

People v Florencia

2010 NY Slip Op 31920(U)

July 20, 2010

Supreme Court, Queens County

Docket Number: 280/10

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. 280- 10

Motion: To suppress identification
and statement evidence.

GINO FLORENCIA,
Defendant.

-----X

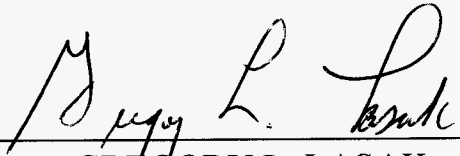
BY: Robert Didio, ESQ.
For the Defendant

RICHARD A. BROWN, D.A.

BY: Karen Ross, 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: July 20, 2010



GREGORY L. LASAK
JUSTICE SUPREME COURT

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

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

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

- against -

Indictment No.280-10

GINO FLORENCIA,

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 identification and statement evidence.

A pretrial suppression hearing was conducted before me on July 1, 2010.

I give full credence to the testimony of the People’s witnesses Detective Carmine Caruso and Detective Kevin Chang.

I make the following findings of fact:

On October 24, 2009, Detective Carmine Caruso of the 108th precinct, was assigned to investigate the homicide of Edison Vera. Detective Caruso testified that on October 28, 2009, at the Orange County Correctional Facility in Orlando, Florida, he met with the defendant, Gino Florencia. Detective Caruso and his partner Detective Kevin Chang entered an interview room where defendant was in custody. Detective Caruso introduced himself and Detective Chang. They engaged in some small talk with the defendant and Det. Caruso produced and utilized a *Miranda* warning sheet¹. The defendant was read

¹People’s #1 in evidence.

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 and signed underneath the *Miranda* warnings. Defendant was asked if he wanted to go back to New York and he responded "yes." Defendant was then asked, "do you know what this is about?" he responded "yes, the incident on Saturday." Detective Caruso then stated, "let me make sure you want to go back to New York and you know what this is about." Defendant stated, "yes, it's about the homicide" The questions and answers were recorded on the *Miranda* warning sheet². Defendant then signed the bottom of the sheet along with Detective Caruso and Detective Chang. Detective Caruso left the interview room for approximately ten minutes. Detective Chang remained with the defendant. Detective Chang testified that when Detective Caruso left the interview the defendant offered him a statement. He stated he did not ask the defendant any questions and the defendant stated in sum and substance he was hanging and drinking with others sometime after five in the morning and all of sudden there was blood on him. Defendant stated, "like anybody who was scared, I ran away." Det. Caruso returned to the interview room and showed the defendant a still photo taken from a surveillance camera. Detective Caruso asked the defendant who the person in the photo was. The defendant stated, "that's me." The defendant signed the photo³.

On November 9, 2009, Detective Caruso met with witness#1 and presented the witness with a photo array consisting of six (6) photos⁴. The witness was asked to view the photo array and asked whether he recognized anyone and where he may have recognized them from. The witness indicated that he recognized number four (4). The photo was of the defendant, Gino Florencia. The witness circled photo #4, the photo of the defendant,

²People's exhibit #1 in evidence.

³People's exhibit #2 in evidence.

⁴People's exhibit #3 in evidence.

and wrote on the bottom of the photo array, “that’s the guy the shot my friend.”

I make the following conclusions of law:

The photographic array at issue was entered into evidence as People’s Exhibit “1” for purposes of the hearing and was reviewed by the Court. Nothing about the array 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 he 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 question for the court with respect to any identification procedure is whether the given procedure was unnecessarily suggestive. A procedure is unnecessarily suggestive if it creates a “substantial likelihood that the defendant would be singled out for identification,” *People v. Chipp*, 75 NY2d 327, 336, *cert denied*, 498 US 88 (1990); *People v. Galletti*, 239 AD2d 598, 599 (2nd Dept. 1997). In addressing this issue, the court must consider the totality of the circumstances surrounding the identification in general. Here, based upon the totality of circumstances, this Court finds that the manner in which the array was displayed was proper and the array itself was not designed to single out the defendant for purposes of identification. Thus, no suppression is warranted.

Defendant also seeks suppression of his statements. Addressing defendant’s

statements made on October 28, 2009, to Detective Caruso and Detective Chang at the Orange County Correctional Facility in Orlando, Florida, the 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 the defendant was read each and every *Miranda* warning by Detective Caruso and that he freely, voluntarily and knowingly waived each and every right 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 Caruso and Detective Chang, 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 identification and statements is denied.

Kew Gardens, New York
Dated: July 20, 2010



GREGORY L. LASAK
JUSTICE SUPREME COURT