

People v Mason

2009 NY Slip Op 33432(U)

September 14, 2009

Supreme Court, Albany County

Docket Number: DA 301-09

Judge: Dan Lamont

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ORIGINAL 

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

-against-

RANDOLPH MASON

Defendant

DECISION/ORDER

Indictment # 25-2443
Index # DA 301-09

FILE

APPEARANCES:

For the People:

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For the Defendant:

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DAN LAMONT, J.

The Indictment accuses the defendant of committing the crimes of Robbery in the First Degree in violation of Penal Law § 160.15(3), a class B violent felony; Robbery in the Third Degree (2 counts) in violation of Penal Law § 160.05, class D felonies; and Grand Larceny in the Fourth Degree (2 counts) in violation of Penal Law § 155.30(1) and Penal Law § 155.30(5), class E felonies. The charges are: (1) that on April 7, 2009, at approximately 3:31 p.m., at 19 Corporate Woods Boulevard, in the Town of Colonie, County of Albany, the defendant Randolph Mason did forcibly steal United States currency valued in excess of \$1,000.00 from Key Bank by using or threatening the immediate use of a dangerous instrument, to wit: a bladed letter opener; and (2) that on April 7, 2009, at

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approximately 1:45 p.m., at 1417 Central Avenue, in the Town of Colonie, County of Albany, the defendant Randolph Mason did forcibly steal a purse taken from the person of Joan Rittenberg.

REMEDY SOUGHT BY DEFENDANT

(a) Tangible evidence:

Defendant, claiming to be aggrieved by an unlawful search and seizure, has made a motion to suppress tangible property seized by the police from his wife's vehicle and from his person.

(b) Statements:

Defendant moves this Court for an order suppressing oral statements and two drawings allegedly made by him to the police upon the ground that such statements and drawings were involuntarily made within the meaning and intent of CPL § 60.45 and/or were the product of an unlawful seizure and arrest of defendant.

BURDEN OF PROOF

(a) Tangible evidence:

The People bear the burden of going forward to show the legality and reasonableness of the police conduct; however, a defendant who challenges the legality of a search and seizure bears the ultimate burden of proving by a preponderance of the evidence that the tangible evidence was illegally seized and should not be used against him.

(b) Statements:

An admission or confession will not be received in evidence at trial unless the People prove beyond a reasonable doubt that such statement was knowingly, freely, and voluntarily made by the defendant. Where the defendant contends that his statements are

the product of an illegal and unauthorized seizure of the defendant's person, the People have the burden of going forward to show the legality of the police conduct; however, a defendant who challenges the legality of the seizure of his person bears the ultimate burden of proving by a preponderance of the evidence that the seizure of his person was unauthorized and illegal.

CREDIBILITY FINDINGS

A pre-trial suppression hearing was conducted before the undersigned on July 6, 2009. Investigator James Gerace, Jr. ("Inv. Gerace"); Investigator Todd Weiss ("Inv. Weiss"); and Investigator Robert Camilli ("Inv. Camilli") from the Town of Colonie Police Department testified for the People. Each police officer appeared frank, candid, and trustworthy, and each officer's testimony had the general force and flavor of credibility. The People's Exhibits received in evidence are found authentic, reliable and worthy of consideration by the Court.

The defendant did not testify or offer any evidence at the hearing.

Based upon the evidence adduced at the suppression hearing, the undersigned makes the following findings of fact:

FINDINGS OF FACT

On April 7, 2009 at approximately 1:46 p.m., the Colonie Police Department responded to Colonie Center where a purse snatching from Joan Rittenberg ("Rittenberg") had occurred in the foyer area of the Boscov's store. Rittenberg described the perpetrator as a very tall, slender black male wearing a plaid or checkered shirt with clean cut hair. The victim and two other witnesses had observed the perpetrator leaving the scene in a white Volkswagen with New York registration DVS8610.

On April 7, 2009 at approximately 3:31 p.m., the Colonie Police Department responded to the Key Bank located at 19 Corporate Woods Boulevard where a bank robbery had occurred. The teller at the bank described the perpetrator as a medium build, muscular black male in his late thirties with a mustache and short hair wearing a blue plaid jacket and glasses. The teller gave the perpetrator money and then he left the bank. Witnesses saw the perpetrator flee in a white Volkswagen Jetta bearing New York registration DVS8610.

The Colonie police learned that the Jetta was registered to Amy L. Docherty ("Docherty") and had been stopped on April 5, 2009 by an Albany County Sheriff's Deputy with the defendant, Randolph Mason, as the driver and sole occupant of the vehicle. Upon contacting Docherty, the police learned that the defendant was her husband and that the defendant took her Jetta to work with him on April 7, 2009. Docherty and another individual named Christine Albert positively identified the defendant as the individual pictured in still photographs from the Key Bank robbery. Docherty also identified the jacket the defendant was wearing in the Key Bank. Susette May and Katherine McNiece positively identified the defendant from a photo array as the perpetrator of the Boscov's robbery. Marla Coleman and Kathryn Powers positively identified the defendant from a photo array as the perpetrator of the Key Bank robbery.

On April 7, 2009 at approximately 11:00 p.m., Inv. Gerace applied to Town of Colonie Justice Susan Tatro for an arrest warrant for the defendant relating only to the Boscov's robbery. Inv. Gerace testified that at the time he applied for the arrest warrant the only positive identification of the defendant as the perpetrator of either crime was a photo identification from a witness at the Boscov's robbery—Susette May identified the defendant in a photo array on April 7, 2009 at 6:35 p.m. Inv. Gerace had information that the

defendant may be trying to flee to Pennsylvania and the Pennsylvania authorities would not assist in his apprehension unless there was an arrest warrant issued. The photographic identifications relating to the Key Bank robbery did not take place until after the arrest warrant had been issued.

On April 9, 2009, Inv. Weiss based upon information that he had derived from his investigations prepared a search warrant application (People's Exhibit #2) for the vehicle, a 2001 white Volkswagen Jetta bearing New York registration DVS8610, and for the defendant's person. The search warrant application consisted of Inv. Weiss' affidavit; incident reports relating to both robberies in the Town of Colonie; a copy of the arrest warrant issued by Judge Tatro on April 7, 2009; and supporting depositions and photographic identifications from witnesses to both robberies indicating that the defendant was the perpetrator.

On April 9, 2009 at approximately 1:30 p.m., Inv. Weiss presented the search warrant application to Town of Colonie Justice Susan Tatro—who reviewed the application, and had Inv. Weiss swear to the truth of the application. Judge Tatro then signed the prepared search warrant (People's Exhibit # 2). Inv. Weiss was not asked any questions by Judge Tatro. The police executed the search warrant later that day and seized various items of tangible property from the vehicle and from the defendant's person. On April 14, 2009, Inv. Weiss filed with Judge Tatro an inventory of tangible property seized (People's Exhibit # 2).

On April 9, 2009 at approximately 2:00 p.m., the Colonie Police learned that the defendant had turned himself in and was in the custody of the New York State Police at the barracks in Cobleskill. At approximately 3:00 p.m., Inv. Weiss and Inv. Camilli arrived at the State Police barracks to take the defendant into custody. Inv. Weiss asked the

troopers if the defendant had asked for an attorney. Inv. Weiss was advised that the defendant had not requested an attorney and had not been questioned since there was an arrest warrant for him.

The investigators made small talk with the defendant as they transported him to the Colonie Police Department. Defendant was calm and friendly and did not request an attorney during the drive. As the defendant arrived at the station, Inv. Gerace started a device that recorded audio and video from the interview room (People's Exhibit #1). The defendant appeared to be physically fine and did not express any discomfort or appear to be disoriented. The defendant had expressed that he was tired because he had been running from the police for two days.

At approximately 3:38 p.m., the defendant was placed in the interview room at the Colonie Police Department. Inv. Weiss made some small talk with defendant for approximately 22 minutes without providing the defendant with any Miranda warnings. Five minutes into the discussion, the defendant stated that his wife was looking into a lawyer for him, but he did not assert his right to counsel or state that he would not speak to the police without counsel present. The defendant made several statements regarding owing money to his bookie (a motive for his thefts) and that he had "no excuse for what I did, bottom line I was desperate."

At approximately 4:10 p.m., Inv. Weiss read the defendant his Miranda rights from a pre-printed form (People's Exhibit # 3). Inv. Weiss wrote the defendant's answers in by hand. Defendant stated that he understood his rights and agreed to talk to Inv. Weiss without an attorney. Defendant then continued to make statements regarding his bookie and needing money to pay his bookie (People's Exhibit # 1: Video times: 26:36-32:57; 34:50-37:00; 43:19-44:50; 45:25-46:43; 58:50-59:00; 59:15-1:00:40; 1:10:42-1:13:40).

During the interview and without direct questioning from Inv. Weiss, the defendant also made multiple statements regarding the Boscov's purse snatching (People's Exhibit # 1: Video times: 37:54-38:19; 40:05-40:13; 57:54-58:00; 1:00:22-1:00:32; 1:05:36-1:06:31; 1:07:13-1:07:38; 1:54:25-1:54:42). Whenever the defendant's statements began to stray to the Boscov's purse snatching, Inv. Weiss appropriately attempted to steer the defendant back to issues regarding the Key Bank robbery. During the interview, the defendant provided the police with a sketch of the letter opener allegedly used as a weapon during the bank robbery and also a sketch of the route he took when leaving the bank (Exhibit #8). At the end of the interview, the defendant refused to provide a written statement without a lawyer.

The defendant was then placed under arrest for the Key Bank robbery and processed.

DISCUSSION

(a) Tangible evidence:

This Court holds and determines that on April 7, 2009 at approximately 11:00 p.m., Town of Colonie Justice Susan Tatro had sufficient facts before her to make a finding of probable cause and issue a warrant for defendant's arrest for the Boscov's purse snatching (see, People v. Berquette, 84 NY2d 978 [1994]; see also, People v. Morales, 36 AD3d 957 [3rd Dept. 2007]; People v. Tunstall, 278 AD2d 585 [3rd Dept. 2000]). On April 7, 2009 at approximately 6:35 p.m., witness Susette May had positively identified the defendant as the perpetrator of the Boscov's purse snatching. Accordingly, this Court holds and determines that defendant's motion to suppress any tangible property seized from his person or any of his statements as the fruits of an unlawful arrest should be and the same is hereby denied.

A presumption of validity attaches to a search warrant, which has already been tested by the issuing judge, thus simplifying the suppression court's task in determining whether the issuing judge could reasonably have concluded that probable cause existed, i.e. the sufficiency of the information provided to support a reasonable belief that contraband and/or evidence of criminal activity would be found upon execution of the warrant (see, People v. Ortiz, 234 AD2d 74 [1st Dept. 1996]). Probable cause requires not proof beyond a reasonable doubt or evidence sufficient to warrant a conviction (see, e.g., People v. Miner, 42 NY2d 937, 938 [1977]; People v. White, 16 NY2d 270, 273 [1965]), but merely information which would lead a reasonable person to conclude, under the circumstances, that contraband and/or evidence of criminal activity may be found at the specific time and place of the search (see, People v. McRay, 51 NY2d 594, 602 [1980]; People v. Bigelow, 66 NY2d 417 [1985]).

On April 9, 2009, Inv. Weiss based upon information that he had derived from his investigations prepared a search warrant application (People's Exhibit #2) for the defendant's vehicle, a 2001 white Volkswagen Jetta bearing New York registration DVS8610 and for defendant's person. The search warrant revealed that: the defendant had been identified as the perpetrator of both the Boscov's purse snatching and the Key Bank robbery; the defendant had been seen driving away from both robberies in a white Volkswagen Jetta bearing registration number DVS8610; the defendant on April 5, 2009 had previously been pulled over driving the same white Volkswagen Jetta; the registered owner of the vehicle and defendant's wife placed defendant in the vehicle at the time of the robberies; and defendant's wife and an acquaintance identified the defendant from surveillance photos from Key Bank.

On April 9, 2009 at approximately 1:30 p.m., Inv. Weiss presented the search warrant application to Town of Colonie Justice Susan Tatro—who reviewed the application, and had Inv. Weiss swear to the truth of the application. Judge Tatro then signed the prepared search warrant. Based upon the four corners of the search warrant application (People's Exhibit # 2), this Court holds and determines that the issuing Court possessed an abundance of probable cause to believe that evidence relating to the two robberies could be found in defendant's vehicle or on his person (see, People v. McRay, *supra*). Accordingly, defendant's motion to suppress tangible property seized should be and the same is hereby denied in its entirety.

(b) Statements:

At approximately 3:38 p.m., the defendant was placed in the interview room at the Colonie Police Department with the video and audio recording device already activated (People's Exhibit #1). Inv. Weiss made some small talk with defendant for approximately 22 minutes without providing the defendant with any Miranda warnings. The defendant made several statements regarding owing money to his bookie (a motive for his thefts) and that he had "no excuse for what I did, bottom line I was desperate."

Defendant was clearly in custody on the arrest warrant issued by Colonie Town Court and was not free to leave from the time he turned himself in at the New York State Police Barracks in Cobleskill. Accordingly, this Court holds and determines that the first 22 minutes of the audio-video coverage of the defendant speaking to the Colonie police at the Colonie Police Station before any Miranda warnings were administered to the defendant must be and the same are hereby suppressed (see, People v. Berg, 92 NY2d 701 [1999]; People v. Yukl, 25 NY2d 585 [1969]). Under the circumstances portrayed on the audio-video recording, defendant's statements made to the police would not constitute

spontaneous statements (see, People v. Maerling, 42 NY2d 289, 302-303 [1978]; see also, People v. Lanahan, 55 NY2d 711 [1981]).

At approximately 4:10 p.m., Inv. Weiss read the defendant his Miranda rights from a pre-printed form (People's Exhibit # 3). Inv. Weiss wrote the defendant's answers in by hand. Defendant stated that he understood his rights and agreed to talk to Inv. Weiss without an attorney. Defendant then continued to make statements regarding his bookie and needing money to pay his bookie (People's Exhibit # 1: Video times: 26:36-32:57; 34:50-37:00; 43:19-44:50; 45:25-46:43; 58:50-59:00; 59:15-1:00:40; 1:10:42-1:13:40).

"Where an improper, unwarned statement gives rise to a subsequent Mirandized statement as part of a 'single continuous chain of events,' there is inadequate assurance that the *Miranda* warnings were effective in protecting a defendant's rights, and the warned statement must also be suppressed" (see, People v. Paulman, 5 NY3d 122 [2005], citing People v. Chapple, 38 NY2d 115 [1975]). New York courts have considered the following factors in determining whether a "single continuous chain of events" exists: (1) the time differential between the *Miranda* violation and subsequent admission; (2) whether the same police personnel were present and involved in eliciting each statement; (3) whether there was a change in the location or nature of the interrogation; (4) the circumstances surrounding the *Miranda* violation; and (5) whether defendant had indicated a willingness to speak to the police (see, People v. Paulman, *supra*). Defendant's pre-Miranda unwarned oral statements to the police were given minutes before his post-Miranda warned oral statements to the same police officers in the same interview room. Under the foregoing circumstances, this Court must hold and determine that defendant's statements regarding his bookie (i.e. his motive for committing the charged robberies) must be and the same are hereby suppressed despite the fact that they were made following defendant's

waiver of his Miranda rights (Id; see also, People v. VanPatten, 48 AD3d 30 [3rd Dept. 2007]). Defendant's other pre-Miranda statement that he had "no excuse for what I did, bottom line I was desperate" may or may not have let the "cat out of the bag" for purposes of the defendant's post-Miranda admissions that he was the perpetrator of both the Boscov's purse snatching and the Key Bank robbery. This issue is rendered moot by the following determination.

Where a defendant's right to counsel has indelibly attached on a pending matter as the result of the issuance of an arrest warrant, the police may still question a defendant on an unrelated matter where the defendant has not requested counsel or counsel has not actually commenced representation on the unrelated matter (see, People v. Ruff, 81 NY2d 330 [1993], see also, People v. Burdo, 91 NY2d 146 [1997]). The issuance of an arrest warrant on a pending charge does not preclude the defendant from waiving the right to counsel with respect to an unrelated matter (see, People v. Madison, 22 AD3d 684 [2nd Dept. 2005], citing People v. Bing, 76 NY2d 331 [1990]).

However, where the pending criminal matter and the uncharged criminal matter are so closely related transactionally, or in space or time, that questioning on the unrepresented matter would inevitably elicit incriminating responses regarding the pending charged crime, interrogation is prohibited (see, People v. Cohen, 90 NY2d 632, 638 [1997]). Specifically, in People v. Townes, 41 NY2d 97, 104 [1976], the Court of Appeals stated:

"Here, the subject of the interrogation and the subject of the criminal charges are so inextricably interwoven in terms of both their temporal proximity and factual interrelationship as to render unavoidable the conclusion that any interrogation concerning the arrest would almost inevitably involve some potentially incriminating discussion of the facts of the crime itself. To separate the arrest from the crime itself and more importantly, to ask the defendant to make that distinction is to seek to draw far too fine a line".

From a review of the cases that have dealt with the issue of the relatedness of a charged (or represented) matter and a new uncharged matter, this Court believes that the most important factor appears to be the closeness in time and space between the two criminal matters (see, People v. Grant, 91 NY2d 989 [1998]—May 9, 1993 homicide charge not related to May 28, 1993 gun possession charge with same gun; People v. Cohen, 90 NY2d 632 [1997]—December 7, 1993 burglary of a gun not related to November 27, 1994 robbery homicide using the stolen gun; People v. Carl, 46 NY2d 806 [1978]—a burglary and attempted burglary of the same building a little more than one week apart related; People v. Frieson, 36 AD3d 542 [1st Dept. 2007]—imitation pistol charge not related to two robberies against different victims, five and eight days earlier; People v. Madison, *supra*—February 14, 2000 robbery not related to February 17, 2000 homicide; People v. Walker, 285 AD2d 660 [3rd Dept. 2001]—gun found in defendant's apartment not related to homicide three months earlier, even though the gun might be the murder weapon; People v. Rivera, 277 AD2d 470 [2nd Dept. 2000]—kidnap and murder of main witness to robbery not related to robbery).

On April 7, 2009, the Colonie police applied for an arrest warrant for defendant for the Boscov's robbery. The Boscov's robbery occurred on April 7, 2009 at approximately 1:46 p.m. The defendant was observed driving a white Volkswagen Jetta, registration number DVS8610, away from the scene of the crime. The Key Bank robbery occurred on April 7, 2009 at approximately 3:31 p.m. (1 hour and 45 minutes after the Boscov's robbery). The defendant was caught on videotape at the Key Bank and was also observed driving a white Volkswagen Jetta, registration number DVS8610, away from the scene of the crime. The two alleged robberies took place in the same jurisdiction (Town of Colonie) and were being investigated by the same Police Department (Town of Colonie).

This Court hereby holds and determines that the Boscov's robbery and the Key Bank robbery, which took place within 2 hours of each other in the Town of Colonie with defendant driving the same get away vehicle, are so inextricably interwoven in terms of their temporal proximity and factual interrelationship and motive as to render unavoidable the conclusion that any interrogation by the Colonie Police on the uncharged Key Bank robbery would almost inevitably evoke some potentially incriminating statements regarding the charged Boscov's robbery—upon which defendant's right to counsel had indelibly attached based upon the arrest warrant. Upon viewing the audio video tape, this conclusion is borne out, in hindsight, by the fact that the defendant provided the police with his motive for committing both crimes before the police even read the defendant in custody his Miranda warnings, and by the defendant's multiple oral statements regarding the Boscov's robbery (People's Exhibit # 1: Video times: 37:54-38:19; 40:05-40:13; 57:54-58:00; 1:00:22-1:00:32; 1:05:36-1:06:31; 1:07:13-1:07:38; 1:54:25-1:54:42).

CONCLUSIONS

(a) Tangible evidence:


This Court holds and determines that defendant's motion to suppress tangible property seized from his person and from the white Volkswagen Jetta should be and the same is hereby denied in its entirety.

(b) Statements:

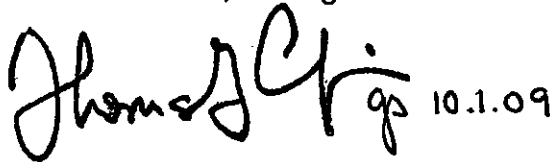
This Court holds and determines that the defendant's motion for an order suppressing oral statements, the videotape of those statements (People's Exhibit # 1), and two drawings made by defendant during his interview with the police on April 9, 2009 should be and the same is hereby granted. Defendant's oral statements, the videotape of those statements, and the two drawings are hereby suppressed.

The foregoing constitutes the Opinion, Decision, and Order of this Court.

Dated: Albany, New York
September 14, 2009


DAN LAMONT, Acting J.S.C.

cc: Bradley A. Sherman, Esq., Asst. Dist. Atty.
John J. Doherty, Esq.

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