

People v Velez

2007 NY Slip Op 34546(U)

October 12, 2007

Supreme Court, Westchester County

Docket Number: 07-00607-01

Judge: Robert A. Neary

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ON 10-12-2007
**WESTCHESTER
COUNTY CLERK**

FILED

OCT 12 2007

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

- against -

JULIO VELEZ,

Defendant.

-----X

NEARY, J.

DECISION AND ORDER

Ind. No. 07-00607-01

FILED

OCT 12 2007

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

The defendant has been indicted for the crimes of Burglary in the Second Degree, Criminal Mischief in the Third Degree and Petit Larceny. It is alleged that on or about October 27, 2003, the defendant did enter unlawfully into a residence at 22 Cliff Avenue in Yonkers with the intent to commit a crime therein.

The defendant, claiming that improper testimony may be offered against him, has moved to exclude the identification testimony at trial of a single alleged eyewitness on the ground that such testimony would not be admissible because of an improperly made prior identification of the defendant by the prospective witness.

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The defendant is also seeking the dismissal of the instant indictment on the ground of impermissible prosecutorial delay amounting to a violation of his due process rights.

By Decision and Order of this Court dated September 12, 2007, *Wade* and *Singer* hearings were ordered to be held prior to trial. On October 10, 2007, a combined hearing addressing these issues was held. A *Sandoval* hearing that had also been ordered was held in abeyance. At the combined *Wade/Singer* hearing, the People called the following witnesses: P.O. Patrick Byrne and Det. Christopher Deering of the Yonkers Police Department and Westchester County Assistant District Attorney Christine O'Connor. One photographic array was entered into evidence at the hearing by the People. The defendant called no witnesses and offered no exhibits.

The Court finds the testimony offered by the People's witnesses to be plausible, candid, and fully credible. The Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On or about November 21, 2003, the defendant was arrested by Yonkers police officers and charged with two (2) residential burglaries that occurred earlier in the day in that jurisdiction. He was duly processed by the police department and his "mug" shot entered into the department's data base for the first time. The Yonkers Police Department photographic data base at the time contained only pictures of persons arrested in Westchester County.

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On October 27, 2003, nearly a month before the defendant's arrest noted above, a burglary occurred in a home located at 22 Cliff Avenue in Yonkers. An officer assigned to the Criminal Identification Unit (CIU) lifted a latent fingerprint at the crime scene. A detective located a possible eyewitness who claimed to have seen a suspicious looking Hispanic man lingering around the home before the burglary was committed. The detective escorted this witness to the Yonkers Detective Division where she viewed a series of photographs, but was unable to pick out the suspicious male. At this time, the defendant's picture was not in the Yonkers photo data base.

Police Officer Patrick Byrne is currently a member of the Yonkers Police Department's CIU. Since September 2004, he has been qualified to use the New York State SAFEIS system. SAFEIS is a statewide law enforcement data base containing primarily the fingerprints of numerous convicted offenders. Officer Byrne is apparently the lone Yonkers police officer with access to this system. Prior to Officer Byrne becoming a qualified SAFEIS operator, the position was held by another officer who retired in January 2002. The Yonkers Police Department attempted unsuccessfully to train another person to replace the retiree in 2002. Thus, the Yonkers Police Department was without ready access to the SAFEIS system for the period between January 2002 and September 2004. During that period, fingerprints from major crime scenes were referred to the County Police on a limited case by case basis for comparison with SAFEIS records.

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When P.O. Byrne took over responsibility for inputting SAFEIS prints, he testified that there were in excess of three hundred (300) prints that had accumulated since his predecessor retired and was not replaced.

Among those accumulated prints were the one lifted at the 22 Cliff Avenue burglary of October 27, 2003. On December 20, 2004, that print was finally submitted for SAFEIS comparison and the defendant was shortly thereafter identified as having a matching print.

In short order, the eyewitness from the Cliff Avenue burglary was contacted by Det. Deering who was now handling the case. He created an array (People's Exhibit #1) and placed the defendant's picture in the second position. He took the array to the witness on December 23, 2004 and she quickly identified the defendant as the man seen outside the home prior to the crime. The detective also reexamined business records from the date of the Cliff Avenue burglary and learned the defendant had sold certain unique items of jewelry taken from the burglary to a local pawn shop.

The print, the photographic identification and the business records were all known to the police and prosecutors by January 2005.

On October 19, 2004, over two months before the defendant was identified by SAFEIS as a suspect in the Cliff Avenue burglary, this defendant was convicted of Burglary in the Second Degree in connection with the crimes he was arrest for on November 21, 2003

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mentioned above. On December 9, 2004, the defendant was sentenced, as a Persistent Violent Felony Offender, to a term of 20 years to life.

ADA O'Connor testified that in February or March 2005, she conferred with the Trial Division supervisor in the Westchester County District Attorney's Office and a decision was reached not to seek an indictment against the defendant for the Cliff Avenue burglary because he was already serving a life sentence. Other factors the prosecutor testified about were taken into account including the limited personnel resources of the District Attorney's Office and the Yonkers Police Department; the inconvenience to civilian witnesses; and judicial economy.

In February 2007, Westchester prosecutors learned that the Appellate Division, Second Department had granted the defendant a new hearing on the issue of identification and they felt the conviction underlying the defendant's life sentence was in jeopardy.

ADA O'Connor further testified that the only reason the People sought and obtained the instant indictment for the Cliff Avenue crime was because prosecutors now feared the defendant whom they characterized as a dangerous career criminal might be freed from custody because of his success before the Appellate Division.

CONCLUSIONS OF LAW

Addressing the issue of the photographic identification first, it is clear that the People have met their burden of going forward to show the pre-trial procedure was constitutionally permissible. The detective who showed the array testified that he chose filler

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photographs for the array that matched the defendant's general characteristics. The Court has examined the array (People's Exhibit #1) and finds it is not suggestive. The pictures all displayed males of approximately the same age, coloring and ethnicity. All participants have similar facial hair. There is nothing distinguishable about the defendant's picture. [See *People v. Wright*, 297 AD2d 391; *People v. Cherry*, 150 AD2d 475; *People v. Shea*, 54 AD2d 391].

Further, nothing in the manner in which the detective displayed the array to the witness or in the comments he made to her before presenting her with the array can be construed as suggestive. [See *People v. Conway*, 274 AD2d 663; *People v. Kelone*, 278 AD2d 656].

As to the identification procedure in this case, the defendant has failed to establish by a preponderance of the evidence that the procedure was impermissible. Based on all the facts and circumstances presented in this case, the defendant's motion to suppress the civilian witness's in-court identification based upon an unnecessarily suggestive photo array is hereby denied.

To determine the question of whether the indictment should be dismissed due to impermissible prosecutorial delay, the Court is guided by the five (5) factors discussed below and delineated by the Court of Appeals in *People v. Taranovich*, 37 NY2d 442 (1975). Those factors used to decide if a defendant's rights have been violated are the same whether the claim is a speedy trial infraction or a due process claim based on prosecutorial delay. [See *People v. Vernace*, 96 NY2d 886 (2001)].

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1. **Extent of Delay** - Although nearly some forty-three (43) months elapsed between the date of the crime and the indictment in this case, a large portion of that period is not chargeable to the People. The period of time that the Yonkers police were without a SAFEIS operator was explained to the Court's satisfaction by Officer Byrne as based upon one officer's retirement, an unsuccessful attempt to train the retiree's replacement, and the need to train and qualify Officer Byrne. Such personnel disruptions in an agency the size of the Yonkers Police Department are not uncommon and any time lag in identifying the defendant as a suspect in the instant burglary should not inure to the benefit of a defendant who was neither arrested nor charged.

There is a twenty-nine (29) month period from when the defendant was identified as a prime suspect until he was indicted. Despite the fact this time frame as well as the forty-three (43) month span mentioned above both fall well within the statute of limitations, the Court will assume *arguendo*, that the twenty-nine (29) months is an unreasonable period requiring the People to establish good cause for the delay.

2. **Reason for the Delay** - The People cite the following as reasons for delaying seeking an indictment:

- (a) Defendant was already serving a life sentence.
- (b) The District Attorney's Office had limited manpower resources to devote to the case and these prosecutors were needed for more pressing matters.
- (c) The Yonkers Police Department had similar manpower concerns.
- (d) The People did not wish to unnecessarily inconvenience civilian witnesses.
- (e) Judicial economy was considered by the People.

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According to ADA O'Connor's testimony, prosecutors considered the defendant to be a dangerous career criminal and once his life sentence became imperiled after a partial appellate victory, they opted to seek an indictment in this case as a means of insuring his continued incarceration.

3. Nature of the Charges - While many of the cases cited by the People in favor of their position that the delay was reasonable and based on good cause involve homicide cases, it cannot be said that Burglary in the Second Degree, a class "C" violent felony is a trivial crime either. Residential burglaries often escalate into more serious crimes when perpetrators unexpectedly encounter household members. It is important to the quality of life enjoyed by the citizens of any city that crimes of this type be prosecuted.

4. Any Extended Period of Incarceration - The defendant's liberty was never affected by this investigation or indictment. He was arrested on the street in Yonkers nearly a month after this crime for two separate burglaries and any incarceration suffered by the defendant was a result of those prosecutions and convictions.

5. Has the Defense been Impaired by the Delay - Aside from mentioning the possibility of losing any alibi defense during oral argument at the end of these hearings, the record is devoid of any evidentiary proof that the defense has been impaired in any manner. While it is clear that the defendant need not demonstrate actual prejudice (*People v. Singer* 44 NY2d 241), it is worth noting no impairment of the defense is apparent on this record.

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As noted in *People v. Singer, supra*, “Thus, we [the Court] stated [in *Singer*] that a determination made in good faith to defer commencement of the prosecution for further investigation *or other sufficient reasons* (emphasis added), will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense. . . .” [See *People v. Lesiuk*, 81 NY2d 485].

An analysis of the *Taranovich* factors clearly favors the prosecution. There is no evidence that the People delayed the prosecution of the defendant to gain some tactical advantage.

Many of the cases cited by the defense deal with unexplained prosecutorial delays. [See *People v. Guzman*, 227 AD2d 219]. That is not the case here. The People have put forth several logical reasons why they choose not to seek an indictment after the defendant received a life sentence on another case. These reasons amount to a good faith exercise of prosecutorial discretion. Once prosecutors felt the defendant’s life sentence was in jeopardy, they promptly sought and obtained the instant indictment.

Clearly, a Class “C” violent felony is a serious crime that should only be dismissed in extreme circumstances. Those circumstances do not exist in this case.

Accordingly, the defendant’s motion to dismiss the indictment due to prosecutorial delay is denied in all respect.

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This constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
October 12, 2007


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