

People v Alke

2009 NY Slip Op 33401(U)

March 30, 2009

Supreme Court, Queens County

Docket Number: 1910/08

Judge: Robert J. Hanophy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM TAP C QUEENS COUNTY
125-01 Queens Boulevard, Kew Gardens, New York

P R E S E N T:

HON. ROBERT J. HANOPHY
Justice Supreme Court

THE PEOPLE OF THE STATE OF NEW YORK

: Ind. No. 1910/08
:
: Motion to Suppress
:
:
:
:
:
:
:

-against-

ERIC ALKE,

Defendant.

The following papers numbered
1 to 4 submitted in this motion

Gerard Marrone, Esq.
For the motion

Daniel Saunders, A.D.A.
Opposed


Notice of Motion and Affidavits Annexed
Answering and Reply Affidavits

Papers Numbered
1-2

Upon the foregoing papers and in the opinion of the Court herein, the defendant's motion to suppress is denied for the reasons stated in the accompanying memorandum of this date.

GRANTED:

Date: March 30, 2009



Robert J. Hanophy, J.S.C.

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, TAP C

THE PEOPLE OF THE STATE OF NEW YORK	:	By: Robert J. Hanophy, J.S.C.
	:	
-against-	:	Dated: March 30, 2009
	:	
ERIC ALKE,	:	Ind. No. 1910/08
	:	
Defendant.	:	
	:	

The defendant, Eric Alke, is charged under indictment number 1910/08 with Manslaughter in the Second Degree and other related offenses. This Court conducted a Huntley hearing on December 2 and 16, 2008. To sustain their burden of proof, the People called Sergeant Claudia Bartolomei and Detectives Ralph Maher and Michael Kane. The Court finds the testimony of these witnesses to be credible and makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Sergeant Claudia Bartolomei became involved in the investigation into the death of Adrian Moldovan that occurred on June 26, 2008 when she received a radio call of a 1013 which is a call that an officer needs assistance. The call said "federal agent, shots fired." The location of the shooting was 72-07 Kessel Street in Queens County.

Upon receiving the call, Sergeant Bartolomei left the precinct and responded to the scene of the shooting. When she arrived at the scene there were already EMS workers tending to the victim and police officers establishing a crime scene. The victim was in the driveway of this two-family residence. Detective Bartolomei saw a gun that was about one to two feet from the victim laying on the grassy part of the driveway. There were also four civilian witnesses present when she arrived. The officers at the scene informed Sergeant Bartolomei that the victim had been shot.

When Sergeant Bartolomei arrived at the scene, the defendant was present in the driveway speaking on his cell phone. He was walking back and forth from his doorway to the opposite side of the house. The patrol sergeant at the scene showed Sergeant Bartolomei the defendant's Customs and Border Patrol Identification and his Badge. After seeing the defendant's identification as a federal agent, Sergeant Bartolomei went over to the defendant and asked him to get off the phone, that she needed to speak to him. The defendant ended his conversation and the Sergeant then asked the defendant, "What happened?" This conversation took place in the driveway.

When asked "What happened?" the defendant responded that the victim had asked to see the defendant's off-duty gun. The defendant said that he showed it to the victim and told the victim, "There it is, but don't touch it." After that occurred the defendant said he didn't know what happened. There was a shot but the defendant said he didn't know what happened. Sergeant Bartolomei then asked the defendant to show her where the gun was and from the doorway the defendant pointed to a ledge that led down into the defendant's basement apartment. The defendant said "That's where I put it." The defendant said "You know. It makes sense. You know. I'm off-duty." "You know. You understand." Sergeant Bartolomei then asked the

defendant if the victim was a friend of his and the defendant said "No. He is the landlord's friend." The defendant was not advised of his Miranda rights prior to making any of these statements. He had not been placed under arrest and he was not in handcuffs.

After speaking to the defendant, Sergeant Bartolomei asked the defendant to go back to the precinct and the defendant said that he would go.

Sergeant Bartolomei testified that at the scene the defendant had blood on his face, blood on his hands and that he was pacing back and forth. The blood she saw appeared to be wet. The defendant did not, however, appear to be injured in any way. The defendant also had a strong odor of alcohol on his breath, his eyes were very red, he had slurred speech and he may have been intoxicated.

Detective Michael Kane was also assigned to assist in this investigation. Pursuant to his investigation, Detective Kane went to the scene of the shooting. When Detective Kane went to the scene of the shooting he saw the defendant standing there covered in blood. Detective Kane asked the defendant to come back to the station house with him. Detective Kane described the defendant as intoxicated but cooperative. Detective Kane drove the defendant to the precinct along with Detective Bahrenburg. Before entering the car, Detective Kane patted the defendant down. He did so for his safety and the defendant's safety. On the way to the precinct there was a conversation with the defendant to the effect that everything was going to be all right because he was a witness to an accidental suicide.

They arrived at the precinct around 3:45 p.m. When they got to the precinct, Detectives Kane and Bahrenburg sat down with the defendant and proceeded to ask what happened. The defendant was not handcuffed or told that he was under arrest and he was not advised of his

Miranda rights prior to this interview.

Detective Ralph Maher was also assigned to assist in this case. He went to the crime scene for about an hour and then went to the precinct. While back at the precinct, Detective Maher saw the defendant for the first time while the defendant was sitting in the precinct interview room which is also a room used as a lunchroom. The defendant was by himself. He was not handcuffed. Detective Maher opened the door and saw the defendant had blood on his mouth, chest and hands and on his clothing. Some of the blood appeared to be wet and some dry. The defendant did not appear to have any injuries of his own. When Detective Maher saw the defendant's appearance, Maher asked the defendant how he got covered with blood. The defendant responded that he gave CPR to a friend that shot himself. Detective Maher asked the defendant how that happened and the defendant proceeded to make statements regarding how the shooting occurred. Detective Maher gave the defendant a soda to drink during the interview. Detective Maher formulated an opinion that the defendant was intoxicated. Detective Maher did not inform the defendant of his Miranda rights before speaking to the defendant.

The first interview with the defendant lasted about 45 minutes. The defendant was cooperative and willing to answer questions. He never asked for a lawyer and never asked to leave. He was not prevented from leaving and eventually did leave. The defendant spoke to one detective regarding his activities of the day prior to the shooting, during the shooting and after the shooting. The defendant was at the precinct for about three or four hours until he left the precinct.

While the defendant was being interviewed at the precinct, his attorney arrived at the precinct and the defendant's attorney was permitted unfettered access to the defendant. At about

4:55 p.m., the defendant said that he didn't want to answer any more questions until a union chief or supervisor from his job was present. When the defendant said that he did not want to answer any more questions, he was not asked anymore questions. The defendant was not arrested until August 2008.

Sergeant Bartolomei did not speak to the defendant again when she went back to the precinct, but she saw the defendant at the precinct seated in the interview room with his attorney when she returned. Also present at the precinct were six to eight members of the United States Custom and Border Patrol Agency. After about three to four hours the defendant left the precinct along with the members of the Customs Agency and his attorney.

When Sergeant Bartolomei told the defendant he was free to leave, the defendant shook her hand and thanked her for the way he was treated. He said that he was very grateful. While at the precinct the defendant was allowed to maintain possession of his cell phone and was permitted to speak to the other members of United States Customs Agency.

CONCLUSIONS OF LAW

The defendant, Eric Alke seeks to suppress all of the statements allegedly made by him to the various law enforcement officials on the day this incident occurred that are contained within the notice served by the People pursuant to C.P.L. §710.30 (1)(a). The defendant argues that he was in custody at the time all of these alleged statements were made and because he was never advised of his Miranda warnings these alleged statements must be suppressed. Contrary to the

defendant's claims the Court finds no basis to suppress.

At the outset, the Court finds that all of the statements allegedly made by the defendant were voluntarily made. The credible evidence clearly established that although the defendant may have been intoxicated the statements that he allegedly made were the product of his free will and his obvious intention to cooperate with the police in their investigation of this incident. There was simply no evidence presented at the hearing to show that any of the alleged statements were involuntarily obtained. The Court finds that the People have met their burden of proving the voluntariness of the statements allegedly made here by the defendant beyond a reasonable doubt.

Furthermore, the Court finds that at the time the defendant made all of the alleged statements to the police, the defendant was not in custody. Therefore, the fact that evidence shows that the defendant was not advised of his Miranda rights prior to making the alleged statements to the police does not require suppression.

In deciding whether a person is in custody, 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. The factors to be considered in applying this objective standard included, (1) the amount of time the defendant spent with the police; (2) whether his freedom of action was restricted in any significant manner; (3) the location of and the atmosphere under which the defendant was questioned; (4) the degree of cooperation exhibited by the defendant; (5) whether he was apprised of his constitutional rights; and (6) whether the questioning was investigatory or accusatory in nature.

Here, the Court finds that the defendant voluntarily agreed to accompany the police to the station house for questioning. See, People v. Diaz, 84 N.Y.2d 8391 (1984). The absence of

handcuffs and the defendant's cooperative attitude are all indicative of the voluntary accompaniment. See, People v. Hatzfeld, 240 A.D.2d 758 (2d Dept. 1977). Furthermore, a police officer's frisking a citizen is not sufficient and of itself to create a custodial setting. See, People v. Davis, 229 A.D.2d 696 (4th Dept 1996). The mere fact that the defendant was frisked before entering the police vehicle pursuant to police policy is not dispositive on the issue of custody. See, People v. Morales, 65 N.Y.2d 997 (1985).

Additionally, the Court finds that the simple fact that the defendant was interviewed at the police precinct does not necessarily mean that he was considered to be in custody at the time of the interview. See, Hicks v. United States, 382 F.2d 158. The evidence presented at the hearing established that the defendant voluntarily agreed to go back to the precinct to be interviewed with respect to the shooting death of the victim. Since he was present during the shooting, it was clearly reasonable to conclude that the defendant was being interviewed as a witness. Moreover, a reasonable person innocent of this crime in the defendant's position would have thought they were not in custody during this interview.


Here, the Court finds no reasonable man in the defendant's position that was innocent would have concluded that he was not in custody, therefore the Court finds that the defendant did not need to be advised of his Miranda rights. As the testimony established, the defendant was left alone at various times while at the precinct and was permitted to leave when he requested to do so. Significantly, his attorney was permitted unfettered access to the defendant who was cooperative with the detectives during the interviews conducted at the precinct. Then, when the defendant expressed a desire to discontinue the interview it was stopped and he left the precinct. Certainly, a person innocent of the crime in the defendant's position at this point would not have believed that

they were in custody while they were speaking to the police under these circumstances.

Furthermore, as the hearing evidence established, the room the defendant was questioned in was a lunchroom and the doors of that room were left open at all times. When the defendant was left alone in the room he was not handcuffed, the door was left open and people were free to move about. Not only was the defendant free to leave at any time, he did in fact leave when he expressed a desire to do so. Accordingly, under the circumstances presented, the Court finds that the interview conducted with the defendant was non-custodial in nature and that there was no requirement that the defendant be advised or waive his Miranda rights. Again, the Court finds that all of the statements made by the defendant at the scene and at the precinct were all voluntarily made. Therefore, the Court declines to suppress any of the alleged statements.

Accordingly, the defendant's motion to suppress is denied.

DATED: March 30, 2009


Robert J. Hanophy, J.S.C.