

<b>People v Campanella</b>
2010 NY Slip Op 33992(U)
June 3, 2010
Supreme Court, Erie County
Docket Number: 00252-2009
Judge: Russell P. Buscaglia
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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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The People of the State of New York

vs

INDICTMENT NO.  
00252-2009

Linda Campanella,

Defendant.

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Frank A. Sedita, III, Esq.  
Erie County District Attorney  
BY: Colleen Curtin Gable, Esq.  
Assistant District Attorney  
Attorney for the People

Kevin W. Spitler, Esq.  
Attorney for the Defendant

**DECISION AND ORDER**

**RUSSELL P. BUSCAGLIA, J.S.C.**

The defendant is charged by this Indictment with Murder in the Second Degree, Penal Law § 125.25. The defendant moves to suppress the statements allegedly made by her pursuant to Section 710.20 of the Criminal Procedure Law. A hearing was conducted pursuant to People v. Huntley, 15 NY2d 72 (1965). Captain Michael Melisz and Officer Brian Whalen of the Village of Hamburg, New York Police Department testified at the hearing.

The credible testimony at the hearing revealed that on October 5, 2008 at approximately 3:25 p.m., Officer Whalen responded to an EMS first aid call at 75 Main Street in the Village of Hamburg. When he arrived, he encountered Herman Forthman, the

victim, whom he knew, being treated by EMTs. He saw a cut on the victim's head. The defendant was also present and was speaking to the EMTs. Officer Whalen overheard the defendant make the statements contained in the initial portion of the Notice served upon her pursuant to § 710.30 of the Criminal Procedure Law. Officer Whalen never asked any questions of the defendant and no promises or threats were made and no coercion was used. The victim was taken to the hospital by Rural Metro ambulance, where he died. In addition to EMTs, another police officer and several volunteer fireman in plain clothes were present.

On October 7, 2008 at approximately 2:30 p.m., Captain Melisz and Detective Richard Schara were investigating the victim's death. They had already spoken with the surgeon and were aware of the nature of the wounds the victim suffered and the cause of death. They went to the defendant's residence in plain clothes. She invited them inside and led them into the diningroom. Captain Melisz asked the defendant to tell him what happened and he wrote down her responses. No promises or threats were made and no coercion was used. The tone of their conversation was not hostile or accusatory and the defendant was cooperative. No Miranda warnings were given and the defendant never asked for a lawyer or for the questioning to stop. The defendant then made the statements contained in the latter portion of the Notice. Captain Melisz asked the defendant if he could look around the apartment to see where the victim had sustained his injuries. The defendant led them downstairs to a small basement where she pointed to a blue sweatshirt she said the victim was wearing when he was injured.

Captain Melisz asked the defendant if she would accompany him to police headquarters. The defendant said she would but preferred to walk there by herself.

Captain Melisz and Detective Schara left the defendant's house after having been there approximately one (1) hour and returned to headquarters where the defendant arrived approximately 15 minutes later.

The defendant was taken into an interview room which was capable of recording her statements. Although no Miranda warnings were given to the defendant, she was told she was not in custody, was going home that day and could stop the proceedings if she chose. No promises or threats were made and no coercion was used. The defendant was not restrained in any way and no one other than Captain Melisz, Detective Schara and the defendant were present. The defendant was told she was being taped before the interrogation began and she still agreed to cooperate. Captain Melisz believed the defendant knew that the victim had died but she did not seem upset. He considered her a suspect but he was still investigating the victim's death. During the interview, the defendant was confronted with incriminating evidence such as the six (6) inch depth of the puncture wound and that the victim suffered two (2) puncture wounds to his bowel. The defendant was told her story was consistent with negligence and that the District Attorney's Office would not believe her explanation because the victim's wounds were not consistent with his falling on a nail. At that point, after approximately 20 minutes at headquarters, the defendant said she wanted to speak with a lawyer and her request was honored. She was permitted to leave headquarters.

The People have the burden of establishing the voluntariness of a person's statement beyond a reasonable doubt, People v. Witherspoon, 66 NY2d 973 (1985). Miranda warnings are an absolute prerequisite to custodial interrogation, Miranda v. Arizona, 384 U.S. 436 (1966). The test to determine custody is what a reasonable person

innocent of any crime would have thought had he been in the defendant's position, People v. Yukl, 25 NY2d 585 (1969). When Officer Whalen responded to the defendant's house on October 5, 2008, he was lawfully present to assist EMTs and volunteer firemen with a first aid call. He did not engage in any interrogation of the defendant but merely overheard the statements she gave the medical personnel in furtherance of the victim's diagnosis and treatment. Her statements were voluntarily made and not protected by any physician-patient privilege.

When the defendant invited Captain Melisz and Detective Schara inside her residence on October 7, 2008, she was not in custody because a reasonable person in her position, innocent of any crime would have believed she was free to leave or tell the police to leave, Yukl, supra. The police asked investigatory, non-confrontational questions and essentially allowed the defendant to give a narrative of what occurred on October 5, 2008. The defendant was cooperative, not restrained in any way and the tone was not hostile. No promises or threats were made and no coercion was used. The length of time Captain Melisz and Detective Schara were present in the defendant's residence included the statement and the search and did not create such an overbearing police dominated atmosphere as to render her statements and cooperation involuntary.

The videotaped statement the defendant made at headquarters was also the product of a non-custodial setting. The same two (2) officers were the only persons present along with the defendant. The defendant was not restrained in any way. No promises or threats were made and no coercion was used. The defendant was allowed to come there by herself, on her terms and her time. She was told she was not in custody and could go home when the statement was done. Although she was confronted with incriminating

evidence and told her explanations were not consistent with the victim's injuries, she had not yet invoked her right to remain silent or her right to counsel. Since she was not in custody, the absence of Miranda warnings was of no moment. Furthermore, when the defendant did say she wanted a lawyer, the police scrupulously honored her request, People v. Ferro, 63 NY2d 316 (1984) and People v. Esquillin, 143 AD2d 766 (2<sup>nd</sup> Dept. 1988).

A reasonable person in the defendant's position, innocent of any crime would not have believed she was in custody. On the contrary, Captain Melisz told her she was going home that day. The fact that the defendant was a suspect does not convert investigatory questioning to accusatory questioning nor make the setting custodial. The police were trying to clarify medical findings made by the victim's surgeon by asking the defendant what happened and following up her answers with questions based on information that had become available to them, People v. Johnson, 91 AD2d 327 (4<sup>th</sup> Dept. 1983), *aff'd*. 61 NY2d 932 (1984). The length of the encounter when balanced against the comfort of the defendant's own home for the first hour, followed by a relatively brief period at headquarters, under less than coercive or hostile conditions did not constitute custody. The defendant was not told she was a suspect nor that she was in custody. The subjective intent of the questioning officer is immaterial unless he conveys it to the defendant, People v. Joy, 114 AD2d 517 (2<sup>nd</sup> Dept. 1985). Furthermore, the defendant was not in custody as evidenced by her leaving police headquarters when the interview concluded, *see*, People v. Dozier, 32 AD3d 1346 (4<sup>th</sup> Dept. 2006), People v. Lunderman, 19 AD3d 1067 (4<sup>th</sup> Dept. 2005) and People v. Mayerhofer, 283 AD2d 672 (3<sup>rd</sup> Dept. 2001). Since the defendant was not in custody in her home or at the headquarters, the failure of the investigating officers


to advise her of the appropriate Miranda warnings does not vitiate the voluntariness of her statements. Therefore, under the totality of the circumstances, her statements were voluntarily made.

Accordingly, the defendant's motion to suppress the statements allegedly made by her is **DENIED**.

This decision constitutes the Order of this Court.

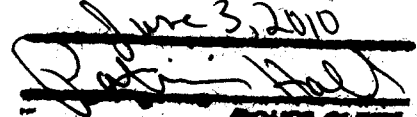
DATED: Buffalo, New York

June 3, 2010

  
RUSSELL P. BUSCAGLIA  
Supreme Court Justice

**GRANTED**

GRANTED:

*June 3, 2010*  
  
**COURT CLERK**