

People v Johnson

2011 NY Slip Op 34297(U)

November 16, 2011

County Court, Suffolk County

Docket Number: 01455-2010

Judge: Gary J. Weber

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COUNTY COURT: SUFFOLK COUNTY
STATE OF NEW YORK

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DECISION AND ORDER

THE PEOPLE OF THE STATE OF NEW YORK,

BY: GARY J. WEBER, J.C.C.

-vs-

DATED: November 16, 2011

CHAD JOHNSON,

CASE NO. 01455-2010

Defendant.

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On November 16, 2011 the prosecution requested the opportunity to reargue their previous motion *in limine* with respect to the introduction of an excerpt from the arraignment minutes, and this court's written decision rendered on November 15, 2011. The prosecution has now added a hearsay objection to the introduction of the transcript, and at the same time withdrawn its previous objection based upon the advocate-witness rule to the testimony of defense counsel should he chose to assume the witness stand. *See People v. Paperno, 54 NY2d 294; and Prince, Richardson on Evidence § 6-114, at 324 (Farrell 11th ed).* The prosecution now argues that counsel for the defendant could testify at trial before the jury; or the prosecutor has offered, in the alternative, a compromise that the arraignment transcript with articulated additions and deletions be admitted on consent. Counsel for the Defendant agreed to the proposed deletion, but objected to the proposed addition. The Court has attached to this decision a copy of the considered exhibit with the deletions reflected by ~~strike-out text~~, and the addition of the prosecutor's remarks in courier font.

DECISION

The motion to reargue is granted. The fact that the prosecution has withdrawn its previous objection based upon the advocate-witness rule and agreed that counsel for the defendant could actually testify to his own observations on the date of the defendant's arraignment in District Court has alleviated the concern that the Defendant might have otherwise been denied the right to call a witness to his physical condition when he was first brought to the court from police custody. *See People v. Berroa, 99 N.Y.2d 134 and People v. Barbato, 254 N.Y. 170; People v. Valletutti, 297 N.Y. 226.* The prosecution has

further offered, alternatively, to waive its hearsay objection to the introduction of the excerpts of the arraignment transcript with the proposed additions and deletions. Both of the proposed alternatives afford the Defendant the right to advance his contention and at the same time protect the prosecution's right to fairly contest that contention.

Defense counsel, William Ferris, Esq., at the arraignment on the felony complaint, described to the District Court judge, in open court and transcribed stenographically, injuries which he then observed present on the defendant, or, with respect to an injury covered by the Defendant's sleeve he had seen only moments before in the lock-up. His description of the injuries has been corroborated by the observations of the clinician at the Suffolk County jail who performed a physical examination of the Chad Johnson after arraignment upon admission to the Suffolk County jail. The records from the jail recorded the observation of: a one centimeter ecchymotic¹ red spot on the right side of the forehead; neck scratches, four lines; left axilla² two, 2 centimeter areas of ecchymosis. Defense counsel's description of injuries he observed as corroborated by the records of the medical examination conducted on the same day are admissible, as an exception to the hearsay rule, as a present sense impression. *People v. Vasquez*, 88 N.Y.2d 561. The prosecution's withdrawal of its witness-advocate objection has made it clear that, the declarant, Mr. Ferris, Esq., is available to testify. In *Buie* the Court held that the unavailability of the declarant is not a prerequisite for admission of statements made as present sense impression, but that trial courts may take into consideration a witness's availability or actual presence in court when balancing the probative value of present sense impression evidence against the potential for undue prejudice or jury confusion. *People v. Buie*, 86 N.Y.2d 501

The trial prosecutor, Mr. Pettigrew, Esq., now argues for the introduction of contradictory observations and remarks made by another prosecutor at the arraignment of Mr. Johnson. After the arraignment had been concluded, that prosecutor supplied the following addendum: "Let the record reflect, based on my observations of the defendant, I do not see the injuries Mr. Ferris claims. Thank you." This rejoinder by the prosecutor at arraignment is not corroborated by the subsequent medical examination, and in the absence of such corroboration does not satisfy the present sense impression to the hearsay rule and is inadmissible.

Under the circumstances, with the withdrawal of the advocate-witness objection to in court testimony of defense counsel, the Court cannot countenance the discretionary admission of defense counsel's remarks as recorded in the arraignment minutes when those assertions were directly contradicted by the prosecution in that court.

¹ecchymosis: The passage of blood from ruptured blood vessels into subcutaneous tissue, marked by a purple discoloration of the skin.

²Axilla: the area on the human body directly under the joint where the arm connects to the shoulder.

Similarly, the Court can not force the Defendant to consent to the introduction of the arraignment prosecutor's hearsay remarks. The Court can only reasonably offer the defense the choice offered on consent of the prosecution, or resort to receiving the testimony of trial counsel and of the arraignment assistant should the prosecution choose to call him in rebuttal.

To the extent that Mr. Ferris, as an agent with speaking authority for the defendant, told the arraignment court that the Defendant contended the observed injuries were the product of an assault by police while the defendant was in custody, that portion of the arraignment minutes will be admissible as a prior consistent statement and prompt outcry should the defendant elect to testify. *People v. Rosario*, ___ NY3d ___, (Oct. 18, 2011).

ORDER

ORDERED that the Defendant, at his election, will be permitted to introduce on his direct case the amended extract without limiting instructions which shall read as follows:

"Extract from the Official Transcript of the Proceedings on May 25, 2010 before the Hon. Richard Horowitz, First District Court, Suffolk County, New York, Part D11:

THE COURT: [DEFENSE COUNSEL FOR CHAD JOHNSON]

[DEFENSE COUNSEL FOR CHAD JOHNSON]: ... "There are a couple of things I would like to say. I have had an opportunity to speak to my client before coming out here this morning... For the record, your Honor, I would like to note that his left arm, which is covered by his shirt as the present time -- he did show me in lock-up there was an injury on his shoulder, on the arm area. Above his left eye there is a mark. Above his eyebrow and the right side of his face, to the right and above his eye, is an injury I am going to ask the Court to direct he be given a medical examination when he goes back to the jail..."

[PROSECUTOR]: Let the record reflect, based on my observations of the defendant, I do not see the injuries [DEFENSE COUNSEL] claims. Thank you."

or in the alternative it is

ORDERED that counsel for the Defendant may elect take the witness stand to testify to his personal observations of the condition of the defendant, under these circumstances, temporary substitute counsel would be appointed by the Court to the defendant for the limited purpose of conducting the necessary examination of Mr. Ferris, with defense of the case to thereafter resume by Mr. Ferris; and it is further;

ORDERED that defense counsel is directed to immediately discuss the tactical choices available to his client and inform the court which remedy he chooses so the necessary arrangements can be made.

The foregoing shall constitute the decision and order of the Court.



GARY J. WEBER, J.C.C.