

People v Montalvo

2010 NY Slip Op 34016(U)

February 8, 2010

Supreme Court, Queens County

Docket Number: 298/09

Judge: Joel L. Blumenfeld

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SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY—CRIMINAL TERM—PART K-23

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

ORDER OF THE COURT

CESAR MONTALVO,

INDICTMENT NUMBER: 298/09

Defendant.

-----X
JOEL L. BLUMENFELD, JSC

The defendant moves to suppress physical evidence, a statement and identification testimony. A *Mapp-Hunley-Wade-Dunaway* hearing was held in which Police Officer Michael Varecka, Detective Christopher Spagnola, former Detective Richard Vecchiarelli, and Jason Downs were called as witnesses. From their credible testimony, the court makes the following findings of facts and conclusions of law.

FINDINGS OF FACT

On June 18, 2008 at 1:45pm, Detective Christopher Spagnola was investigating a burglary. The description of the burglar was a male white, five foot seven inches tall, 210 pounds in weight with short brown/blond hair, balding with a reddish tank top and khaki shorts. His roommate's Vaio laptop computer, was taken from that location.

When the detective arrived at the location, an apartment, he spoke with Jason Downs. Downs told the detective that he was taking a shower when he heard the buzzer from the front of the apartment building. He stepped out of the shower and asked who was there. No one responded, but he heard other buzzers going off. He then returned to the shower. Between five and ten minutes later Downs heard a loud noise in his apartment. He yelled out his roommate's

name, but heard no response. He exited the shower a second time and saw his kitchen window open and the screen to the window cut and the front door opened. He quickly dressed and ran to the front door on the fourth floor and saw a male on the third floor landing. He saw that male walking down the stairs with a black cord (that Downs would later realize belonged to the laptop that was taken from his apartment). He yelled down to that person, and the person turned around for what Downs testified was two seconds. He described this person as male, white, wearing a red or orange tank top in his mid-40s or early 50s in age¹, approximately five foot seven inches in height, husky build with thin "salt and pepper" hair.²

Spagnola relayed the information of the burglary to Detective Carla Alvarado who was investigating multiple break-ins at that location and this one seemed to fit the descriptions of the others.

A week later, on June 26, 2008, at around 1:15pm in Queens, Police Officers Michael Varecka and Sean Hines were on foot patrol when they received a radio transmission of an assault in progress. They observed Alban Dizdari, one of the complainants, holding Cesar Montalvo, the defendant, against a wall about a block from the location of the incident. As the officer approached, the defendant stated into a black cell phone "They got me." PO Varecka talked to Alban Dizdari while PO Hines talked to the defendant.

¹ The court notes that Detective Spagnola testified that Downs stated that the perpetrator's age was approximately in his mid-30s or early 40s.

² When Detective Spagnola testified he read from arrest report which contained Detective Vecchiarelli's description of the defendant at the time of the arrest: "[H]e had the defendant at five-five, 160 pounds, brown eyes, salt and pepper hair, short hair length close cut, light skin tone, clear complexion.... He had him at 56 years old, that's the actual pedigree that he got from the defendant" (Transcript, p 49).

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Dizdari told PO Varecka that the defendant came into his apartment and when he confronted the defendant and asked him what he was doing there, the defendant told him he was there to see a particular person. When Dizdari told him that the person the defendant was looking for did not live in the apartment, the defendant struck him with an umbrella. Dizdari then chased the defendant.

At this point, the defendant was placed under arrest and the black cell phone was seized. PO Varecka informed the special operations lieutenant that what Dizdari told him seemed to fit a pattern of burglaries for that location.

Detective Christopher Spagnola, who investigated the burglary at Downs' apartment, heard that an arrest was made (of the instant defendant) on a burglary where the description in terms of time and place seemed to match other burglaries.

Since Alvarado, who was the lead investigator of these types of burglaries was not working that day, her partner, Detective Vecchiarelli was handling the investigation. Vecchiarelli was informed by Varecka that the defendant had been arrested for the Dizdari burglary.

Spagnola and Vecchiarelli assembled a photo array using the photo management system and showed it to Jason Downs in his apartment. Downs identified photo number six (the defendant) as the person he saw on the third floor landing. The two detectives later that day assembled a lineup. Downs observed the lineup and identified number one (the defendant) as the person he saw on the third floor landing.

CONCLUSIONS OF LAW AND DECISION OF THE COURT

The defendant moves to suppress the cell phone, the statement "you got me" and the identification testimony of Downs.

After the hearing both parties were given the opportunity to submit memoranda of law and they both have.

The defendant does not make any arguments as to why the cell phone and the statements should be suppressed. It is clear that the cell phone was properly seized from the defendant as a search incident to a lawful arrest (*see e.g. Chimel v California*, 395 US 752, 762-3 [1969]). Accordingly the motion to suppress the cell phone is denied.

It is equally clear that the statement "They got me" was spontaneous and not a product of an interrogation environment, that is the "the result of express questioning or its functional equivalent" (*People v Stoesser*, 53 NY2d 648, 650 [1981]). Accordingly, the motion to suppress the statement "They got me" is denied.

The crux of the issue regarding the identification is whether the photo array was unduly suggestive, thereby tainting the lineup identification and any in court identification. In determining whether an identification process is "unduly suggestive" this court is required to determine whether there was any substantial likelihood that the defendant would be singled out for identification (*see People v Chipp*, 75 NY2d 327, 336 [1990]).

The court has examined the six photos in the photo array and finds that they are close to what Downs described as the person he saw on the third floor landing and close to the pedigree description in the arrest report. All the photos were similar in size, the faces were similar in size,

[*5]
position and expression and there was nothing in these pictures that would make the defendant's picture stand out.

As to the line-up, the court has examined the photos of the line-up and finds that they too are close to what Downs described as the person he saw on the third floor landing and close to the pedigree description in the arrest report. The defense attorney in his memorandum of law is correct in pointing out that the individuals in the line-up had different hairstyles and colors, some did not have facial hair and they were of different ages. However, these differences were, for the most part slight and they were all in the range of the description.

It is interesting to note that the description that Downs gives as to the perpetrator's age and the actual age of the defendant is of little concern for the purposes of this decision. Downs states that his the perpetrator is in his mid-40s to early 50s, while the defendant's age is 56.³ However, a person's description of someone's age — unlike a person's actual age — is subjective. It is not like hair color or hair length which is objective — gray hair is gray hair. Nevertheless, as stated before, the people portrayed in the photo array and the participants in line-up appeared to be in the same range as the defendant which, among other things, renders it *not unduly suggestive*.

Another issue is the short time between the photo array and the line-up. The question arises because of the short time as to whether the witness, Downs, once picking out a picture, is looking for the picture — as opposed to the person whom he saw on the third floor landing — at

³ This could be an issue raised at trial as to the strength of Down's identification of the defendant, but has nothing to do in this case with it being unduly suggestive.

the line-up.⁴ However, this is a factual argument which the defendant can make at trial (*see People v Hawkins*, 55 NY2d 474).

Further, the court finds that the picture of the photo array and the line-up showing the defendant are not identical. There are some differences between the picture of the defendant in the photo array and in the line-up. For example, while they both have salt and pepper hair, as Downs described the defendant's hair (including eyebrow and moustache), the picture in the line-up shows much more salt than pepper. It should also be noted that in no picture is the defendant (or any other person in the array or line-up) wearing a red or orange shirt.

Accordingly, the motion to suppress identification testimony is denied as well.⁵

Finally, this court finds that there was an independent source that would attenuate any improper police arranged identification procedure in this case. Downs, in the shower, heard the apartment building buzzer go off and he responded. When no one responded, he returned to the

⁴ The court is also concerned about this issue and the necessity of the photo array or line-up at that time as the defendant was already in custody for the Dizdari burglary and would not have been released even if not identified by Downs. Once arraigned, counsel could have been assigned and a court-ordered line-up could have been pursued. However, these are policy issues and no cases have been cited that the procedures employed by the police after arrest violated the defendant's constitutional rights.

⁵ Although defense counsel states in his factual statement that the defendant requested an attorney and the lineup was conducted without counsel present, defense counsel does not raise it in his "Issues" section of his memorandum of law. It can be assumed that he did not feel it was a legal issue. The People, nevertheless, do address it. First, they raise the factual argument that his request for an attorney was for questioning, not for the line-up. Second, the People argue that since there was probable cause to arrest the defendant, neither the defendant or counsel can stop an investigatory lineup once the police decide to conduct one (*see People v Jones*, 2 NY3d 235 [2004]). The role of counsel at a lineup, although not without value, is limited to being a passive observer (*People v Hawkins*, 55 NY2d 474, 485). However, the important role of an observer is mitigated when there "will be an eyewitness who can be examined and cross-examined at the Wade hearing and at the trial as to whether any improper conduct was resorted to" (*id.*, at 486 n. 4 [emphasis in original]). "While generally there is no constitutional right to counsel at an investigatory lineup prior to the commencement of formal adversarial proceedings, where the police are aware that the defendant is represented by counsel on the charge under investigation, or on an unrelated charge, and the defendant specifically asks for counsel, then the right to counsel at the lineup is triggered (*see Kirby v Illinois*, 406 US 682; *People v Wilson*, 89 NY2d 754; *People v LaCiere*, 76 NY2d 670; *People v Coates*, 74 NY2d 244)" (*People v Brown*, 26 AD3d 392 [2d Dept 2006]). In the instant case, there is no evidence that counsel had been appointed on the other case, therefore there was no violation of defendant's right to counsel.

shower. When he then heard sounds from his apartment, he called out thinking it might be his roommate. When no one responded, he alertly realized that something was amiss, exited the shower, got quickly dressed, left his apartment and deliberately observed a person on the landing one flight below — the distance of a mid-size car, as Downs testified — and called out. The person on the stairs turned around and Downs observed his face for about two seconds and able to make a detailed description of the person on the third floor landing, including hairstyle, color, build, height, and approximate age. The totality of the circumstances leads this court to believe that this is a source of identification independent of the police-arranged line-up. However, this is unnecessary since this court finds the identification procedures employed by the police to be legally proper.

The Clerk of the Court is directed to enter this Order. IT IS SO ORDERED.

DATE: February 8, 2010
Kew Gardens, NY



JOEL L. BLUMENFELD,
Acting Justice of the Supreme Court