

People v Smith

2007 NY Slip Op 30062(U)

March 9, 2007

Seneca County Ct

Docket Number: 0000040

Judge: W. Patrick Falvey

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STATE OF NEW YORK
COUNTY COURT COUNTY OF SENECA

THE PEOPLE OF THE STATE OF NEW YORK

against

Indictment No. 06-040

JEFFREY C. SMITH,

Defendant.

APPEARANCES: Hon. Richard E. Swinehart
Seneca County District Attorney
(David G. Mashewske, Esq., of Counsel)
Counsel for the People

Michael J. Mirras, Esq.
Seneca County Public Defender
(John Nabinger, Esq., of Counsel)
Counsel for the Defendant.

MEMORANDUM-DECISION AND ORDER

W. PATRICK FALVEY, J.C.C.

Defendant, Jeffrey C. Smith was indicted for Four counts of Burglary in the Third Degree, in violation of Penal Law §140.20, a class D felony; Two Counts of Criminal Mischief in the Third Degree, in violation of Penal Law §145.05, a class E felony; Two Counts of Petit Larceny, in violation of Penal Law §155.25, a class A misdemeanor; One Count of Criminal Mischief in the Fourth Degree, in violation of Penal Law §145.00(1), a class A misdemeanor and Three Counts of Criminal Trespass in the Third Degree, in violation of Penal Law §140.10(a), a class B misdemeanor.

Defendant, previously moved for assorted forms of relief as requested in the defendant's Notice of Omnibus Motion dated February 1, 2007. After argument of his Omnibus Motion on February 8, 2007, certain branches and elements therein were decided and determined.

The Court also granted the defendant's application for hearings regarding the legality of the seizure of the defendant's clothing at or near the time of his arrest and "Sandoval" (People v. Sandoval, 34 NY2d 371).

Hearings were conducted, in the defendant's presence, on February 28, 2007. At that time counsel agreed that the Sandoval issues would be heard In Limine, just prior to jury selection. The case was marked submitted on March 7, 2007.

As to the remaining issues the following constitutes the decision of the Court.

The defendant claims to be aggrieved alleging that the seizure of his clothing and back pack was illegal. The People agree that there was a warrantless search but argue that the items taken were incident to a valid arrest.

Only one witness testified and he appeared on behalf of the People and I give full credence to that testimony and hereby find the following essential facts and conclusions of law:

FACTS

Village of Seneca Falls Police Officer, Timothy A. Snyder, knew the defendant from prior involvements.

Officer Snyder had got off duty at 3:00 P.M. on May 23, 2006. While at the Seneca Falls Police Department he observed the defendant come to the dispatch window at approximately 4:00 P.M. He was wearing a yellow blue striped Aeropostale shirt and orange hat.

The following day, May 24, 2006, at approximately 6:40 A.M. Snyder's sergeant requested that he respond to 115 Fall Street, Seneca Falls, New York, to answer a burglary complaint.

When he arrived at the scene he noted that the building contained a number of offices and different businesses. He first went to Dr. Oleska's office where he observed a filing cabinet

tipped over and papers thrown about.

Approximately one hour later Snyder was advised that there was video equipment in the building. He then met with the building caretaker and reviewed the video tape. While looking at it, Officer Snyder noticed a male wearing the same clothing as he had observed on the defendant the previous day; and after a closer look he recognized the defendant as the person in the video.

The video shows the defendant entering the building when it opened and then leaving. Snyder also noticed that the defendant, wearing the same clothing, and carrying a backpack, returned later in the evening at approximately 9:00 P.M. However, by this time, most of the businesses in the building were closed. He also observed Jamie Seeley leave the building and lock it. The defendant then came out of the building at a later time.

Officer Snyder went to speak with Seeley in her office. She indicated that she left at approximately 9:00 P.M. Snyder noted that her office was also destroyed. The Sinicropi office was also damaged in that ceiling tiles located under Seeley's office were removed.

Snyder saw the defendant later that day in the IGA parking lot just after 6:00 P.M. The defendant was wearing the same clothes as before. Snyder asked the defendant to come to the police department to discuss an unrelated pending criminal mischief case. The defendant was not in custody and voluntarily accompanied Officer Poole to the police department.

Officer Snyder and Investigator Porretta met the defendant at the station house where Porretta read the defendant his so-called Miranda warnings.

The defendant was not handcuffed or told that he could not leave. The interview continued but no statements were made by the defendant regarding the case at bar.

As Officer Poole was about to place the defendant under arrest, he asked the defendant for his clothing. The defendant became irrate, stating that you've already made up your mind,

you are already going to arrest me. He then took off his clothes. Once he was calmed down he was placed under arrest for criminal trespass on this case and criminal mischief on the unrelated case. Both the arrest and taking of defendant's property occurred at approximately the same time, to wit: 6:00 P.M. (1800 hours) on May 24, 2006 (see Exhibits 1&2).

LAW AND CONCLUSIONS

The People concede that this was a warrantless search but argue that the defendant's property was taken incident to a lawful arrest. The defendant, on the other hand, asserts that his property was taken without a warrant and prior to his arrest; thus requiring suppression.

Although a defendant who challenges the legality of a search and seizure, has the burden of proving illegality, it is the People who have the burden of going forward in the first instance to show the legality of the police conduct. People v. Feingold, 106 AD2d 585.

The general proposition with regard to searches incident to arrest is that the arrest must precede the search. People v. Evans, 43NY2d 160. In this regard, the People must be able to establish that probable cause existed at the moment of arrest. However, probable cause at the time of the arrest cannot be based on the evidence obtained as a result of the ensuing search. People v. Feingold, supra.

A search of the person undertaken prior to arrest qualifies as a search incident to arrest, if a formal arrest follows immediately and is not based upon evidence uncovered during the search. People v. Williams, 273 AD2d 79; lv den 95 NY2d 940.

In addition, the mere fact that an officer has probable cause to arrest does not authorize an incidental search of the person, unless there is a contemporaneous arrest. New York Suppression Manual §13.02[2]. "The fact that the search precedes the formal arrest is irrelevant as long as the search and arrest are nearly simultaneous as to constitute one event. People v. Evans, 43 NY2d 160. Thus, it is immaterial which occurs first, provided that they are almost simultaneous so they can be reviewed as one transaction.

Clearly in the case at bar the request for defendant's clothes and the arrest can be viewed as one transaction. The officer clearly had probable cause based on his earlier investigation of the scene and observations of the store video tape where he identified the defendant, noting that he was wearing the same clothing he had on the day before at the police station. In fact, the defendant was wearing that same clothing the day of his arrest.

Based on the facts presented, probable cause did exist for the arrest prior to the request for the clothing; the arrest and search were contemporaneous and properly viewed as one transaction.

Therefore, the People have met their burden in showing the legality of the search and the property seized is not suppressed.

Accordingly, the defendant's motion to suppress the property seized is denied in all respects.

The foregoing constitutes, the Opinion, Decision and Judgment of this Court.

SO ORDERED.

Dated: March 9, 2007.

s/ _____ W.

Patrick Falvey
Acting Seneca County Judge