

People v Hicks

2011 NY Slip Op 34227(U)

March 28, 2011

Supreme Court, Erie County

Docket Number: 02502-2010

Judge: Russell P. Buscaglia

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

The People of the State of New York

vs

INDICTMENT NO.
02502-2010

Robert Hicks,

Defendant.

Frank A. Sedita, III, Esq.
Erie County District Attorney
BY: Sarah E. Ryan, Esq.
Assistant District Attorney
Attorney for the People

Jon A. Nichols, Esq.
Attorney for the Defendant

DECISION AND ORDER

RUSSELL P. BUSCAGLIA, J.S.C.

The defendant is charged by this Indictment with Criminal Possession of a Weapon in the Second Degree, Penal Law § 265.03. The defendant moves to suppress the identifications made of him and the statement allegedly made by him pursuant to Section 710.20 of the Criminal Procedure Law. A hearing was conducted pursuant to United States v. Wade, 388 U.S. 218 (1967) and People v. Huntley, 15 NY2d 72 (1965). Officer Jimmie Larke and Detective Carl Lundin of the City of Buffalo, New York Police Department testified at the hearing.

The credible testimony at the hearing revealed that on August 29, 2010 at approximately 4:15 p.m., Officer Larke was in uniform, driving a marked police car in the

vicinity of Tonawanda Street in the City of Buffalo when he received a radio call of a man with a gun. Within minutes, he arrived at that location and encountered a fellow officer with his gun drawn pursuing the defendant who was fleeing on a bicycle. Officer Larke chased the defendant on foot and from a distance of approximately 20 feet, recognized him as an employee of a Tim Horton's on Niagara Street that he had seen on numerous occasions.

The defendant dropped his bicycle and fled on foot, jumping over fences and eventually eluding the pursuing officers. The path the defendant took was retraced by the investigating officers and a loaded handgun was recovered from inside a garbage tote on top of trash. Detective Lundin who also responded to the scene interviewed two victims, Charles Bremer and Louis Padilla, who both told him that Joonie pulled a gun on them but they did not know his real name.

Officer Larke went to the Tim Horton's where he recognized the defendant and asked employees there the defendant's name. He was told that the defendant's name was Robert Hicks. He returned to his police station, looked in a mugbook and confirmed it was the defendant that fled from him earlier that day. He conveyed this information to Detective Lundin who prepared photo arrays to show to the victims. Detective Lundin used the Buffalo Police Department's photo imaging computer system to generate the arrays by inputting the defendant's characteristics, black male, approximately 22 years old, clean shaven with a short haircut. Later in the day on August 29, 2010, the victims were brought to the police station and were separated. Padilla was taken to an interview room by Detective Lundin. No one else was present and the lighting was adequate. The array was placed face down and Detective Lundin read the instructions to Padilla. No suggestion was made as to whom to select, no promises or threats were made and no coercion was

used. The five (5) stand-ins sufficiently resembled the defendant in all relevant characteristics. Padilla selected photo #5, the defendant and said that's him right there.

Bremer was brought to a separate interview room and shown a duplicate array by Detective Lundin using the same procedure. No one else was present and the lighting was adequate. No suggestion was made as to whom to select, no promises or threats were made and no coercion was used. Bremer also selected photo #5, the defendant.

On August 30, 2010 at approximately 7:00 p.m., Officer Larke saw the defendant driving a car on Esser and Conder Streets in the city of Buffalo. He activated his overhead lights and pulled the defendant's car over. The defendant complied and Officer Larke told him the detectives wanted to talk to him about the previous day on Tonawanda Street. The defendant agreed to accompany Officer Larke and he was placed, uncuffed, in the rear of the police car and taken to the police station. Officer Larke allowed the defendant's passenger to drive the car away. The defendant was not interrogated by Officer Larke or advised he was under arrest. When they arrived at the police station, Detective Lundin brought the defendant into an interview room and confronted him with the discovery of the handgun inside the garbage tote along the path of his flight. The defendant did not make any statements to Detective Lundin. Lt. Michael March entered the room and advised the defendant of the appropriate Miranda warnings. The defendant said he understood them. Detective Lundin then took a written statement from the defendant. At the conclusion of the statement, the defendant was given an opportunity to review it for accuracy before signing it. No promises or threats were made and no coercion was used. The defendant remained uncuffed and he did not invoke his right to remain silent or his right to counsel. At the conclusion of the statement, the defendant was arrested.

The People have the initial burden of going forward to establish that the identification procedure was not unduly suggestive and that burden is minimal, People v. Ortiz, 90 NY2d 533 (1997). If the People meet their burden, the defendant has the burden of persuasion by a preponderance of the evidence to establish a basis for suppression, People v. Berrios, 28 NY2d 361 (1971). The photo arrays shown to the victims were fair in that the five (5) stand-ins sufficiently resembled the defendant in all relevant characteristics and no single photo stood out from the others, People v. Chipp, 75 NY2d 327 (1990). No suggestion was made by Detective Lundin as to which photo to select and no promises or threats were made. Therefore, under the totality of the circumstances, the the identification procedures were not unduly suggestive.

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. Yuki, 25 NY2d 585 (1969). When the defendant's car was stopped by Officer Larke on August 30, 2010, he was seized because his liberty was interfered with in a significant way. The defendant did not violate any Vehicle and Traffic Laws. Although he was not told he was under arrest and he was not handcuffed, he was not free to leave. However, he was not interrogated by Officer Larke.

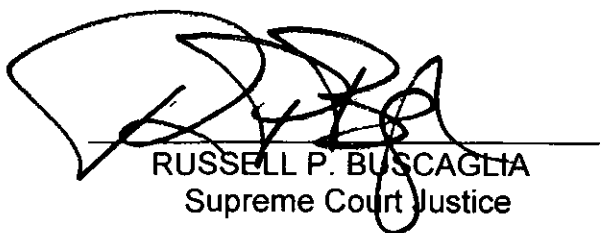
At the police station, the defendant remained uncuffed when he was turned over to Detective Lundin who preliminarily confronted him with the discovery of the abandoned handgun prior to Miranda warnings. The defendant did not make any statements to

Detective Lundin until after Lt. March advised him of the appropriate Miranda warnings and the defendant said he understood them. No promises or threats were made and no coercion was used. The defendant did not invoke his right to remain silent or his right to counsel. Therefore, under the totality of the circumstances, the defendant's statement was voluntarily made.

Accordingly, the defendant's motion to suppress the identifications made of him and the statement allegedly made by him is **DENIED**.

This decision constitutes the Order of this Court.

DATED: Buffalo, New York
March 28, 2011



RUSSELL P. BUSCAGLIA
Supreme Court Justice

GRANTED: *March 28 2011*
Wendy Smith
CLERK