satisfied, the officer took no further direct action with respect to the defendant. He did, however, continue to pursue the investigation and to keep the suspect in sight.

In order to see if he could obtain a more detailed description of the perpetrator, Officer Neff communicated by radio with Officer Cordova, who was with the victim of the alleged robbery . He inquired whether the robbery suspect was wearing “cargo pants”. Officer Cordova communicated with the victim and replied in the affirmative.

Officer Neff now knew that the individual he had spoken to previously matched at least a general description of a suspect being sought in connection with a recent robbery. This constituted “reasonable suspicion” that the individual had committed the robbery and justified not an arrest for which probable cause would be required but a forcible stop and detention.

THE SHOWUP AND IDENTIFICATION ISSUES

The question now is whether an otherwise valid stop becomes invalid by virtue of the subsequent detention of the suspect for the purpose of a showup procedure. This issue was specifically addressed by the Court of Appeals in People v. Hicks, 68 NY2d 234 (1986). In Hicks, the police forcibly stopped and frisked two individuals on suspicion of robbery based upon a “nonspecific description” which in some respects varied from that provided by the witness. Following the forcible stop the officer told the suspects about the robbery and informed them that he was going to take them to the crime scene for possible identification. The suspects were allowed to park their vehicle. Both seated themselves in the patrol car without objection. No guns were drawn. No one was handcuffed or questioned. The trip to the scene took less than one minute. Upon arrival three witnesses identified the suspects and they were arrested.

The Hicks court ruled that the action taken by the police was not an arrest which would have required probable cause. The detention of the suspects was a stop as recognized in Terry v. Ohio, 392 US 1 (1968). In reviewing the police action the Court applied the criteria set forth in United States v. Sharp, 470 US 675 at pp. 682-6 (1960) including an inquiry as to whether the police action was “reasonably related in scope to the circumstances justifying it” and “whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions”. The Court found that the detention of the suspects and their transportation to the crime scene was not only reasonable under the principals set forth in Sharp and Terry but that the “speedy on the scene viewing ...was of value to both law enforcement and the defendant (see, People v. Love, 57 NY2d 1023 (1982); People v Adams, 53 NY2d 241 (1981); People v. Brnja, 50 NY2d 366 (1980); People v. Blake, 35 NY2d 331,337 (1974)).

The brief detention here was even less intrusive than the one in Hicks. The suspect was not taken to the scene of the crime. The witness was transported to his location. He was not handcuffed or questioned. The stop was not conducted with drawn weapons. Under these circumstances the Court finds that the police action was reasonable.

The next question to be considered is the legality of the identification procedure employed by the police. Showup identifications, while generally suspect and disfavored, are permitted when conducted shortly after the crime, at or near the crime scene (People v. Duuvon, 77 NY2d 541(1991); People v. Hicks, *supra*; People v. Love, *supra*; People v. Brnja, *supra*.). As set forth in the cited cases, prompt on the scene showup procedures are allowed because they help to insure an identification by the witness while his sense impression of the perpetrator is fresh in his mind and is likely to be most accurate. The procedure is also advantageous to the accused since if he is not identified he may be released with a minimum of delay, People v. Blake, *supra*.

In reviewing the showup procedure the Court must be concerned with whether the identification process was unduly suggestive and, if so, whether it was conducive to a substantial likelihood of misidentification, Stovall v. Denno, 388 US 293 (1967); Simmons v. United States, 390 US 377 (1970)

The showup in this case was conducted while the defendant was standing, without handcuffs or other restraint. None of the officers involved suggested to the victim that the person he was asked to potentially identify had been arrested or was otherwise known to the police to be the “right man”. The victim identified the defendant based upon his own recollection of the events and acting on his own volition. The procedure was not unduly suggestive and the motion to suppress it and the anticipated in court identification testimony of the defendant by the victim is denied.

THE ARREST AND RECOVERY OF US CURRENCY

Once the victim had made an in person identification of the defendant as one of the individuals who had robbed him the officers had probable cause to effect an arrest, People v. Gonzalez, 138 AD2d 622 (2nd Dept., 1988). The sum of United States currency recovered from the defendant’s person was seized pursuant to an authorized custodial arrest, Chimel v. California, 395 US 752 (1969).

THE STATEMENTS

Following the arrest, the defendant was transported to the 113 Precinct where Officer Cordova processed the arrest paperwork. In the course of this procedure the defendant, without being questioned in any way with respect to the basis for the arrest, spontaneously volunteered that he “didn’t know why he was arrested when the female was responsible”.

A short time later the defendant was interviewed by Detective Frank Tofano of the 113th robbery Squad. The detective advised the defendant of his *Miranda* rights. The defendant, however, did not respond in any way to these warnings. The Detective then asked him if he was willing to answer questions. The defendant responded that he would do so but that he would not put anything in writing. He proceeded to make an oral statement with respect to the robbery.

The defendant has moved to suppress both of the alleged statements on the ground that they were the product of an illegal arrest and that they were otherwise involuntary pursuant to CPL 60.45. As noted previously the arrest of the defendant was supported by probable cause and was not improper. With respect to the other issues raised by the defendant, the People have the burden to establish beyond a reasonable doubt that the statements were voluntary, People v. Witherspoon, 66 NY2d 973 (1985).

THE STATEMENT TO OFFICER CORDOVA

Spontaneous statements by the defendant are not generally subject to suppression. A spontaneous statement is one made without apparent external cause, People v. Lanahan, 55 NY2d 711 (1981) and which is “not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed”, People v. Maerling, 46 NY2d 289, 302-03 (1978). The test for spontaneity is whether or not the statement was “triggered by police conduct which should reasonably have been anticipated to evoke a declaration from the defendant”, People v. Lynes, 49 NY2d 286, 295 (1980).

Applying this test to the defendant’s initial statement it is clear that it was made voluntarily and spontaneously by him without any interrogation or prompting by police officers.

THE STATEMENT TO DETECTIVE TOFANO

The defendant’s second and more detailed statement, however, was clearly made while in custody and resulted from police interrogation. With respect to this statement the People have the burden to establish beyond a reasonable doubt that the defendant knowingly and intelligently waived his rights to counsel and to remain silent. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders, Miranda v. Arizona, 384 US 436, 475 (1966) .

Waiver need not be express. Silence coupled with an understanding of the rights is sufficient, Butler v. North Carolina, 441 US 369 (1979); People v. Bretts, 111 AD2d 864 (2nd dept., 1985), People v. Santiago, 72 NY2d 836 (1988).

As Chief Justice Warren wrote in Miranda v. Arizona, *supra*, at page 475: “an express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.' See also Glasser v. United States, 315 US 60 (1942)”.

What is required at the outset is some affirmative acknowledgment that the suspect understood his rights¹. The cases cite by the People are illustrative of this principal. In People v. Bretts, 111 Ad2d 864 (2nd Dept., 1985) the Second Department affirmed a lower court decision denying suppression. In so doing the Court noted that “defendant was twice read the *Miranda* warnings and each time **expressly indicated that she understood her rights**”[emphasis added]. In People v. Hastings, 282 AD2d 545 (2nd dept, 2001), the Court again upheld a denial of suppression ruling that “the defendant was informed of his *Miranda* rights, **understood these rights**, and voluntarily waived them by continuing to speak with the officer”[emphasis added]. No facts are cited in the Hastings case but it is clear that there was a specific factual finding that the defendant “understood his rights”. In their memorandum of law the People acknowledge that this defendant “never acknowledged that he understood the warnings”.

In People v. Schroeder, 71 AD2d 907 (2nd Dept., 1979) the arresting officer testified at the suppression hearing that he read to the defendant from a police department form which contained the customary *Miranda* warnings. He further stated that after the reading of each

¹. As in *Miranda* where the Court holds that an affirmative statement that the defendant does not want an attorney indicates that he knows that he has a right to have one.

right he asked the defendant if he understood that right and the defendant answered that he did. Finally he testified that the form concluded with the question: "Now that I have advised you of your rights, do you wish to answer any questions without an attorney present?" The officer testified that in response to this question the defendant "did not reply". Whereupon he questioned the defendant who made an inculpatory statement. The Court suppressed the confession holding that "the defendant's silence in response to the inquiry as to whether he wished to answer questions without an attorney present cannot be deemed to constitute a valid waiver of his right to remain silent, or a consent to be questioned" People v. Shroeder, *supra* at page 907, see also People v. Breland, 145 AD2d 639 (2nd Dept., 1988); People v. Campbell, 81 AD2d 300 (2nd Dept., 1981); People v. Golden, 116 Misc. 2d 1049 (Sup Ct, Queens Co., 1982).

In this case, the evidence of waiver is even less compelling. The defendant made absolutely no response to indicate that he understood the meaning of the rights of which the detective advised him. He was not asked if he understood the rights or if, having been advised of his rights whether he wished to waive them and make a statement².

The facts in this case are also similar to those set forth in People v. Campbell, *supra*. In Campbell, the defendant responded affirmatively that he understood the rights which the officer had read to him. Without asking the defendant if he wished to waive his rights or if he, in fact, wished to make a statement the officer said to Campbell "I will take the fingerprints off this gun, and if it is your gun, you ought to tell us". At this point Campbell said "it is my gun". The Court suppressed the statement holding that "although the defendant declared that he "understood" the Miranda warnings, (the record) is totally devoid...of any express waiver of this constitutional right as mandated by Miranda v. Arizona, (citations omitted)", Campbell, *supra*, page 303. , The Court went on to write that:

² The most appropriate (although not the only) way for the Police to proceed in this situation is for the officer to ask the suspect after each individual right whether he understood and to conclude by asking whether, having been advised of his rights, he wished to make a statement.

The defendant's inculpatory statement coming immediately after (the officer's) admonition, was the result of an impermissible intrusion on the defendant's right to make an unpressured and uninfluenced election whether he should or should not waive his constitutional rights, and that

The rights sought to be protected, involve not only a statement of the defendant's rights but, most vital to him, a comprehension of the advises coupled with a reasonable opportunity on his part to consider the consequences of the options offered to him and to make his choice whether or not to waive his rights without any intervening pressure, cajoling or implied threats by his interrogator. and there is nothing in the record to indicate that he did.

This case differs from *Campbell* in that the defendant never expressly affirmed that he understood his rights and, although rather than being directly questioned he was asked if he wished to make a statement, he was never asked if he understood and wished to waive his *Miranda* rights. The case for suppression here is, therefore, stronger than in *Campbell*

The People's argument with respect to the facts as set forth in their memorandum of law is well taken. The defendant's prior criminal history³, his interaction with the officers, the fact that he agreed to make an oral but not a written statement, and the fact that he indeed made a detailed statement provide some evidence that he understood his rights and voluntarily waived them, see, People v. Reed, 75 AD2d 650 (2nd Dept, 1980)⁴. As noted by the Supreme Court in Johnson v. Zerbst, 458 US 458, 464 (1938), however, "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and ... do not presume acquiescence in the loss of fundamental rights". No amount of circumstantial evidence that the person may have been aware of this right will suffice for proof of knowing

³. The Court cannot consider this factor as no proof regarding the defendant's prior record was introduced at the hearing.

⁴. In *Reed*, the defendant was, like the defendant in *Shroeder*, silent when asked if he wanted to speak without a lawyer. However, the statement was not suppressed because *Reed* had a lengthy criminal history and had said "I'll get a lawyer when I'm ready" indicating to the Court a knowledge of his *Miranda* rights and, therefore, an informed decision to waive them.

waiver, see, Miranda v. Arizona, *supra* pages 472, 473 and the People have the burden to establish waiver beyond a reasonable doubt, People v. Witherspoon, *supra*.. On this record the Court cannot find beyond a reasonable doubt that the defendant knew and understood what rights he was waiving when he answered Detective Tofano's questions. Therefore, the defendant's second and more detailed statement to the Detective Tofano must be suppressed.

Dated: April 14, 2003
Kew Gardens, New York

/s/
SEYMOUR ROTKER, J.S.C.

