

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

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THE PEOPLE OF THE STATE OF NEW YORK

BY: SEYMOUR ROTKER, J.S.C.

- against -

Indictment No. 2009 - 04

DECISION AND ORDER

VICTOR COSENTINO,

Defendant.

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The following constitutes the opinion, decision and order of the court.¹

In the present motion, defendant moves to have Assistant District Attorney George Farrugia, the assigned prosecutor in this matter, recused from handling further prosecution of this case. Defendant claims that as a result of a follow-up question the prosecutor asked of the complainant during the lineup procedure, recusal is warranted.²

Specifically, defendant argues that the prosecutor's conduct at the lineup will be the material issue at trial since defendant's identification as the perpetrator of the crime is being challenged. Thus, defendant asserts that under both, the "Advocate-Witness Rule" and the "Unsworn Witness Rule," this prosecutor must be recused from further handling this litigation.

In opposition, the prosecutor asserts that his follow-up question to the complainant at the defendant's lineup was merely for clarification and recusal is not warranted. The assistant district attorney contends that defendant would not be denied a fair trial if he

¹A full recitation of the facts are outlined in this Court's decision, dated March 20, 2005, which addressed defendant's suppression motion. See Court file. The complainant identified this defendant at the lineup in question.

²This Court has already ruled upon the propriety of the lineup procedure and found that suppression of the identification procedure, as well as, any in court identification is not warranted.

continues as the prosecutor. In any event, the People argue that neither the “advocate-witness rule,” nor, the “unsworn witness rule” calls for disqualification under the facts presented.

RELEVANT FACTS

On July 27, 2004, Victor Cosentino was at the 113th precinct to be viewed in lineups. Defense counsel, N. Richard Wool, Esq., represented defendant at the lineup. Assistant District Attorney George Farrugia was also present on behalf of the People during the lineup.

Rajinder Singh Bammi, the complainant identified number “4”, defendant Cosentino, as the man with the black suit who hit him and said go back to his country. While the complainant was still looking at the lineup, the prosecutor asked Rajinder Singh Bammi if this was one of the individuals in the group that had hit him during the incident. The witness verified that he had been struck by this defendant.

As previously held by this Court, the assistant district attorney merely asked the viewing witness for a clarification as to what this defendant did, after the victim had already identified defendant. Upon a review of the hearing evidence, there was no prodding by the prosecutor to select defendant since he was already identified by the complainant.³

DECISION

A defendant may move to disqualify a prosecutor from handling a case as a result of the prosecutor’s pretrial involvement based upon two legal principles. See People v. Paperno, 54 N.Y.2d 294, 445 N.Y.S.2d 119 (1981).⁴ These principles, outlined separately

³Nevertheless, defendant can still argue this assertion to the jury. However, the source of the question to the complainant need not be identified to avoid any prejudice to defendant, as explained herein.

⁴In Paperno, the defense made a motion to remove the trial prosecutor who had questioned defendant before the grand jury because the defendant wished to call the assistant as a trial witness. It was thus argued that it was a violation of the advocate-witness rule to have the particular prosecutor present the trial evidence.

herein, are: the “advocate-witness rule” and the “unsworn witness rule.” Id. at 299.

The “advocate-witness rule,” provides that an attorney should withdraw from representing a client when it appears that the lawyer, or a firm member, will be called to

Furthermore, the defense argued that the assistant’s conduct in front of the grand jury would be a material issue at trial and therefore, recusal was mandated pursuant to the unsworn witness rule. In Paperno, the defendant was charged with criminal contempt stemming from his grand jury testimony on three separate occasions. Notably, the prosecutor whose recusal was sought, was the same attorney who presented the matter to the grand jury and was also handling the trial.

The defendant was initially convicted after trial and the Appellate Division reversed the conviction stating that the prosecutor should have been recused where he would act as an advocate in a case where his own conduct is a material issue. The Court of Appeals then reversed the Appellate Division and sent the case back to the Appellate Division finding that the defendant must first make a significant showing that the prosecutor’s conduct will be a material issue at trial to be entitled to recusal of the prosecutor. The Appellate Division, after having the case remitted to them for a decision consistent with the Court of Appeals analysis, reversed the conviction upon the ground that the trial court failed to take proper steps to see that the prosecutor did not become an unsworn witness against the defendant, which is what ultimately happened. The trial court actually permitted the prosecutor to read the grand jury testimony, with the assistance of a reader from the district attorney’s office, before the petit jury. The issue in the case was the nature and tone of the questions asked of defendant before the grand jury.

Moreover, in summation, the prosecutor also called the jury’s attention to the reading of the grand jury minutes at the trial indicating that they had seen what occurred before the grand jury by the recitation before them, again, a recitation which was done by the same prosecutor presenting the case before the grand jury. Thus, the prosecutor became an unsworn witness by in essence reenacting the grand jury testimony. The trial court failed to take measures to prevent this and could have had court reporters recite the grand jury testimony for the petit jury. Thus, although defendant did not meet his burden to establish that the prosecutor would become a witness on a material issue prior to trial, it was during the trial, that the trial court allowed the prosecutor to become an unsworn witness against the defendant and failed to take proper precautionary measures beforehand to prevent this from occurring. As a result, the defendant was deprived of a fair trial. Thus, a new trial was ordered in the interest of justice. See People v. Paperno, 90 A.D.2d 168, 456 N.Y.S.2d 778 (2d Dept. 1982).

testify regarding a disputed issue of fact by his or her own client. (emphasis added).⁵ Thus, if a prosecutor will be called to testify to a disputed issue of material fact by the People, he should be disqualified. Here, there is no disputed issue of fact, the prosecutor admits asking the complainant the question at the lineup. The People have no intention of eliciting testimony in this regard by calling the assistant district attorney as a witness.

⁵ The Code of Professional Responsibility addresses the issue of Lawyers as Witnesses and provides that:

(a) A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, except that the lawyer may act as an advocate and also testify:

(1) If the testimony will relate solely to an uncontested issue.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm to the client.

(4) As to any matter, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case.

(b) Neither a lawyer nor the lawyer's firm shall accept employment in contemplation or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudice to the client.

© If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, the lawyer shall not serve as an advocate on issues of fact before the tribunal, except that the lawyer may continue as an advocate on issues of fact and may testify in the circumstances enumerated in paragraphs (a)(1) through (4) of this section.

(d) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness on a significant issue other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw from acting as an advocate before the tribunal.

See Code of Professional Responsibility DR 5-102[a] [22 NYCRR 1200.21](emphasis added).

Furthermore, under the “advocate-witness rule,” if the Court will allow the defense to call the prosecutor as a witness, and the prosecutor’s testimony would be adverse to the People, the prosecutor should be disqualified (emphasis added).

Thus, under the “advocate-witness rule,” defendant must establish that Assistant District Attorney Farrugia will be called as a witness for the People; or, that if defendant was permitted to call the prosecutor as a witness at trial, the prosecutor’s testimony would be adverse to the People’s position.⁶ It cannot be said that the prosecutor’s testimony would be adverse to the People. The People do not contest that the question was asked during the lineup viewing.

In any event, defendant is not permitted to call A.D.A. Farrugia as a witness at trial. Others are available to testify upon this issue and this prosecutor’s testimony would be cumulative. See e.g. People v. Somerville, 249 A.D.2d 687, 671 N.Y.S.2d 779 (3d Dept. 1988)(no need to call prosecutor as advocate witness because other investigators present when defendant made statement who could testify). A factor to be considered by the Court in rendering its decision, is the demonstration by a defendant of the necessity of calling the prosecutor as a witness at trial as to a material issue. If the testimony the defendant seeks to elicit relates to an undisputed or a collateral issue, or if it is cumulative, the defendant’s request to call the prosecutor will and should be denied. Paperno, *supra* at 303, citing Fisher v. United States, 231 F.2d 99 (9th Cir. 1956); Gajewski v. United States, 321 F.2d 261 (8th Cir. 1963), *cert denied* 375 U.S. 968 (1964); Hayes v. United States, 329 F.2d 209 (8th Cir. 1964), *cert denied* 375 U.S. 968 (1964); United States v. Schwartzbaum, 527 F.2d 249 (2d Cir. 1975), *cert denied* 424 U.S. 942 (1976).⁷

This Court finds that it is not necessary to call this prosecutor as a witness. In the event that defense counsel attempts to cross-examine the complainant about the follow-up question at the lineup and the testimony defendant seeks to elicit is not forthcoming, defense

⁶During the course of this litigation, the People have represented that they will not be calling A.D.A. Farrugia as a witness.

⁷ The trial court has discretion as to whether to permit a defendant to call the assistant district attorney as a trial witness. See People v. Poplis, 30 N.Y.2d 85, 330 N.Y.S.2d 365 (1972).

counsel can call the detective to testify about the question posed. See Prince, Richardson on Evidence §§8-104 et seq. [Farrell 11th ed]. Here, the mere fact that the question was asked, as distinguished from its truth or falsity, is relevant and thus, is not hearsay.⁸

The second principle upon which defendant relies to support his contention that this prosecutor should be recused from further prosecuting him is the “unsworn witness” rule. Under this theory, it is impermissible for the prosecutor to “inject his own credibility into the trial”. See Paperno, supra at 300-01.⁹ The “unsworn witness” rule recognizes the need to accommodate the interest of the defendant in receiving a fair trial and of the District Attorney’s office in choosing its own representative. Paperno, supra at 301 (emphasis added).

Therefore, to succeed upon a motion to disqualify a specific prosecutor from litigating a case before a jury, a defendant must make a showing that the pretrial activity of the assistant district attorney would render his trial participation unfair. Paperno, supra at 302. The showing for this relief requires that the defendant demonstrate that there is a significant possibility that the prosecutor’s pretrial activity would be a material issue in the case. Id. (emphasis added); see also People v. Cannady, 243 A.D.2d 642, 663 N.Y.S.2d 244 (2d Dept. 1997). Defendant has failed to make such a showing. Here, although identification may be the issue in the case, the prosecutor’s follow-up question is not the material issue. The issue, as stated by defendant, is the identification by the complainant, not anything the prosecutor asked. If defense counsel believes that the question asked influenced the witness, this can be explored by cross-examining the witness. The material issue is not what the prosecutor asked, which is not disputed, but the fact that it was said. Defendant is arguing, and can still argue, that this question influenced the complainant when making his identification if he so chooses. Thus, defendant has not met his burden to be entitled to

⁸The hearsay rule does not apply because the statement is not offered for the truth of the fact asserted. This is an “apparent exception” to the hearsay rule.

⁹As noted in the Paperno decision, convictions have been reversed by the Court of Appeals where: the prosecutor prejudices the defendant by expressing his personal belief on matters that may influence the jury; argues his own credibility on summation; vouches for the credibility of prosecution witnesses; or, suggests the existence of facts not in evidence through cross-examination. See Paperno, supra at 301 (citations omitted).

recusal of this prosecutor from trying the case before the jury.

Nevertheless, even if a defendant fails to meet his burden of demonstrating that the prosecutor should be recused, as we have here, a court should still take steps to avoid prejudice to the defendant if there exists some danger that the prosecutor's pretrial activity might allow him to unfairly interject his credibility into the trial thereby unfairly influencing the jury. Paperno, *supra* at 304.¹⁰

Thus, even though defendant has not met his burden and made the necessary showing for the prosecutor's recusal; because this Court finds that there is some danger that the prosecutor's pretrial activity, his asking the followup question at the lineup, might allow the assistant district attorney to unfairly influence the jury by injecting his own credibility into the trial, this Court is taking steps to avoid prejudice to defendant.¹¹ Thus, the Court directs that the prosecutor is not permitted to allude to or mention that he was personally present during the lineup viewing by the complainant. Furthermore, the prosecutor cannot comment on the followup question in summation, however, he can argue the evidence which is elicited at trial through the testifying witnesses.¹² The People can question the complainant as to the manner in which the identification took place, within the bounds of the evidentiary rules. Moreover, defense counsel can bring out the question asked and the manner in which it was done on cross-examination of the witnesses. Defense counsel is not permitted to elicit that it was A.D.A. Farrugia who asked the question at the lineup.¹³

¹⁰A reversal will not result if the prosecutor participates in the trial unless the defendant demonstrates a substantial likelihood that prejudice resulted from the prosecutor's participation in the trial.

¹¹See Paperno, *supra* at 303-04.

¹²If the prosecutor intends to mention the question during summation and can do so as fair comment upon the evidence, fair response, or some other proper evidentiary rule, he is first instructed to approach the Court and obtain a ruling outside the presence of the jury. However, under no circumstances can the assistant state that he was personally there or asked the question at the lineup.

¹³Clearly, defense counsel would not want to bring out the fact that the trial prosecutor was present and asked the question during the lineup since defense counsel is arguing that he does not want the prosecutor to inject his own credibility before the jury, in violation of the "unsworn witness" rule.

In sum, this ruling is consistent with permitting defendant to assert his theory of the case, a misidentification defense. Although this Court has ruled that the lineup procedure is admissible at trial and that the complainant is permitted to make an in court identification because the procedure was not suggestive, this finding does not prevent defendant from raising a misidentification defense, which is what defendant asserts is his theory of defense. Defendant can certainly question the complainant regarding the opportunity the witness had to observe defendant during the incident, as well as, bring out the line up procedure, including the form and questions asked while the victim viewed the lineup.¹⁴ Clearly, these questions can be asked of the complainant and it is not necessary to call the assistant district attorney as a witness at the trial.¹⁵

Thus, with the proper safeguards in place, as outlined above, to ensure that defendant receives a fair trial, recusal is not warranted because defendant has not met his burden to be entitled to such relief.

Accordingly, the defendant's motion is denied.¹⁶

Kew Gardens, New York

Dated: May 12, 2005

¹⁴In his motion, defendant argues that the prosecutor was confused as to the role the defendant played in the incident and therefore, based on his own misperception, he improperly asked the followup question. This argument is based upon the identification issue which is a question of fact for the jury to consider. Any argument related to what the prosecutor thinks is not determinative of the validity or correctness of the identification made by the complaining witness. The prosecutor was not present during the incident and the defense attorney, who has appeared before this Court numerous times and is well qualified to handle this matter, can question the complainant regarding the circumstances surrounding the incident, including any descriptions that may have been provided by him.

¹⁵For example, defense counsel can ask the complainant if he initially identified defendant as, "the man with the dark suit who said to go back to your country." Counsel can follow-up by then asking the complainant whether he was then asked another question, "did he hit you?" This fact is uncontested and it is not necessary to bring out the source of the question, the Assistant District Attorney. This avoids having the prosecutor interject his own credibility into the trial.

¹⁶A copy of this decision is being sent to all counsel who represent defendant's indicted under Queens County indictment number 2009-04 so that they too can abide by the Court's ruling as outlined herein.

SEYMOUR ROTKER
JUSTICE SUPREME COURT