

People v Pope

2010 NY Slip Op 33193(U)

October 28, 2010

Sup Ct, Kings County

Docket Number: 11840-2008

Judge: Michael A. Gary

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File name

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CRIMINAL TERM PART 12

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

-against- : DECISION AND ORDER
330.30 Motion

BRIAN POPE : IND. NO. 11840-2008
Defendant :
-----X

MICHAEL A. GARY, J.

Defendant was convicted of Murder in the second degree (Penal Law § 125.25) and Criminal possession of a weapon in the second degree (Penal Law § 265.03) after a jury trial. By notice of motion dated October 1, 2010 defendant has moved this court for an order setting aside the verdict pursuant to CPL § 330.30. The People have opposed this motion in a written response dated October 8, 2010.

A motion pursuant to CPL § 330.30 may rest on any one of three grounds, as listed in the statute. They are:

1. Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.
2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, of improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict; or
3. That new evidence has been discovered since the trial which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

The defendant has made two arguments pursuant to subdivision 1, of CPL § 330.30. First, defendant claims that because this court ruled that there was a *Payton* violation, there

could be no independent probable cause to arrest the defendant, and therefore the admission of identification evidence at trial was fruit of the poisonous tree and was improper. Second, the defendant claims that during summation the ADA improperly claimed that a witness made a positive identification of the defendant, though that witness, Shakeba Darden, did not testify at trial. The defense argues that this violated the defendant's rights under *Crawford v. Washington*, 541 US 36 (2004).

As to defendant's first argument, the People point to the pre-trial hearing testimony, where evidence showed that 3 people identified the defendant, supplying ample probable cause for the police to arrest him. Notwithstanding the court's finding of a *Payton* violation, evidence concerning a police arranged identification of defendant was admissible at trial.

The Court's ruling regarding the admissibility of the identification evidence was proper pursuant to *People v. Jones*, 2 NY3d 235 (2004). In any event, the testimony in support of the determination of probable cause was based on a finding by the court that Detective Osgood testified credibly at the pre-trial hearing.

The defendant next challenges the references made by Detective Osgood to a photo array and line-up "identification" of the defendant, as improper. The People point out that the testimony was brought out in response to the introduction of the photo array as a defense exhibit (introduced as Exhibit C) during cross examination of Eddie Wilson, the security guard on duty the night of the homicide. See Trial Transcript (TT)

July 16, 2010 p. 209-211.

The court agrees with the People. The defense initiated the testimony regarding the photo array; not the People. Thus, once the defense opened the door to testimony about the photo array, the People were allowed to respond to that testimony through their witnesses

(Detective Osgood).

The relevant testimony was as follows:

ADA: What did you do when you were first assigned to investigate the homicide?

Det Osgood: I had come into the office and then reported over to the nightclub.

Q. What did you do at he nightclub?

A. I'd went [sic] over, looked at some film, and then from there went over to the Lutheran Hospital.

Q. What did you do at Lutheran Hospital?

A. I went to check on the status of the victim. He was still alive at the time and I spoke with Shakeba Darden.

Q. And after speaking with Shakeba Darden, did you then begin to investigate a suspect?

A. Yes.

Q. Who did you begin to investigate?

A. Brian Pope.

Q. And when you began to investigate Brian Pope, what did you do?

A. I went back to the precinct and I generated a photo of Brian Pope.

Q. What did you do with that photo?

A. I then entered it into what's called a photo management system... generates photos..

[The Court ruled on an objection.]

A. I had entered it into the photo management system and selected photos that were similar to that photo. The photo management system then shuffles them and

produces a photo array.

(Detective was then shown Exhibit C in evidence)

Q. Detective do you recognize that?

A. Yes

Q. What do you recognize that to be?

A. The photo array that I generated.

Q. And who did you show that photo array to?

A. To Eddie Wilson.

(TT p. 233-235)

The defendant similarly complains that it was error for the court to allow testimony concerning a conversation by Detective Osgood with Shakeba Darden, alleging that this testimony implied to the jury that she specifically identified the defendant Brian Pope to the police. As she never testified, admitting this information constituted impermissible hearsay, in violation of his rights under *Crawford v. Washington, supra*. Further, the defense argues, this error was compounded as improper bolstering when the People referenced Shakeba Darden in their summation.


The People counter that testimony concerning Shakeba Darden was proper as it was limited by the court, and it did not impermissibly suggest that she identified the defendant as having committed the murder. Further, they argue that it was proper for the information from the detective to be elicited to explain his investigation and this court agrees. *See People v. Dunbar*, 74 AD3d 1227 (2d Dept) *lv. denied* 15 NY 3d 851 (Table, 2010). This very limited testimony did nothing more than show the jury that the detective got a name from Shakeba Darden.

The People made a single reference in the summation to Shakeba Darden as a person who suggested the defendant's name to the detective. There was no characterization of Ms. Darden as an eyewitness to the homicide, or to her positively identifying the defendant as the perpetrator of the crime, see, *e.g.* *People v. Berry*, 49AD3d 888 (2d Dept. 2008) and thus, the reference was not improper nor did it prejudice the defendant, and thus the passing reference to her was not impermissible bolstering. In light of the fact that there were other people who identified the defendant as the perpetrator of the crime, the single reference by the prosecutor to Shakeba Darden could not have been harmful.

This court finds no basis to grant defendant's motion for relief pursuant to CPL § 330.30. Accordingly, the motion to set aside the verdict is denied.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
October 28, 2010


MICHAEL A. GARY, J. S. C.

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