

People v Cirino

2008 NY Slip Op 33757(U)

January 7, 2008

Supreme Court, Oneida County

Docket Number: 07-239

Judge: Barry M. Donalty

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This opinion is uncorrected and not selected for official publication.

held. The hearing was held on December 4 and 5, 2007. The People produced Investigators Robert Kopek, Steven White and Anthony Franco and Patrolman Raymond Maldonado of the Utica Police Department, Assistant District Attorney Bridget Scholl and Stanley Weidman of the Onondaga County District Attorney's Office, Gabriel Ramos, Investigator Samuel Serrano of the New York State Police, Dennis Rodgers, Jose Nunez and Jerry Scott as witnesses and the defendant rested without calling any witnesses.

The Court has determined the credibility of the witnesses, and upon such determination, makes the following findings of fact.

Findings of Fact

On April 12, 2007 at 9:25 p.m., Inv. Kopek overheard a radio transmission reporting shots fired on the 1100 block of Neilson Street in the City of Utica. While en route, he learned that there was an officer down.

Previous to this, Ptl. Thomas Lindsey had reported to dispatch that he had stopped a car at that location and advised dispatch of the description of the car. Ptl. Lindsey was the officer down after having been shot at the scene. He was deceased as a result of the injuries received.

Inv. Kopek also heard Ptl. Fernald call out over the radio that he had pulled over the vehicle that Ptl. Lindsey had stopped. Inv. Kopek proceeded immediately to Ptl. Fernald's

location on John Street where he had detained the red Dodge Neon and two passengers.

The male passenger, Sammy Rivera, stated that a guy in a white hoody shot the cop. The female passenger was Naomi Diaz. Inv. Kopek observed what he believed to be brain matter and blood on the outside of the driver's side door of the Neon.

Sammy Rivera and Naomi Diaz were taken into custody and transported to the Utica Police Department to be interviewed.

As a part of the investigation, Inv. Kopek sought to identify and interview associates of Mr. Rivera. He was able to review photographs provided by Naomi Diaz of Mr. Rivera and others. (Hearing Exhibit #4).

While he was reviewing the pictures, Inv. Kopek recalled an incident in August of 2006 in which the defendant was with some of the same people depicted in the photographs. The investigator then sought to locate and interview the defendant seeking any helpful information he might have.

He was able to locate the other individuals depicted in the photographs (Hearing Exhibit #4) and eliminate them as suspects.

Inv. Steven White was assigned to assist in the homicide investigation. On April 17, 2007, he interviewed the defendant believing that he may have information about the murder. The defendant was in custody at that time on an Onondaga County

warrant. Ptl. Raymond Maldonado assisted in the interview as a Spanish interpreter for Inv. White. A statement was taken from the defendant, but no admissions were made at that time. Once the statement was completed, it was read to the defendant, the defendant indicated it was true and signed it (Hearing Exhibit #9, defendant's statement).

After the April 17, 2007 interview, the defendant was in custody pursuant to the Onondaga County warrant, and was lodged at the Justice Center in Syracuse.

Assistant District Attorney Bridget Scholl was assigned to prosecute the defendant on the drug case in Syracuse. In February of 2007, the Grand Jury indicted him charging him with Criminal Possession of a Controlled Substance in the Fifth Degree. The defendant failed to appear and a bench warrant, which resulted in his April 17, 2007 arrest, was issued.

On April 18, 2007, the defendant was arraigned in Onondaga County Court and Charles Keller was assigned to represent him. He rejected an offer of one year and Ms. Scholl informed counsel that she would represent the case to a Grand Jury and would seek an indictment for Criminal Possession of a Controlled Substance in the Third Degree.

On April 21, 2007, Sammy Rivera was interviewed again by police and during this interview he disclosed that he knew the defendant and that he was the person who murdered Ptl. Lindsey.

Some time after May 3, 2007, Attorney Keller approached Ms. Scholl and told her that the defendant had information regarding the gun used to kill Ptl. Lindsey, and sought to trade the information for a favorable disposition of his case.

On May 14, 2007, a debriefing of the defendant was scheduled at the Onondaga County District Attorney's office at his request. The defendant arrived at about 2:45 p.m. and was with Charles Keller, his attorney, and Gabriel Ramos, an interpreter hired by the defendant. Invs. Dean Decker and Stanley Weidman and ADA Scholl of the District Attorney's Office were present to listen to what the defendant had to say. As translated by Mr. Ramos, the defendant said that he knew the location of the gun used in the Lindsey homicide. During the interview, Attorney Keller told ADA Scholl that the defendant wanted to work his case out. He was told that if the defendant gave truthful information concerning the location of the murder weapon, then she would not file the class B felony charge.

After about one hour and fifteen minutes, the District Attorney's investigators believed it prudent to contact the Utica Police to continue the interview. Both the defendant and his attorney agreed and the interview ceased pending arrival of the Utica Police. The defendant was provided with dinner while he awaited their arrival.

Invs. Kopek and Serrano traveled to Syracuse to meet with

the defendant. They arrived at 6:30 p.m. and met with the defendant, his attorney, two investigators from the Onondaga County District Attorney's office and the defendant's interpreter. Inv. Serrano, who is fluent in Spanish, conducted the interview and translated the questions into Spanish and the defendant's responses into English. Mr. Ramos was present and verified the translation as the interview was ongoing.

The defendant provided information indicating that he knew the location of the murder weapon.

They spoke to the defendant for about two hours during which time the defendant was provided with breaks (Hearing Exhibits #1 and #2, DVDs containing the contents of the interview). At the end of the interview, Mr. Keller and the defendant agreed to other interviews as necessary and arrangements were then made to contact Mr. Keller at a future time to assist with locating the gun that was used.

Within one week, the defendant was brought to Utica to locate the gun with his attorney present.

On June 1, 2007, Invs. Kopek and Serrano returned to Syracuse to speak with the defendant once again. The defendant was present with his attorney and interpreter. During this interview, which lasted less than one hour, he provided additional information (Hearing Exhibit #3, DVD containing the contents of the interview). Attorney Keller told the investigators at that time that he only

represented the defendant on the pending Syracuse drug case and, once disposed of, he would no longer be representing him.

On June 6, 2007, the defendant pled guilty to Criminal Possession of a Controlled Substance in the Fifth Degree in Onondaga County Court and was sentenced to time served. He was released from custody. Upon leaving the Justice Center, he was met by Invs. Serrano and Kopek. They told him that they wished to continue the interview. He agreed and voluntarily accepted their ride back to Utica. There was no conversation in the car during the transport. At 1:45 p.m., they arrived at the Utica Police Department at which time the defendant voluntarily accompanied the investigators to an interview room. In that room there was a time line set up regarding the defendant's various statements concerning his whereabouts on April 12, 2007.

Prior to asking any questions, Inv. Serrano advised the defendant of his Miranda rights in Spanish by reading them aloud from a form (Hearing Exhibit #8). The defendant thereafter acknowledged that he understood his rights, initialed each right and agreed to speak with the investigators without counsel present. In addition, Inv. Serrano reviewed the "Waiver of Rights" portion on the form which consisted of two questions. The questions asked if the defendant understood his rights and whether he wished to speak to an attorney. The investigator read the two questions aloud and the defendant answered them by writing the word "yes"

next to the first question and "no" next to the second question, thereby agreeing to the interview without benefit of counsel. Both the defendant and Inv. Serrano signed the bottom of the document. The defendant waived his rights at 2:10 p.m.

After receiving and waiving his rights, the defendant spoke with Invs. Kopek and Serrano. During the interview, the defendant now claimed he was present when the murder occurred. The interview lasted for five hours and concluded at about 7:00 p.m. During the interview, the defendant was provided with pizza, water and bathroom breaks. Upon completion of the interview, the defendant was arrested (Hearing Exhibits #5, #6 and #7, DVDs containing contents of the interview).

While the defendant was housed in Onondaga County and in Oneida County, several inmates came forward disclosing conversations had with the defendant concerning the murder while he was in jail. They were not placed with the defendant by law enforcement in order to obtain admissions or engage him in conversations.

On April 23, 2007, Inv. Anthony Franco was in Syracuse working on another case when he was asked to interview inmate Jerry Scott at the Onondaga County Correctional Facility. He had never spoken to Mr. Scott prior to that date. Mr. Scott had contacted Jail Ministries and asked them to contact the Utica Police Department because he had information regarding a homicide. During

the interview, Mr. Scott indicated that he had spoken to the defendant about the murder four or five times prior to April 23, 2007. Inv. Franco told Mr. Scott in the future not to initiate any conversations with the defendant, that he could listen but not to solicit any information.

Mr. Scott testified that he met the defendant on April 20, 2007 and on numerous occasions, when the story aired on the news, the defendant would converse with Mr. Scott about it. Mr. Scott said that the defendant spoke about the murder nearly every day. At the end of April, Mr. Scott was being moved to Jamesville Correctional Facility and prior to leaving, he wished him luck, whereupon the defendant again spoke about the murder.

On April 24, 2007, Mr. Scott called Inv. Franco and said that he had additional information. Again, Inv. Franco told him not to initiate any conversations with the defendant.

On May 6, 2007, Inv. Serrano traveled to Elmira Correctional Facility to interview Jose Nunez, an inmate who said he had information concerning the defendant's knowledge of the murder. Mr. Nunez provided information concerning statements made by the defendant at Onondaga County Correctional Facility, where he met the defendant and had many conversations with him. Mr. Nunez had no prior contact with the police and talked to them only after leaving the Onondaga County Correctional Facility in May of 2007.

In June of 2007, Dennis Rodgers was an inmate at the

Oneida County Correctional Facility and saw the defendant in jail but did not know why he was there. On June 10, 2007, Mr. Rodgers was in the medical unit. He saw the defendant enter the unit and overheard a conversation between him and another inmate concerning the Lindsey murder. On June 19, 2007, Mr. Rodgers appeared in County Court and upon return in the van, he heard other inmates asking the defendant questions concerning the Lindsey case. On June 20, 2007, Mr. Rodgers was returned to County Court. At that time, he asked to speak to the police and told them what he had heard the defendant say about the murder.

I hereby makes the following conclusions of law.

Conclusions of Law

On May 14, 2007, Invs. Kopek and Serrano were contacted by the Onondaga County District Attorney's Office to interview the defendant based on information that he had provided concerning the Lindsey murder. The defendant had volunteered information concerning the location of the gun in an effort to receive a benefit on a pending, unrelated drug charge in Onondaga County. Upon arrival at the District Attorney's Office, Invs. Kopek and Serrano met with the defendant in the presence of his attorney, Charles Keller, who represented him on the Syracuse drug charge.

On June 1, 2007, Invs. Kopek and Serrano met with the defendant and his attorney a second time to obtain additional information. During the second interview, Attorney Keller told the

investigators that he would no longer be representing the defendant once the Syracuse drug case was concluded. Counsel also accompanied the defendant to Utica when he was transported for purposes of locating the gun.

Perhaps believing in the adage that the best defense is a good offense, it is clear that it was the defendant, through his counsel, who initiated contact with the police, that counsel was present at all times during the interviews, and that the defendant was questioned in an investigatory rather than an accusatory manner (See, People v. Murphy, 43 AD2d 1276, People v. Regan, 21 AD2d 1357; People v. Cunningham, 13 AD3d 1118, lv. denied 4 NY3d 829, 5 NY3d 761). The Court determines beyond a reasonable doubt that the defendant's rights were in no way violated on any of the above occasions, and his motion to suppress is denied.

On May 6, 2007, the defendant was released from the custody of the Onondaga County Correctional Facility at the conclusion of his drug case. As he was being released, Invs. Kopek and Serrano offered the defendant a ride back to Utica for further interview which the defendant accepted. There were no conversations in the vehicle relating to this case.

Upon arrival at the Utica Police Department, the defendant voluntarily agreed to speak with the investigators as a continuation of the prior conversations. The Court determines that the defendant was not in custody at this time. See Matter of Kwok

T, 43 NY2d 213, 220; People v. Yukl, 25 NY2d 585. See also, People v. Hodge, 44 NY2d 553, 559; People v. Vogler, 201 AD2d 890, lv denied 83 NY2d 916.

Therefore those statements do not fall within the requirements of Miranda v. Arizona, 384 US 436. Custody is required before it is necessary for an officer to advise an individual of his or her Miranda rights. "In deciding whether a defendant was in custody prior to receiving his warnings, the subjective beliefs of the defendant are not to be the determinative factor. The test is not what the defendant thought, but rather what a reasonable man, innocent of any crime, would have thought had he been in the defendant's position. (Hicks v. United States, 382 F2d 158; see also People v. Rodney P [Anonymous], 21 NY2d 1; Williams v. United States, 381 F2d 20; Fuller v. United States, 407 F2d 1199; State v. Seefeldt, 51 NJ 472; Conyers v. United States, 237 A2d 838; State v. Bower, 77 Wn 2d 634)" People v. Yukl, supra at 589; see also, People v. Centano, 76 NY2d 837, 838.

In making such a determination, the hearing court is guided by factors which include '(1) the amount of time spent with the police, (2) whether the person's freedom of action was restricted, (3) the location and atmosphere under which the questioning took place, (4) whether constitutional rights were administered, and (5) whether the questioning was investigatory or accusatory in nature.'" (People v. Mosley, 191 AD2d 893).

Any reasonable person in the defendant's position would not have thought he was in custody or that his freedom of movement had been restricted in any way. This was simply a continuation of the alleged cooperation he was providing concerning the murder. Therefore, there was no requirement or obligation that the investigators administer to the defendant any rights pursuant to Miranda v. Arizona, supra. See, People v. DeTore, 34 NY2d 199, 209.

Thus, the statements made by the defendant were not the product of custodial interrogation to which the Miranda warnings would apply. See, People v. Mallory, 175 AD2d 623.

Even if the Court were to determine that the defendant was in custody at the Utica Police Department the motion would also be denied.

Prior to any interview, the defendant was properly advised of his rights as required by Miranda, and in his native language, after which he indicated that he understood his rights and agreed to the interview without counsel.

According to the testimony, Attorney Keller clearly indicated that his representation of the defendant was only with regards to the Onondaga drug case. Once that case was disposed of, his representation of the defendant ceased. See, People v. Arthur, 22, NY2d 325, People v. Pinzon, 44 NY2d 458. "A criminal action...terminates with the imposition of sentence or some other

final disposition in a criminal court of the last accusatory instrument filed in the case" (CPL §1.20[16][c]). Thus, defendant was no longer represented by counsel on that matter (People v. Bing, 76 NY2d 331, 344; People v. Brant, 277 AD2d 1022, lv. denied 96 NY2d 756). No attorney-client relationship existed between Attorney Keller and the defendant with respect to the murder case. The defendant has failed to establish such a relationship (see, People v. Rosa, 65 NY2d 380, 387, People v. Vasquez, 252 AD2d 989, lv. denied 92 NY2d 907, People v. Burdo, 91 NY2d 146, 149-150).

The Court determines beyond a reasonable doubt that the defendant's oral statements were not in any way or manner the product of any violation of the defendant's constitutional rights and such statements shall be admissible at trial provided that the proper foundation is laid.

The defendant also alleges that certain prosecution witnesses, to whom the defendant made admissions in jail, were acting as agents of the prosecution. Clearly, the inmate-witnesses, in each instance, had not solicited the statements, the statements had been freely volunteered by the defendant and the prosecution had not promised the inmate-witnesses any benefit in return for the information that they provided.

Jerry Scott had contacted Jail Ministries in Syracuse and asked them to contact the Utica Police Department because he had information regarding a homicide. After his initial meeting with

Inv. Franco, Mr. Scott contacted him again on three separate occasions with additional information.

Jose Nunez contacted the police as well but only after he had been transported to State Corrections from Onondaga County to report information that he received from the defendant while being incarcerated with him in Syracuse.

After overhearing conversations between the defendant and other inmates, Dennis Rodgers initiated contact with the police to report what he had heard the defendant say.

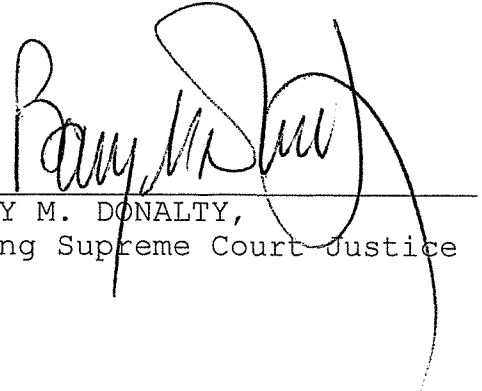
Jerry Scott, Jose Nunez and Dennis Rodgers had no contact with the police before they had overheard conversations of the defendant while he was incarcerated. Moreover, the inmate-witnesses had not been coached or instructed by the police or prosecutors to seek out or initiate contact with the defendant in order to secure from him information concerning the Lindsey murder (See People v. Cardona, 41 NY2d 333). Based on the testimony of Dennis Rodgers, Jose Nunez and Jerry Scott, the Court determines that in each instance, the inmates were not acting as agents of the police, and thus the defendant's motion is denied (see, People v. Cardona, supra at 335; People v. Keith, 23 AD3d 1133, 1134; Massiah v. United States, 377 US 201, 205-207; People v. Fewell, 43 AD3d 1293, 1295).

Therefore, the Court determines beyond a reasonable doubt that the defendant's oral statements to the inmates were not in any

way or manner the product of any violation of the defendant's constitutional rights and such statements shall be admissible at trial provided that the proper foundation is laid.

The foregoing constitutes the opinion, decision and order of this Court.

ENTER.



A handwritten signature in black ink, appearing to read "Barry M. Donalty", is written over a horizontal line. The signature is stylized and cursive.

BARRY M. DONALTY,
Acting Supreme Court Justice

Decided: January 7, 2008