

**People v Fox**

2007 NY Slip Op 34517(U)

September 12, 2007

Supreme Court, Kings County

Docket Number: 8607/06

Judge: Jill Konviser

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM, PART 26

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THE PEOPLE OF THE STATE OF NEW YORK :

-against-

JOHN FOX,

Defendant.

-----X

DECISION AND ORDER

IND. No. 8607/06

**JILL KONVISER, JUSTICE:**

On September 11, 2007, this Court re-opened the Dunaway portion of the defendant's suppression hearing pursuant to Criminal Procedure Law §710.40(4) to hear testimony from a defense witness, Assistant District Attorney Jennifer Sipress. The parties made oral argument at the conclusion of the re-opened hearing. For the reasons stated below, this Court adheres to its Decision and Order of August 27, 2007, that the defendant, on October 10, 2006, voluntarily accompanied the police from his dorm room at the SUNY Maritime College to the 61<sup>st</sup> precinct and that he was not in police custody until approximately 3:30 a.m. on that same day after he freely and voluntarily confessed to the charged crimes. Thus, the defendant's motion to suppress his statements and lineup identification as the fruit of an illegal arrest is denied.

**Procedural History**

On August 27, 2007, the defendant's motion to suppress his statements and lineup identification on the ground that he was arrested without probable cause in his dorm

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room at the SUNY Maritime College in the Bronx was denied.<sup>1</sup> As set forth in the August 27, 2007 Decision and Order, this Court found that on October 10, 2006, at approximately 2:00 a.m. the defendant voluntarily accompanied the police from his dorm room at SUNY Maritime to the 61<sup>st</sup> precinct and that he was not in police custody until approximately 3:30 a.m. on that same day after he freely and voluntarily confessed to the charged crimes.

On September 10, 2006, the defendant made an oral application in open court to re-open the suppression hearing based upon his receipt on September 6, 2007, of a document entitled "Homicide Investigative Report," which was provided to him in connection with the prosecutor's Rosario obligations. The Homicide Investigative Report is a document prepared by the Kings County District Attorney's Office. Page seven of that Report states in pertinent part: "John Fox [was] apprehended at Maritime Academy, Bronx, N.Y., 10/10/06 at 2:00 a.m."

The defendant argued that this portion of the Report was inconsistent with the police testimony provided at the hearing that the defendant voluntarily accompanied the police to the precinct and that he was not in police custody until approximately 3:30 a.m. on October 10, 2006. Accordingly, the defendant requested that the hearing be re-opened so that he could examine, under oath, the assistant district attorney who drafted the portion of the Report at issue, Jennifer Sipress.

<sup>1</sup>In the Decision and Order of August 27, 2007, this Court also found that the defendant's statements were given freely and voluntarily and were not the product of threats or coercion. Likewise, this Court ruled that there was nothing suggestive about the defendant's lineup identification procedure.

On September 11, 2007, the defendant's motion to reopen the suppression hearing was granted. See C.P.L. §710.40(4). This Court found that the suppression hearing was required to be re-opened as the defendant met his burden of proffering "new facts, which could not have been discovered with reasonable diligence before the determination of the motion" and that such facts were "pertinent to the suppression issue." People v. Velez, 39 A.D.3d 38 (2d Dept. 2007); see People v. Clark, 88 N.Y.2d 552, 555 (1996); People v. John, 38 A.D.3d 568 (2d Dept. 2007).

#### **Findings of Fact**

Assistant District Attorney Sipress, who testified as a defense witness, testified that she did write the statement in the Homicide Investigation Report that the defendant was "apprehended at Maritime Academy, Bronx N.Y. 10/10/06 at 2:00 a.m." She also testified that she was not present at the Maritime Academy. Instead, she explained that she was at the 61<sup>st</sup> precinct on October 10, 2006, when she prepared the Report and obtained the information that the defendant was "apprehended" at 2:00 a.m. on October 10, 2006, from police personnel who were present at the precinct on that date. Ms. Sipress could not recall the particular officer or officers who provided her with that information. Nor did she recall whether the officer or officers who provided her with that information were present when the defendant accompanied the police from SUNY Maritime to the 61<sup>st</sup> precinct. Ms. Sipress testified that she understands the word "apprehended" to mean "custody."

**Conclusions of Law**

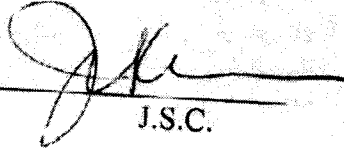
The testimony provided at the re-opened hearing has not provided this Court with any basis to alter its earlier decision, crediting Detectives Byrnes and Cennamo, that the defendant voluntarily accompanied the police to the 61<sup>st</sup> precinct on October 10, 2006. Ms. Sipress was not present at SUNY Maritime on October 10, 2006 at the time the defendant encountered the police officers and thus has no personal knowledge regarding the circumstances under which the defendant accompanied the officers to the precinct. Moreover, the testimony offered by Ms. Sipress -- that an unknown officer or officers at the 61<sup>st</sup> precinct told her that the defendant was "apprehended" at SUNY Maritime at about 2:00 a.m -- is hearsay, is not attributed to either Byrnes or Cennamo and, as such, casts no doubt on their credibility. Accordingly, this Court adheres to its Decision and Order of August 27, 2007 that on October 10, 2006, at approximately 2:00 a.m., the defendant voluntarily accompanied the police to the 61st precinct and that he was not in police custody until approximately 3:30 a.m. on that same date after he fully confessed to the charged crimes.

The defendant's motion to suppress his statements and lineup identification as the fruits of an illegal arrest is denied.

This constitutes the Decision and Order of the Court.

Dated: Brooklyn, New York  
September 12, 2007

**ENTERED**  
SEP 14 2007  
NANCY T. SUNSHINE  
COUNTY CLERK

  
J.S.C.