People v Burroughs
2010 NY Slip Op 33990(U)
July 12, 2010
County Court, Westchester County
Docket Number: 09-1566
Judge: Barry E. Warhit

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

LARRY BURROUGHS,

Defendant.

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DECISION & ORDER

Indictment No.: 09-1566

WARHIT, J.

On July 12, 2010 this Court conducted combined pre-trial suppressions hearing for the purpose of determining whether the identification procedure employed by members of the Yonkers Police Department on November 9, 2009 was unduly suggestive and conducive to an irreparably mistaken identification, whether probable cause existed to support the arrest of the defendant on November 10, 2009 and whether noticed statements allegedly made by the defendant to a member of the Yonkers Police Department were involuntary within the meaning of CPL § 60.45.

The People called Detective Cartagena as their only witness at this pre-trial suppression hearing. The defense called no witnesses. Upon consideration of the facts presented and after hearing oral argument from both parties, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On November 9, 2009, at approximately 5:40 p.m. Detective Hector Cartagena, an 11-year veteran of the Yonkers Police Department and a 2-year veteran of that police department's detective division, was assigned to investigate a burglary of an apartment located at 637 Van Cortlandt Park Avenue in the City of Yonkers that was alleged to have occurred on November 6, 2009. In furtherance of the investigation and in an attempt to gather information, Detective Cartagena knocked on doors of the neighboring apartments. A twelve-year-old female neighbor reported that at about 1:30 p.m on November 6, 2009 she had observed a black male exiting the reportedly burglarized apartment. The child witness described this black male as being between forty and sixty years of age, about 5'7" tall and "not fat". She reported that the man she had seen had a moustache and "salt and pepper" colored hair. . The child's mother was present when her daughter spoke to the detective but did not participate in the conversation.

Subsequent to speaking to the child witness, Detective Cartagena spoke to other residents of 637 Van Cortlandt Park Avenue. One of the individuals he spoke to was an adult female named Amy Grant. Ms. Grant reported that on November 6, 2009 she had seen a man on the first floor of the building who fit the description provided by the child witness. Ms. Grant advised that she knew the man as "Larry" and was familiar with him as he used to reside in the building.

From information contained in a criminal database Detective Cartagena learned that an individual named Larry Burroughs had previously resided at 637 Van Cortlandt

Park Avenue in Yonkers. Det. Cartagena compiled a photographic array which included Mr. Boroughs and five additional fillers. He showed the photographic array to the child witness on November 9, 2009 at the Yonkers Detective Division. Prior to the child witness viewing the array, Detective Cartagena informed her that she would be looking at six photographs for the purpose of seeing if she recognized the individual she had seen coming out of her neighbor's apartment on November 6, 2009. Detective Cartagena specifically instructed the twelve year old witness that she might not recognize anyone and that she should not feel obligated to select anyone's photograph from the array. The child's mother was present when her daughter viewed the array but neither participated in it nor gave her daughter any instructions regarding her viewing of it.

Nearly immediately upon being shown the array, the twelve year old witness pointed to the individual depicted in photograph number five and stated, in sum and substance, "that is the man I saw coming out of my neighbor's apartment". At Detective Cartagena's request, she circled the photograph she had pointed to and wrote her initials beneath it. The individual the child witness identified was Larry Burroughs, the defendant herein.

Through investigative efforts which included contact with the defendant's parole officer, Detective Cartagena determined that Larry Burroughs was then residing at 409 Union Avenue in the City of Mount Vernon in the County of Westchester. On November 10, 2009 at approximately 9:00 p.m. Detective Cartagena and two fellow detectives went to that multi-dwelling building. After entering through the front door, which was open, they learned from an unidentified individual they came upon in the common area

that Larry Burroughs unit was on the top floor.

The detectives knocked on the door of Mr. Burroughs' unit and he opened it. Detective Cartagena advised him that they wanted to discuss an incident with him and requested that he accompany the detectives to the Yonkers Detective Division for that purpose. Mr. Burroughs agreed to accompany the officers and voluntarily did so after he retrieved his keys and locked the door to his unit.

Mr. Burroughs was not handcuffed or placed under arrest but was subjected to a pat down which revealed that he was not in possession of any weapons or contraband. Detective Cartagena drove to the Yonkers Detective Division Detective. Another detective rode in the front passenger seat and a third detective sat along side Mr. Burroughs in the backseat of the vehicle. During the approximately ten minute ride, Mr. Burroughs was not handcuffed and the alleged burglary was not discussed.

At the Detective Division, the detective escorted Mr. Burroughs to an interview room where he was left alone for period of time. None of his personal property was taken from him. At approximately 10:25 p.m. on November 10, 2009 Detective Cartagena returned to the interview room and read the *Miranda* warnings to Mr. Burroughs from a pre-printed card. Mr. Burroughs acknowledged that he understood each of the *Miranda* rights and indicated that he was willing to speak to the detective. Defendant signed the *Miranda* card.

Detective Cartagena then engaged Mr. Burroughs in a conversation concerning the burglary alleged to have occurred at 637 Van Cortlandt Park Avenue on November 6, 2009. Mr. Burroughs initially denied having been in the vicinity of 637 Van Cortlandt Park Avenue on that date. However, upon being advised by Detective Cartagena that a

witness or witnesses reported having seen him, Mr. Burroughs admitted to having been in the area of the building. He denied that he had entered 637 Van Cortlandt Park Avenue until Detective Cartagena informed him that witnesses had also seen him inside the building. Mr. Burroughs maintained that he had not committed the burglary and stated his purpose for having been at 637 Van Cortlandt Park Avenue on November 6, 2008 was social in nature.

At approximately 11:25 p.m. Detective Cartagena placed Larry Burroughs under arrest. The defendant was handcuffed and taken to Central Booking.

CONCLUSIONS OF LAW

I. MOTION TO SUPPRESS IDENTIFICATION

Defendant moved to exclude the pre-trial identification and any identification testimony on grounds that the identification procedure was unduly suggestive. It is well settled that a suggestive or otherwise improper identification procedure violates due process and is not admissible to determine the guilt or innocence of a defendant (*U.S. v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed 2d 1149).

The People bear the burden of establishing the reasonableness of the police conduct and that the pre-trial identification procedure was not unduly suggestive (*People v. Chipp*, 75 NY.2d 327, 335, 553 N.Y.S.2d 72, 552 N.E.2d 608, *cert. denied* 498 U.S. 833, 111 S.Ct. 99, 112 L.Ed.2d 70). Once such a showing has been made by the People, the burden of proof shifts to the defendant who must establish, by a preponderance of the evidence, that the identification procedure employed was

impermissibly suggestive and conducive to an irreparably mistaken identification (*Id.*).

Through the testimonial evidence adduced at the pre-trial hearing and the introduction of the photographic array into evidence the People met their burden of establishing that the identification procedure at issue was neither unduly suggestive, nor conductive to an irreparably mistaken identification. Under the totality of the circumstances the photographic array was not so "impermissibly suggestive as to give rise to a substantial likelihood of ... misidentification" (*Neil v. Biggers,* 409 US 188; *People v Duuvon,* 77 NY2d 541; *People v Reed,* 171 AD2d 707). The law does not require that the defendant be surrounded be people nearly identical in appearance. (*Chipp,* 75 NY.2d at 336).

The array consisted of the defendant and five fillers. (*People v. Campbell*, 149 A.D.2d 719). The defendant and the fillers are all black males of a similar weight and who appear to be between the ages of forty and sixty and each has facial hair including a moustache and some degree of graying hair. The five fillers depicted in the photographic array at issue are similar enough to the defendant in age and general appearance such that there existed little likelihood of the defendant being singled out based upon particular characteristics (*People v. Avent*, 29 A.D.3d 601, 813 N.Y.S.2d 786, *lv. denied* 9 N.Y.3d 1004, 850 N.Y.S.2d 392, 880 N.E.2d 878; *People v. Ragunauth*, 24 A.D.3d 472, 805 N.Y.S.2d 654, *lv. denied* 6 N.Y.3d 779, 811 N.Y.S.2d 346, 844 N.E.2d 801).

Moreover, at this pre-trial hearing no evidence was presented as to the child witness having been prompted or that the defendant's identity was otherwise implied to her in any manner. (*People v. Garcia,* 219 A.D.2d 541, 542, 632 N.Y.S.2d 62, *appeal*

denied 88 N.Y.2d 847, 644 N.Y.S.2d 694, 667 N.E.2d 344). To the contrary, the testimony clearly demonstrated that the child witness, who had been cautioned not to feel obligated to select any individual from the array, selected the defendant in a nearly spontaneous fashion.

The People met their burden at this pre-trial hearing of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness in the pre-trial identification procedure. The defendant did not establish, by a preponderance of the evidence, that the identification procedure used was unduly suggestive (*Chipp*, 75 N.Y.2d 327). Consequently, this Court did not need to reach a determination as to whether an independent basis existed for the child witness' identification of the defendant (*People v. Keller*, 299 A.D.2d 915, 750 N.Y.S.2d 691, *lv. denied* 99 N.Y.2d 583, 755 N.Y.S.2d 719, 785 N.E.2d 741).

Accordingly, the defendant's motion to suppress the identification and the prospective identification testimony of the witness, which was noticed by the People, is hereby denied.

II. MOTION TO SUPPRESS STATEMENTS - PROBABLE CAUSE TO ARREST

Defendant has alleged in his omnibus motion that he was arrested without probable cause and that statements were obtained from him while he was in custody. Defendant contends that these statements must be suppressed as "fruit" of the illegal arrest (*Dunaway v. New York*, 442 U.S. 200 (1979) and because they were involuntary within the meaning of CPL § 60.45. It is well settled that the People may not introduce a defendant's admission or confession absent proof, beyond a reasonable doubt, that the

defendant's statements were voluntary (*People v. Huntley*, 15 N.Y.2d 72).

The testimonial evidence adduced at this pre-trial suppression hearing established that the defendant was not handcuffed at his residence or during transport to the police department and further showed that he agreed to accompany the detectives to the Yonkers Detective Division for questioning. Defendant's consent obviated the need to show that the detectives had probable cause to detain the defendant (*People v. Barcliff*, 140 A.D.2d 615, *citing*, *People v. Hodge*, 44 N.Y.2d 553, *People v. Bryant*, 50 N.Y.2d 949, *cert. denied* 449 U.S. 958). However, in this case, probable cause sufficient to support the defendant's arrest existed based upon the child witness having previously identified the defendant as the man she saw exiting the burglarized apartment. These facts, when viewed as a whole, would lead a reasonable person possessing the same expertise as the arresting officers to conclude than an offense has been committed and that the defendant committed the offense. (CPL §140.10; *People v. Allen*, 209 A.D2d 622).

Defendant seeks suppression of the noticed statements, which he is alleged to have made to a member of the Yonkers Police Department, on grounds that the statements are involuntary within the meaning of CPL § 60.45. The People bear the burden of demonstrating the voluntariness of the defendant's statements by proof, beyond a reasonable doubt (People v. Huntley, 15 N.Y.2d 72). The determination as to whether a defendant's statement is voluntary depends upon an analysis of the "totality of the circumstances" under which it was made (People v. Barton, 13 A.D.3d 721, 787 N.Y.S.2d 135, lv. denied 5 N.Y.3d785, 801 N.Y.S.2d 806, 835 N.E.2d 666; People v. Rushion, 26 A.D.3d 448, 808 N.Y.S.2d 912).

The evidence elicited at this pre-trial suppression hearing showed that the defendant agreed to accompany detectives to the police department to answer questions and that he was not handcuffed or otherwise restrained during the approximately one hour period of questioning. Moreover, the defendant's personal property was not taken from him until after the questioning ceased.

The mere fact that the defendant was questioned at the Detective Division of the Yonkers Police Department does not trigger custody nor does the fact that the detective, in an apparent excess of caution, read him *Miranda* warnings (People v. Yukl, 25 N.Y.2d 585); *People v. Nolcox*, 190 A.D.2d 824; *and see, People v. Blake*, 177 A.D.2d 636).

Nevertheless in evaluating the voluntariness of the defendant's statements, this Court finds it significant that the defendant was read *Miranda* warnings, that he indicated he understood these warnings, that he did not ask for a lawyer, and that he agreed to speak to the detectives. Even statements which are the product of custodial interrogation are admissible at trial when the People demonstrate that the statements were made after a knowing, intelligent and voluntary waiver of the *Miranda* warnings.

The determination as to whether a waiver is knowing and voluntary "is essentially a factual issue that must be determined according to the circumstances of each case" (*People v. Williams*, 62 N.Y.2d 285, 288, 476 N.Y.S.2d 788, 465 N.E.2d 327). Factors which this Court has considered include the particular characteristics of the defendant including his age, the conditions of the questioning and its brief duration as well as manner in which the police dealt with the defendant.

The evidence adduced at this pre-trial hearing established that *Miranda* warnings were read to the defendant, that he understood these rights and that he never stated that

he wished to consult with an attorney or indicated he was unwilling to talk to the police without an attorney present (*People v. Cunningham*, 49 N.Y.2d 203, 424 N.Y.S.2d 421, 400 N.E.2d 360; *People v. Gamble*, 70 N.Y.2d 885, 524 N.Y.S.2d 427, 519 N.E.2d 338).

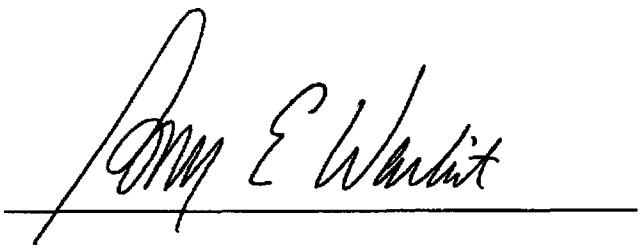
Significantly, there was evidence at this pre-trial suppression hearing that the defendant declined the detective's request that he provide or sign a written version of his statement. The defendant's refusal provides evidence that his will was not overborne and that he appreciated he could decline to cooperate with the police.

The defendant's statements were not the product of an atmosphere of impermissible coercion which overcame the defendant's will to resist to the point where his statements were not the product of an essentially free and unconstrained choice. To the contrary, the testimony established that no "coercive tactics or deprivations were used, and that no factors indicative of involuntariness were present" (Barton, 13 A.D.3d at 722; Rushion, 26 A.D.3d 448).

Based upon the totality of the evidence presented at the hearing, this Court finds that the People have met their burden of establishing that the oral statements the defendant made to police were voluntarily made (People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179). Accordingly, the defendant's motion to suppress the statements on the ground that they were involuntary within the meaning of CPL §60.45 is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
July 12, 2010



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WESTCHESTER COUNTY COURT JUDGE

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