

People v Vasser

2010 NY Slip Op 30643(U)

March 18, 2010

Supreme Court, Queens County

Docket Number: 1469/09

Judge: Gregory L. Lasak

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SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART TAP-D

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

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

- against-

Indictment No.1469/09

Motion: To suppress
statement and identification
evidence.

NIGEL VASSAR,

Defendant.

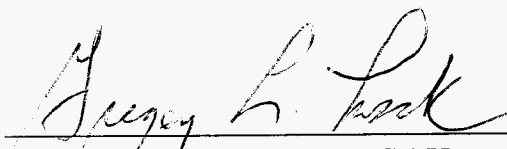
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BY: MICHAEL SIFF, ESQ.
For the Defendant

RICHARD A. BROWN, D.A.
BY: JAMES QUINN, 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: March 18, 2010



GREGORY L. LASAK
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART TAP-D

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THE PEOPLE OF THE STATE OF NEW YORK

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

- against -

Indictment No.1469/09

NIGEL VASSER,

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 Murder in the Second Degree (PL §125.25(1)).

Defendant moves to suppress statements and identification evidence. The People consent to expand the hearing to include a probable cause hearing.

A pretrial suppression hearing was conducted before me on February 16, 2009.

I give full credence to the testimony of the People’s witnesses, Police Officer Daniel Mizvesky, Detective Brian Driscoll, Detective William Milan and Detective James Lavin.

I make the following findings of fact:

On April 23, 2009, Police Officer Daniel Mizvesky from the 103rd precinct was assigned to cover patrol in the 100th precinct. At approximately 7:30pm, Police Officer Mizvesky, in uniform and in a police van, was patrolling the Hammell’s Projects in the vicinity of 85-02 Rockaway Beach Blvd. Police Officer Mizvesky testified that he heard approximately four (4) gunshots (being fired) as he approached that location. He observed three (3) males running towards 85-02 Rockaway Beach Blvd. away from where he believed the shots had been fired. The first individual was a male black, approximately

five six to five eight, medium to dark complexion, wearing an orange hoodie and dark pants. The second (male) was a male black, approximately five six to five eight, wearing dark colored pants and a green hoodie sweatshirt. The third individual was a male black, approximately five six to five eight, medium to dark complexion, wearing a black top and dark bottoms. Officer Mizvesky testified he observed their faces clearly from approximately eight to ten feet away. The lighting conditions were good. It was a clear day and still light out.

Officer Mizvesky testified that he paid closest attention to the individual with the orange hoodie because he observed him favoring his right side as if he was running with a heavy object on the right side of his body. He followed the three individuals and observed them enter 85-02 Rockaway Beach Blvd.. He also entered and proceeded up six (6) flights of stairs, never losing sight of them. They entered apartment 6-E and closed the door. Officer Mizvesky radioed for backup and left the location when Emergency Services and the Sergeant appeared. Officer Mizvesky then went back outside to the crime scene.

Officer Mizvesky was called back to 85-02 Rockaway Beach Blvd. where he observed three (3) individuals being escorted out (of 85-02 Rockaway Beach Blvd.). He identified defendant, Nigel Vasser, as the individual with the orange hoodie who he had observed enter apt.6-E . The defendant was not wearing the orange hoodie at the time he identified him.

Detective James Lavin, testified that on April 23, 2009, he responded to 85-02 Rockaway Beach Blvd. at approximately 7:30pm and observed many people standing outside the location. He entered 85-02 Rockaway Beach Blvd. and had a conversation with Police Officer Mizvesky. Detective Lavin then exited the building and approached Detective Conroy and Detective Hovington who were speaking to a female, witness A.¹ Witness A was seated on the ground and was pointing up toward the 6th floor of 85-02 Rockaway Beach Blvd. yelling “News, you shot my best friend.” Witness A was then

¹Witness A is a person known to the District Attorney’s Office.

brought to the 100th precinct. At approximately 10:45pm while in the presence of ADA O'Hare, witness A stated that she knew the defendant from the neighborhood and had observed him shooting the gun. Detective Lavin then placed the defendant, Nigel Vasser, under arrest.

Detective Brian Driscoll testified that on April 23, 2009, at approximately 11pm, he was a member of the 100th precinct detective squad. Detective Driscoll testified that at that time he interviewed the defendant, Nigel Vasser, whom he also knew from the area as "News". Also, present in the interview room was Detective Lavin. Detective Driscoll told the defendant he wanted to ask him questions about what had happened that day. Detective Driscoll produced and utilized a Miranda warning sheet². The defendant was read each warning one at a time, one through six. After each question the defendant was asked if he understood and he responded that he did. "Yes" was written next to each question. The defendant then initialed each question on the left hand side and signed the bottom of the sheet. Defendant was asked if he knew why he was there and what had happened. Defendant responded that he did not know who was involved in the shooting. Detective Driscoll and Detective Lavin then left the interview room.

On April 24, 2009, at approximately 1pm, Detective William Milan of the Queens Homicide Squad entered the interview room at the 100th precinct where the defendant was being held. Detective Milan showed him a copy of the *Miranda* warning sheet³ and asked him if he remembered the warnings he was given earlier by Detective Driscoll and if he understood them. Defendant responded that he did. Detective Milan asked the defendant some background information including his name, and nickname "Bad News." Defendant asked Detective Milan "is the girl dead?" Defendant further stated that he felt bad for the girl and her family but he does not believe in being a snitch on himself or anyone else. He asked, "what if the other guy didn't have a gun?" Again, Detective Milan asked the

²People's exhibit 1 in evidence.

³People's exhibit 3 in evidence.

defendant what happened. Defendant then stated he was going to wait and see what happens. He did not feel they had enough and he wanted to wait and see if they got more and whether the District Attorney's would make an offer.

On April 24, 2009, at approximately 6:45pm, Detective Driscoll returned to the interview room with Detective Lopez. He showed the defendant the *Miranda* warning sheet and told him that the warning were still in effect and asked the defendant if he understood that his Miranda warnings were still in effect. Defendant responded yes. Detective Driscoll then asked the defendant if he was willing to speak to them and the defendant stated he was willing to make a statement. Defendant was given a piece of paper and in his own handwriting made a statement⁴. Underneath the defendant's written statement was a series of questions and answers written by Detective Lopez⁵. Next to each question and answer the defendant wrote his initials.

Detective Lavin further testified that at approximately 11pm on April 24, 2009, he was present at the 100th precinct with Assistant District Attorney Naomi Schneidmill where she conducted an interview which was digitally recorded.⁶ The defendant was read each and every *Miranda* warning. The defendant said he understood the warnings and was willing to make a statement. The defendant then made a recorded statement as to what had happened on April 23, 2009 at the Hammell's projects. The defendant was then taken by Detective Lavin to a holding cell in the precinct. At approximately 11:50pm, on April 24, 2009, while the defendant was in the holding cell, Detective Lavin asked the defendant a series of questions which the defendant responded to. This took place less than one (1) hour after the defendant was re-read his Miranda warnings by ADA Schneidmill.

I make the following conclusions of law:

Probable cause to arrest is present when the facts and circumstances known to the

⁴People's exhibit #2 in evidence.

⁵People's exhibit #2 in evidence.

⁶People's exhibit #4 in evidence.

arresting officer warrant a reasonable person with the same expertise to conclude that a crime is being or was committed, and that the defendant is the perpetrator. *See People v. Maldonado*, 86 N.Y.2d 631, 635 N.Y.S.2d 155 (1995); *People v. Carrasquillo*, 54 N.Y.2d 248, 455 N.Y.S.2d 97 (1981); *People v. McCray*, 51 N.Y.2d 594, 435 N.Y.S.2d 679 (1980); *see also* C.P.L. § 70.10(2). The totality of circumstances gives rise to a finding of probable cause when it is more probable than not that the person to be arrested committed a crime. *See People v. Carrasquillo*, *supra* at 254; *People v. Surico*, 265 A.D.2d 596, 697 N.Y.S.2d 356 (3d Dept. 1999). This legal conclusion is made after all the facts and circumstances are considered together. *See People v. Bigelow*, 66 N.Y.2d 417, 423; 497 N.Y.S.2d 630 (1985). Although the facts and circumstances viewed separately may be insufficient to establish probable cause, when these factors are viewed in totality, probable cause may be found. *Id.*

The police possessed probable cause to arrest the defendant after witness A told the police that she observed the defendant shooting a gun. She stated she knew the defendant from the neighborhood. Thus, the police possessed probable cause to arrest defendant.

A hearing to evaluate the propriety of the identification of the defendant made by Police Officer Mizvesky was conducted before the Court. The New York State Constitution prohibits the introduction at trial of 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). 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).

In addressing this issue, the court must consider the totality of the circumstances

surrounding the identification in general. Here, the People served notice of a “show-up” identification by PO Mizvesky. PO Mizvesky observed the defendant shortly before he ran into 85-02 Rockaway Beach Blvd. holding his right side. Police Officer Mizvesky followed the defendant into the building where he observed the defendant with the others enter apartment 6-E. Officer Mizvesky remained outside the apartment door until a Sergeant and ESU officers arrived. Shortly thereafter, Police Officer Mizvesky was called back to 85-02 Rockaway Beach Blvd. where he observed the three individuals being escorted out and he identified the defendant, Nigel Vasser, as the one with the orange hoodie he had seen earlier entering apartment 6-E at that location. Accordingly, the defendant’s motion to suppress identification testimony is denied. Based upon the totality of circumstances, this Court finds that the manner in which the defendant was displayed was proper and was not designed to single out the defendant for purpose of identification. Thus, no suppression is warranted.

Defendant further seeks to suppress his statements. A law enforcement officer must administer the *Miranda* warnings to a person in custody before questioning him (*Miranda v. Arizona*, 384 US 436 [1966]). The People have the burden of demonstrating that a defendant was administered each and every *Miranda* warning and that the defendant knowingly, voluntary and intelligently waived them (*Miranda v. Arizona*, supra).

The waiver must be the product of a free and deliberate choice rather than intimidation, coercion or deception. It must be made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it (*Colorado v. Spring*, 479 US 564 [1987]). Where a defendant clearly understands his *Miranda* rights and promptly, after being administered those rights, willingly proceeds to make a statement, a waiver has been established (*People v. Sirno*, 76 NY2d 967 [1990]; *People v. Stoffel*, 17 AD3d 992 [4th Dept 2005], citing *People v. Pond*, 217 AD2d 721, 722 [3d Dept 1995]).

Where a defendant has been given the *Miranda* warnings and knowingly,

voluntarily and intelligently waives those rights, the police are not required to repeat the warnings prior to questioning within a reasonable time thereafter, so long as the defendant has remained in continuous police custody (*People v. Petronio*, 34 AD3d 602, 603 [2d Dept 2006] [twenty-five hour time period was not unreasonable]; *People v. Gonzalez*, 5 AD3d 696, 697 [2d Dept 2004] [eleven and one-half hour time period was not unreasonable], *People v. Fowler*, 2009 WL3720701[N.Y.Sup.] [twenty-five hour time period was not unreasonable)).

Indeed, the court must consider the totality of the circumstances to determine the voluntariness of a defendant's statement (see *People v. Anderson*, 42 NY2d 35, 38 [1977]). The relevant factors to be examined in determining the totality of the circumstances surrounding a defendant's statements include the "duration and conditions of detention⁷, the attitude of the police toward the defendant, and the age, physical state and mental state of the defendant" (*People v. Petronio*, supra at 604, quoting *People v. Baker*, 208 AD2d 758, 759 [2d Dept 1994]).


The defendant was first administered *Miranda* warnings by Detective Driscoll on April 23, 2009, at approximately 11pm at the 100th precinct. The evidence indicates that the defendant was read each and every *Miranda* warning by Detective Driscoll and that he freely, voluntarily, and knowingly waived each and every right. The defendant was then told by Detective Milan and Detective Driscoll before each subsequent conversation that the *Miranda* warning were still in effect and he stated that he understood before agreeing to answer questions and make statements. A digital recording, People's exhibit 4 in evidence, clearly shows that at approximately 11pm on April 24, 2009, the defendant was then re-read each *Miranda* warning by ADA Schnidmill. Defendant is observed on tape voluntarily waiving such rights and making a statement. The People have satisfied their burden of demonstrating that defendant was neither coerced, tricked,

⁷The defendant was given the opportunity to use the telephone, was provided food, and was observed sleeping for approximately five to six hours.

nor pressured into making his statement, but rather 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 Driscoll, Detective Milan and Detective Lavin, 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).

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

Kew Gardens, New York
Dated: March 18, 2010


GREGORY L. LASAK
JUSTICE SUPREME COURT