

People v Rhodes

2008 NY Slip Op 31794(U)

June 19, 2008

Supreme Court, New York County

Docket Number: 0001385/2007

Judge: Gregory L. Lasak

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SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-23

P R E S E N T: HON. GREGORY L. LASAK
Justice.

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

- against-

Indictment No. 1385- 07

Motion: To suppress identification
and statement evidence.

JACK RHODES,

Defendant.

-----X

BY: PAUL MONTGOMERY, ESQ.
ELIZABETH NEWTON, ESQ.
For the Defendant

RICHARD A. BROWN, D.A.
BY: DIANA MEJIAS, A.D.A.
Opposed

Upon the foregoing papers, and due deliberation had, suppression is denied. See accompanying memorandum this date.

Kew Gardens, New York
Dated: June 19, 2006



GREGORY L. LASAK
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-23

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

BY: GREGORY L. LASAK, J.S.C.

- against -

Indictment No.1385- 07

JACK RHODES,

Defendant.

-----X

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

An indictment has been filed against the defendant accusing him *inter alia* of the crime of Robbery in the First Degree (PL §130.35-1).

Defendant moves to suppress identification and statement evidence.

A pretrial suppression hearing was conducted before me on January 8, 9, 2008, February 25, 26, 2008, March 4, 10, 25 & 27, 2008.

I give full credence to the testimony of the People’s witnesses Detective Christopher Alger, Sgt. Kenneth Kearns, and defense witness Alexandra O’Neil. I find the testimony of Gregory Rosenfeld, credible in part and not credible in part.

I make the following findings of fact:

On March 7, 2007, Detective Chris Alger of the Queens Robbery Squad, was assigned to investigate a series of cases. Detective Alger met with the complainant Rose Morat. Rose Morat told Det. Alger that on March 4, 2007 she was leaving her building at 172-90 Highland Avenue, to go to church when she was approached by a male in the lobby area of her apartment building. As she walked with her walker through the lobby, the male was adjusting his bicycle. She believed the male was going to open the door for her when he suddenly began punching her in the face. The male grabbed her pocketbook as Rose Morat struggled to hold onto it. Ms. Morat was knocked to the ground and the male left the building with his bicycle. Rose Morat is 101 years old.

Det. Alger further testified he met with a second complainant Elizee Solange. Elizee

Solange told Det. Alger that on the same day, March 4, 2007, she walked into the lobby of her building, at 92-33 170th Street, and she was approached by a male who offered to assist her. Ms. Solange refused any assistance and entered the elevator. The male entered the elevator with her but exited a floor below hers. When Ms. Sloange exited the elevator and walked to her apartment door she was grabbed from behind by the same male who began to hit her, pushed her to the ground and removed a ring from her finger and her pocketbook. Ms. Solange is 86 years old.

Det. Alger testified that on or about March 9, 2007 he retrieved a security video tape from 172-90 Highland Avenue, Ms. Morat's building.

On March 9, 2007, Det. Alger spoke to Peter Minaqui who observed the security video¹ and stated he recognized the male as someone he observed in the basement shed area of 175-06 Devonshire Road on March 4, 2007.

Det. Alger further testified that he spoke to a Sylvia Diaz, on March 12, 2007, who states that she observed a male with a bicycle in the lobby of 172-90 Highland Avenue.

On April 17, 2007, Det. Alger met with a complainant, Angela Khan, regarding an incident that took place on December 30, 2006 at 88-30 182nd Street. Angela Khan stated that on that day she walked through her garage and entered the basement when she was followed by a male who began to talk to her and began to punch and kick her.

Det. Alger testified that, on April 19, 2007, he input heights, weights, and ages into the photo manager system which provided him with different photos including a photo of the defendant.

On April 19, 2007 Det. Alger put together a photo array, including a photo of the defendant. On April 20, 2007 Det. Alger separately showed the photo array to Peter Minaqui and Angela Khan. Peter Minaqui and Angela Khan both viewed the photo array and picked #5. Angela Khan stated #5 was the male who beat and robbed her. Peter Minaqui stated that #5 was the male that he observed in his building on the day Rosa Morat was assaulted. Photo #5 was a photo of the defendant, Jack Rhodes. As a result of the photo array identifications, Det. Alger issued a wanted card for the defendant, Jack Rhodes.

¹The video tape surveillance was released to the media

On April 27, 2007, Det. Alger was notified by the 76th precinct, and he went to Brooklyn and picked up the defendant. The defendant was brought to the Queens Robbery Squad where he was read his Miranda warnings. Det. Alger used a Miranda warning sheet², and the defendant was read each warning, wrote the word “yes” and initialed each question and signed the warning sheet. Also, present in the interview room was Det. Culver. Defendant waived his rights and was questioned by the Detective. When asked why he beat and robbed those old ladies, defendant responded “I have a drug problem, crack problem” and “my life is over”. Defendant further stated he had to show that he is remorseful without telling them exactly what happened.

Line-Ups

On April 27, 2007, Det. Alger placed defendant in a line-up³ along with five (5) others⁴. Peter Minaqui, Solange Elizee, Sylvia Diaz and Angela Khan were present at the 109 pct.. The witnesses were all placed in separate areas of the precinct. The first line-up was viewed by Solange Elizee. Solange Elizee recognized the defendant, #5, as the person who robbed and beat her. Sylvia Diaz then viewed the line-up and identified the defendant, #5. Angela Kahn viewed the line-up and identified the defendant, #5, as the one who beat and robbed her in December 2006. Peter Minaqui then viewed the same line-up and identified the defendant, #5, as the man who was inside his building and had a conversation with him on the day Rose Morat was robbed.

On April 27, 2007, Det. Alger showed the photo array⁵ to Rose Morat who identified, #5, the defendant, as the person who robbed her.

Det. Alger testified that a still photo was created from the video surveillance taken on the day Ms. Morat was robbed at 172-90 Highland Blvd. The still photo was used to create a wanted poster⁶ and distributed city-wide. The poster was distributed prior to the line-up identification in

²Miranda warning sheet People exhibit 3 in evidence.

³The line-up was memorialized. Photos of the line-up were entered as People’s 4, 5, & 6 in evidence.

⁴Defendant chose position number 5 in the line-up.

⁵Photo array, People’s exhibit 7 in evidence.

⁶Wanted poster, defense exhibit B marked for identification only.

this case. A second wanted poster was also created.⁷

On rebuttal, Det. Alger, testified that Defense exhibit D was created by Central Robbery Sector on or about April 23, 2007. Neither Defense exhibit D nor People's 9 were distributed to the public. They were maintained internally by the NYPD. Prior to any witnesses coming to the precinct to view the line-up all internal wanted posters in the precinct were taken down.

Det. Alger testified that he spoke to some of the witnesses concerning the wanted posters. He was informed by Ms. Elizee that the only poster that she had observed was a poster consisting of the still photo from the surveillance video taken at 172-90 Highland Avenue. Det. Alger further testified that on or about February 28, 2008, he spoke to Peter Minaqui at which time he questioned the witness as to whether he viewed any posters or photos of the defendant prior to identifying him in a photo/line-up. Mr. Minaqui told him he had only viewed the surveillance video on the news but never saw any posters containing the defendant's photo. When Det. Alger asked Angela Khan the same question, she stated she did not see any posters in her building but she did see the surveillance video on the news. Witness, Sylvia Diaz, stated she also saw the surveillance video on the news and that is when she informed the management office that she believed she saw the defendant in the lobby of Rose Morat's apartment building. Sylvia Diaz never saw any of the wanted posters. Det. Alger testified that he also spoke to Rose Morat on or about February 29, 2008. Rose Morat told him she did not recall seeing any posters in the lobby or elevator at her building. She did remember seeing the video surveillance on the news. Det. Alger stated that after he initially testified at the hearing he realized that he was mistaken as to how and which wanted posters were distributed to the public. Det. Alger was not involved in the distribution of those posters.

Sgt. Kenneth Kearns was called by the People and shown a wanted poster created in this case after the March 4, 2007 incident, displaying a still photo from the surveillance video.⁸ Sgt. Kearns stated that on or about March 9, 2007 the poster was circulated to areas where the crimes took place. At the time they did not know the identity of the person in the photo. Sgt. Kearns

⁷Wanted poster, defense exhibit E in evidence.

⁸Wanted poster, People's exhibit 8 in evidence.

further testified that his unit created a second wanted poster on or about April 25, 2007 which was distributed to the police throughout the city⁹ The second poster was distributed to members of the police department after the defendant's identity was known to the department. Sgt. Kearns stated that only the first poster, People's 8 in evidence, was distributed to the public. People's 8 consisted of a still photo taken from the video surveillance; a blurry black and white half body profile. One of those posters was displayed in Solange Elizee's apartment building.

Sgt. Kearns testified that on April 27, 2007, he picked up Solange Elizee and drove her to the 109 pct. to view a line-up. Sgt. Kearns did not observe any wanted posters in the building where Ms. Elizee was living. He described Ms. Elizee as an elderly, very frail woman who used a walker to assist herself in walking. Sgt. Kearns described the line-up viewing area as 4ft. by 8 ft. Because of the set up and size of the viewing area Ms. Elizee was unable to use her walker and required assistance in order to ambulate and view the line-up.

Sgt. Kearns testified that all six individuals in the line-up were seated and one by one they came up to the window holding their number. He stated Ms. Elizee identified number five as the man who robbed and beat her. He testified that when number five came to the window Ms. Elizee became very unsettled and shaky and he grabbed her arm and he held her steady. Sgt. Kearns testified that neither he nor anyone else in the viewing area told Ms. Elizee that she was cringing when she looked at number 5 in the line-up, nor did anyone squeeze her hand.

Defense case

Defendant called Gregory Rosenfeld as a witness. Mr. Rosenfeld testified that he was an investigator for the Legal Aid Society, for thirteen (13) months. Mr. Rosenfeld testified that he graduated from the University of Colorado where he received a degree in English/Philosophy. Mr. Rosenfeld does not have a law enforcement background nor did he take any law enforcement or criminal justice classes while in college. Mr. Rosenfeld testified that the extent of his training consisted of a four day conference and a weekly two month training course offered by the Legal Aid Society all conducted in a classroom setting.

Mr. Rosenfeld stated that he spoke to the complainant, Solange Elizee, on two occasions.

⁹Wanted poster, People's exhibit 9 in evidence.

On May 22 & 24, 2007, he went to her apartment¹⁰, identified himself as an investigator and asked to speak to her about what happened on March 4, 2007 and to discuss the identification procedure. At the time of this interview Mr. Rosenfeld had been employed by the Legal Aid Society for approximately four (4) months. Mr. Rosenfeld testified that Ms. Elizee told him she was unable to identify anyone from a picture but she later viewed a line-up. Mr. Rosenfeld testified that he questioned Ms. Elizee at length regarding the line-up. She told him two officers were present with her and they held her hands as the individuals in the line-up stepped up to the window for her to view them. She stated she was uncertain what numbers they were wearing but thought "perhaps, this one" as to number two or three, but it wasn't two because he had lighter skin. Mr. Rosenfeld stated that Ms. Elizee told him, after the line-up was completed, the police officer told her that she would cringe when number five (5) stepped forward. He further stated that when questioned regarding number five (5) she was unable to identify him but ultimately she identified number five (5). Jack Rhodes, as the individual who beat and robbed her. Ms. Elizee told him she did not see any photos on TV but there were pictures of the man who attacked Rose Morat in her building, one in the elevator which was later removed. Ms. Elizee also told Mr. Rosenfeld that the police told her that fingerprints of the defendant were found. She was unsure if she was told before or after the line-up. Mr. Rosenfeld testified that he kept notes as to his interview with Ms. Elizee and when questioned as to how sure she was that the man identified, the defendant, was the man who attacked her she stated she was one hundred percent (100%) certain.

Defendant further called Alexandra O'Neil, a Daily News Reporter, as a defense witness. Ms. O'Neil testified that she has been employed by the Daily News for two (2) years. During this period she has covered several hundred if not thousands of stories. Ms. O'Neil testified that she received an assignment to cover a particular story concerning a woman by the name of Rose Morat and Solange Elize. At the time she had been employed by the Daily New for one (1) year.

On April 27, 2007, Alexandra O'Neil went to Rose Morat's home to speak to her about the suspect, Jack Rhodes, whom the police had in custody. Ms. O'Neil testified she was in possession of a picture of the defendant, Jack Rhodes. Ms. O'Neil did not recall where she received the photo

¹⁰At the time of this interview Mr. Rosenfeld had only covered between 40 and 50 cases as an employee of the Legal Aid Society.

nor was she able to describe that photo. Ms. O’Neil state she went to Ms. Morat’s apartment door and had a brief conversation with her. She stated Ms. Morat opened the door slightly and she had a conversation with her in the doorway that lasted approximately five (5) minutes. Ms. O’Neil was unsure what time of day it was, how she entered the building or what floor she went to. Ms. O’Neil stated she asked Ms. Morat about the fact that the police had a suspect in custody and she showed her the photo of the defendant. She asked Ms. Morat whether the photo was the suspect. Ms. Morat said she could not be sure, but if it was the right person she was glad the police made an arrest. Ms. O’Neil testified that she was paraphrasing the conversation between herself and Ms. Morat. Ms. O’Neil was unable to state specifically how long Ms. Morat viewed the photo. Ms. O’Neil’s memory was vague and she did not recall many of the details as this was one of hundreds if not thousands of interviews she has conducted in her career.

Ms. O’Neil stated she no longer had any notes she had taken or the photo she possessed on that day. Ms. O’Neil stated Ms. Morat was a little frazzled and irritated by another reporter trying to interview her. Ms. O’Neil thought because Ms. Morat had received many calls from reporters seeking to interview her. Ms. O’Neil testified that there were other reporters present in the building when she left Ms. Morat’s door. Ms. O’Neil’s own testimony was that Ms. Morat seemed irritated, she was unsure of the lighting conditions, and they stood in the doorway for only a few minutes. There is nothing in the record to support whether Ms. Morat actually looked at the photo Ms. O’Neil was holding. Regardless, the possible viewing of the photo under these conditions could not have tainted any later identification procedures.

I make the following conclusions of law:

The defendant seeks suppression of the identification by the complainants/witnesses. The New York State Constitution prohibits the introduction at trial of the identification evidence obtained by the government or its agents, if the identification was secured through unduly suggestive means. An identification procedure is “unduly suggestive” if it “creates a substantial likelihood that the defendant would be singled out for identification.” People v. Chipp, 75 N.Y.2d 327, 335, 553 N.Y.S.2d 72 (1990) *cert. denied*, 498 U.S. 833 (1990).

The photographic arrays at issue were entered into evidence as People’s Exhibit “1, 2 & 7”¹¹

¹¹All three photo arrays are identical.

for purposes of the hearing and were reviewed by the Court. Nothing about the arrays was suggestive. Under New York rules of evidence, trial testimony regarding pre-trial photographic identification procedures is precluded, People v. Caserta, 19 NY2d 18 (1966); People v. Cioffi, 1 NY2d 70 (1956). Admissibility notwithstanding, however, such procedures are still subject to constitutional scrutiny. Thus, a hearing was held, as is required, to determine whether anything in the makeup of the array itself or the manner in which it was conducted suggested to the witness that she should identify the defendant as the perpetrator and in this way tainted any further prospective identifications.

At the hearing the prosecution bears the burden of going forward with proof that the pre-trial identification procedure was legally conducted and non-suggestive. Once the People have gone forward, it is the defendant who bears the burden to establish by a preponderance of the credible evidence that the identification procedure employed by the authorities was improper, People v. Chipp, 75 NY2d 327, *cert. denied*, 498 US 833(1990).

The photo-array shown to the complainants contained six photographs, one of whom was identified as the person who robbed them. Under these circumstances the photo array did not taint the later line-up identification by the complainant.

The court is satisfied with the testimony of Sgt. Kearns as to the placement and distribution of the wanted posters. Det. Alger further questioned all the witnesses regarding any possible viewing of any wanted posters containing defendant's photo. None of the complainants/witnesses viewed any poster displaying a full photo of defendant's face. The fact that Ms. Elizee may have observed the wanted poster¹² in her elevator which displayed the still photo from the surveillance video, produced on March 9, 2007, could not have tainted any later identification. Any suggestiveness is attenuated by the passage of time between the viewing of the surveillance photo and the later identification. People v. Thompson, 17 AD 3d 138 (2005).

The Court has further reviewed photographs of the line-up¹³ and found the makeup of the individuals placed in the line-up to be similar to the defendant and not suggestive in any way.

¹²People's exhibit 8 in evidence.

¹³Three photos of the line-up were admitted into evidence as People's 4, 5 & 6.

At the hearing the prosecution bears the burden of going forward with proof that the pre-trial identification procedure was legally conducted and non-suggestive. Once the People have gone forward, it is the defendant who bears the burden to establish by a preponderance of the credible evidence that the identification procedure employed by the authorities was improper, People v. Chipp, 75 NY2d 327, *cert. denied*, 498 US 833(1990).

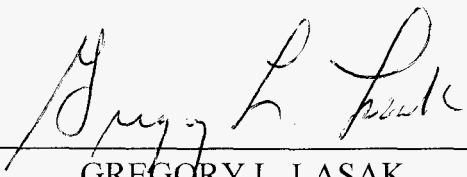
Here, based upon the totality of circumstances, this Court finds that the manner in which the arrays were displayed was proper and the line-ups themselves were not designed to single out the defendant for purposes of identification. The identification procedures in this case were not impermissibly suggestive nor did any events give rise to a substantial likelihood of misidentifications. Thus, no suppression is warranted.

Defendant also seeks suppression of his statements. Addressing defendant's statements made on April 27, 2007 to Detective Alger, this Court finds that the People have met their burden of establishing beyond a reasonable doubt that defendant's statement was voluntary. See People v. Witherspoon, 66 N.Y.2d 973, 498 N.Y.S.2d 789 (1985). The evidence indicated that defendant was read each and every Miranda warning by Detective Alger and that he freely, voluntarily and knowingly waived each and every right¹⁴ before agreeing to speak to the detective. The People have satisfied their burden of demonstrating that defendant was neither coerced, tricked, nor pressured into making his statement, but that he freely chose to speak (See People v. McKie, 25 N.Y.2d 19 [1969]; People v Kaye, 25 N.Y.2d 139 [1969]). Thus, crediting the testimony of Detective Alger, this Court finds that defendant was fully and properly apprised of his Miranda rights and knowingly, intelligently and voluntarily waived them. See People v. Sirno, 76 N.Y.2d 967, 563 N.Y.S.2d 730 (1990).

¹⁴People's Exhibit 3 in evidence.

Accordingly, the defendant's motion to suppress the identification and statement evidence is denied.

Kew Gardens, New York
Dated: June 19, 2008



GREGORY L. LASAK
JUSTICE SUPREME COURT