

**People v Valerio**

2007 NY Slip Op 30657(U)

March 27, 2007

Supreme Court, New York County

Docket Number: 0002405/2002

Judge: Laura A. Ward

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 70

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

ALLEN VALERIO,

Defendant.

-----x  
Laura A. Ward, J.:

DECISION AND ORDER  
#2405/02  
**RECEIVED**  
APR 10 2007  
SUPREME COURT  
CRIMINAL TERM  
NEW YORK COUNTY  
CORRESPONDENCE/MOTION  
SUPPORT UNIT

The defendant was tried and convicted of criminal possession of a weapon in the third degree, in violation of Penal Law § 265.02. He was sentenced to a term of incarceration of five years. The defendant moves, pursuant to Criminal Procedure Law § 440.10(f), to vacate the judgment of conviction. The defendant argues that the People failed to disclose the statements of three witnesses which were in the People’s possession, that the statements were favorable to him, and that had the People disclosed these statements, the defendant could have used the statements to his advantage.

At trial, the People called Police Officer Maria Rojas as a witness. Officer Rojas testified that on April 20, 2002, at about 5:30 P.M. she was on patrol in a police car with a lieutenant who was driving. (Trial transcript [“Tr.”] at pp. 4 to 5) Officer Rojas stated that, at 143<sup>rd</sup> Street and Broadway, they were alerted to “something big. . . going on” on the other side of Broadway. The lieutenant made a U-turn. When they arrived on the other side of Broadway she observed a crowd of over 50 people and a car stopped in the middle of the street. (Tr. at pp. 6 to 7) She testified that a male, the defendant, was in the back seat of the car and there were two females, one in the back seat and one in the front passenger seat. The male appeared to be bruised. A third female was outside the car and went to speak to the lieutenant. (Tr. at pp. 7 to 8)

Officer Rojas testified that the crowd was agitated and yelling. The crowd told Officer Rojas, in Spanish, that the man in the car beat up an old lady and had a gun. (Tr. at pp. 10 to 11) When Officer Rojas approached the car, she knocked on the window and told the occupants in the car that she needed to see their hands. While the two females complied, the defendant did not look at Officer Rojas, nor did he show his hands. Officer Rojas repeated the command in Spanish and when the defendant still failed to acknowledge Officer Rojas, she addressed the defendant again in English. (Tr. at pp. 12 to 13) The defendant continued to ignore

Officer Rojas. Officer Rojas opened the door to the car, grabbed the defendant by his left arm out of the car and took him towards the rear of the car. When the defendant was removed from the car, the crowd starting yelling that he was the one who robbed an old lady. Officer Rojas asked the defendant to put his hands behind his back. The defendant failed to comply. Thereafter, Officer Rojas attempted to handcuff the defendant. The defendant struggled with Officer Rojas causing her to need the assistance of another police officer to handcuff the defendant. (Tr. at pp.15 to 16) The defendant was taken to a police car. The officer who assisted Officer Rojas handcuff the defendant reached into the defendant's pocket and recovered a gun. (Tr. at p. 17) An ambulance was called for the defendant. He was taken from the scene in the ambulance. (Tr. at p.19) On cross-examination, Officer Rojas was asked if the crowd had beaten the defendant. Officer Rojas testified that she asked the crowd if they had beaten the defendant and they denied it. (Tr. at pp. 60 to 61)

At the station house Officer Rojas spoke to the three females occupants of the car, Joann Cavallo and her daughters Nicole and Natasha. (Tr. at p. 40) Approximately six hours after the incident, the defendant was questioned at the station house by a detective. The defendant stated that the gun was not his and that it was put in his pocket by the Dominicans. (Tr. at pp. 58 & 76)

Subsequent to his conviction the defendant learned that Joann, Nicole and Natasha Cavallo made written statements at the time they were interviewed by the police. The defendant argues that these statements were withheld from him despite the fact that they were relevant and favorable to his case.

In sum and substance, the statements recite that the three females were in a car when they noticed a man lying in the street among broken glass. At some point they observed a crowd of people kicking and beating the man. Joann went to the man to protect him from the crowd. Joann and Nicole then helped the man into the back of the car while Natasha called 911. People in the crowd were saying that the man was "a bad one" and had robbed an old woman. Joann stated that when the police arrived, a woman told the police that the defendant was armed. Nicole stated that when the police arrived, she, her sister and the defendant were told to put their hands up and that she and her sister put their hands up but that the man did not. Nicole also stated that the man was told to get out of the car but did not comply and thereafter the police officer pointed her gun at him. Finally, Nicole stated that "they found a gun and a box cutter."

The defendant argues that had these three statements been disclosed to him the

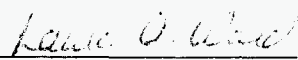
defense could have used them to rebut the People's witness. The defendant asserts that the statements could have been used to "substantiate or argue" his claim that nobody in the crowd told the police that he had a weapon. The defendant states the court was misled into believing that the defendant was arrested because of the crowd's statement that he was armed. He also states that he could have used the statements "to prove [he] did not know about the gun" (Defendant's Affidavit [Aff.] at p. 4) and that no one in the crowd said that he had beaten an old lady. Additionally, the defendant argues that the statements could have been used to correct the impression that he was a "gun toting predator." (Aff. at p. 8)

The defendant's arguments are belied by the very statements he claims would have benefitted him had he known about them. Joann Cavallo's statement includes references to the crowd claiming that the defendant had robbed an old woman and that when the police arrived members of the crowd told them that the defendant was armed. Nicole Cavallo's statement substantiates Officer Rojas' testimony that the defendant was uncooperative and that the police found a gun and box cutter on the defendant. Clearly, as opposed to being exculpatory or favorable to the defendant, the statements are inculpatory and favorable to the People's case as they substantiate the testimony of Officer Rojas and even establish the defendant's possession of a gun, the crime for which the defendant was convicted. Therefore, the People were under no obligation to disclose these statements to the defendant pursuant to *Brady v. Maryland*, 373 US 83 (1963).\*

The motion is denied.

The foregoing is the decision and order of the court.

Dated: New York, New York  
March 27, 2007

  
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Laura A. Ward  
Acting Justice Supreme Court

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\* Nor did the People have to disclose the written statements pursuant to *People v. Rosario*, 9 NY2d 286 (1961), as the People did not call Joann Cavallo or either of her daughters as witnesses at trial.