

**People v Turner**

2012 NY Slip Op 33672(U)

August 10, 2012

Supreme Court, New York County

Docket Number: 5446/10

Judge: Maxwell T. Wiley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 42

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THE PEOPLE OF THE STATE OF NEW YORK,

**DECISION AND ORDER**  
Indictment No. 5446/10

-against-

MICHAEL TURNER, HAFIZ ZAHIRUDDIN, and  
DAVID SOLANO,

Defendants.

----- X

MAXWELL WILEY, J.:

Each defendant has moved to suppress various items of evidence. After motion practice, the court granted the motions to the extent of ordering a hearing for each defendant. As to the defendant Turner the court ordered a combined *Mapp/Dunaway/Huntley* hearing. As to the defendant Zahiruddin the court ordered a combined *Mapp/Dunaway/Huntley/Wade* hearing. As to the defendant Solano the court ordered a *Mapp/Dunaway* hearing.

The hearing took place on January 19, 20, 24, and 26, 2012. Two witnesses testified for the People, both members of the New York Police Department: Detective Robert Reid and Lieutenant Manuel Hernandez. The defendants did not call any witnesses.

The court denied the motions orally from the bench on February 15, 2012.

The following constitute the court's findings of fact and conclusions of law.

**FACTS**

The Court credits the testimony of the witnesses. On November 11, 2010, at about 11:45 p.m. Detective Reid was called to the scene of a violent robbery at a restaurant on University Place near East 13<sup>th</sup> street in Manhattan. At that scene the detective interviewed the

victim of the robbery, an employee of the restaurant, and viewed surveillance footage of the restaurant's interior. Other police officers interviewed other employees. After a brief interview at the restaurant, the victim, who had suffered several injuries during the robbery, including a blow to the head, was removed to the hospital. Later that night, the victim was brought to the Sixth Precinct Detective Squad for more detailed interviews with detectives and further review of surveillance footage. The interviews and review of the videos took place over the course of several hours. Detective Reid finished his shift at about 8:00 a.m. on November 12. He then stayed at the station house to sleep until his next shift began that afternoon.

During the course of these interviews and review of the video, Detective Reid learned the following. The victim was the executive chef at the restaurant. At about 11:30 p.m. on November 11 the victim went to the manager's office in the basement of the restaurant in order to begin closing the restaurant for the evening. The victim took an elevator to the basement level. There he noticed the defendant Turner, an employee of the restaurant. The victim thought this odd since Turner's shift had ended a half hour earlier. Unbeknown to the victim, but recorded on security video, Turner had propped open an outside door. Two men entered the open door. As the victim approached the office he was set upon by the two men, who were wearing masks. The men dragged him by his collar into the office. One of the men, wearing a hockey mask, beat the victim with a hammer. The second man, wearing a ski mask, assisted in the beating. The men demanded that the victim open the safe in the office. During the struggle the hockey mask on one of the men slipped off and the victim saw his face. Additionally, the victim recognized the voice of the second man in the ski mask as that of the defendant Solano, who worked with the victim in the kitchen of the restaurant. Solano and the other man subdued the victim with duct tape and forced him to give them the combination to the office safe.

Meanwhile, Turner had gone upstairs to the restaurant, but had sent the elevator back down to the basement.

Turner had remained at the restaurant when police first arrived in response to a 911 call about the robbery. The police attempted to interview all employees of the restaurant that night, but Turner left the restaurant before being interviewed, and Solano was not present for work that night.

Efforts to interview Turner began the next morning, November 12. Lt. Hernandez arrived at the Sixth Precinct Squad at 10:00. He had been briefed throughout the night about the crime and the progress of the investigation. Once at the precinct he reviewed the videos and the information that had been gathered by Detective Reid and other detectives during the night. The decision was made to attempt to contact any restaurant employees who had not been interviewed at the crime scene the night before. Lt. Hernandez contacted the restaurant's management and asked them to call the precinct if and when Michael Turner arrived at work. At about 11:20 a.m., the restaurant so notified the police that Turner had arrived. The lieutenant and another detective went to the restaurant and asked both Turner and his employers for permission to interview Turner at the precinct. The employers agreed, as did Turner. Turner's manner was "cooperative" as the detectives drove him to the station house. Turner was not handcuffed, as he was being treated as a "witness" at that point.

Turner arrived at the precinct a few minutes after 12:00 noon. Lt. Hernandez asked him to sit in an interview room and wait for Detective Reid or another case detective to arrive. Lt. Hernandez was not aware, however, that Reid was asleep in another part of the station house. Turner waited in the interview room, with the door open, until about 7:00 that evening. Periodically, the lieutenant checked with the defendant to see if he wanted anything to drink or

eat. The defendant asked no questions and made no demands to leave. At about 4:00 p.m. Detective Reid began his next shift. He conferred with the lieutenant and other detectives and introduced himself to Turner and asked Turner to continue to wait—which is what Turner did.

At about 7:00 p.m. Reid completed his review of the evidence gathered thus far, and he another detective entered the interview room. Before asking Turner any questions he advised him of his *Miranda* rights. Though he also advised Turner that he was being interviewed as a witness, the detective told him that his behavior the night before around the elevator appeared “suspicious,” and that the police would like a detailed accounting of his movements at the restaurant before and during the robbery. Turner executed a written waiver of his constitutional rights and spoke with the detectives. Initially, Turner denied any involvement in the crime and attempted to explain his movements on the restaurant elevator and around the back door. Turner wrote out a statement to this effect at about 7:20 p.m. During this interview, before completing the written statement, Turner also gave the police consent, in separate writings, to search his cell phone and his employee locker at the restaurant. Turner gave police his cell phone, which was placed outside the interview room, on the top of a nearby low wall.

Meanwhile, other detectives were sent to the restaurant to pick up David Solano, who had appeared for his next work shift. Solano was brought to the precinct detective squad at about 8:45 p.m. As detectives attempted to search him, Solano struggled. Ultimately, several detectives, including Detective Reid, were required to subdue Solano and recover a “crack pipe” and several hundred dollars from his pocket. Among other items recovered from Solano was a cell phone. The cell phone was placed next to Turner’s cell phone on the low wall in the detective squad.

This struggle occurred near the entrance to the holding cells in the detective squad. When Solano was initially brought into the squad, on his way to the cells, he passed the entrance to the interview room, where Turner sat with the door open. Reid left Turner alone in the interview for some time while he dealt with the arrest and search of Solano. When the detective returned, Turner said, in substance, I guess you know what's going on. You got David. Detective Reid told Turner that the statement he had made earlier that night was not consistent with "what we see on the video." Reid advised Turner that the police "kind of knew he is involved," and they "are going to find out," so that it was time for Turner to tell the truth. Turner then admitted that he knew about the robbery that Solano was planning, and that he had agreed to leave the restaurant door open for him that night, in exchange for \$300 of the proceeds. Detectives continued to interview Turner in order to get the details of Turner's participation in the crime and his knowledge of his accomplices. Finally, Turner committed his revised statement to writing at about 11:15 p.m. In this statement, Turner identified the three participants in the robbery as himself, David Solano, and an associate of Solano's known to Turner only as "Echo."

During the course of taking Turner's statement Reid asked another detective to look through Turner's cell phone to see if he could find any names or numbers connected to the participants in the robbery. The other detective picked up one of the phones resting on the wall near the interview room and holding cell and looked through its contents and found contact information for a person named "Echo." The phone that the detective was examining did not, in fact, belong to Turner, but was instead the phone that had been recovered from Solano. Using the information taken from this phone, detectives used an internal NYPD database to discover that "Echo" was Hafiz Zahiruddin. They further learned that Zahiruddin was on parole.

The next day, November 13, detectives obtained a search warrant for the contents of Solano's cell phone. In his application for the warrant—which was made part of the record of the hearing by the court—Detective Reid swore to: his observations of the surveillance videos; his interviews of the robbery victim; his interviews of Michael Turner; and his recovery of the cell phone from David Solano. The search warrant application contained no reference to the viewing of the contents of the cell phone by detectives on November 12.

Armed with the information derived from Solano's cell phone, detectives contacted Zahiruddin's parole officer, and learned that Zahiruddin was scheduled to report to the parole offices on November 17. On that date the Zahiruddin's parole officer notified the police that Zahiruddin had appeared as scheduled, and officers from the Sixth Precinct were sent to bring him to the station house. When he arrived, Detective Reid noticed immediately that, based on his review of the surveillance footage, Zahiruddin resembled the perpetrator of the November 11 robbery whose mask was pulled off by the victim during the struggle. At about 3:30 p.m. the defendant was placed in the interview room, and Detective Reid administered his *Miranda* warnings. Zahiruddin waived his rights in writing and agreed to speak with the police. In essence, after some questioning, Zahiruddin admitted that he knew of Solano's plan to commit the robbery, but he denied participating in the robbery and stated that he told Solano not to do it. He further pointed to a tattoo on his neck and told detectives that if they saw a person on the surveillance video they thought was him, they should also see the tattoo. Zahiruddin declined to commit his statement to writing.

The police seized Zahiruddin's cell phone and a set of neck beads which resembled beads that were worn by a perpetrator and were visible on the surveillance video from November 11.

At some point during Zahiruddin's stay at the precinct a woman who identified herself as his mother called, concerned about him. After being told that her son would most likely be charged with robbery, she mentioned that he had been doing "stupid things" lately, like getting a tattoo on his neck the weekend before.

The police made arrangements for the robbery victim to view a line-up containing Zahiruddin. The victim arrived at the station house at about 9:00 that evening. Before he arrived Detective Reid arranged for four police officers to act as stand-ins in the line up. The officers were selected based on their resemblance to Zahiruddin. When the victim arrived he was placed in an area of the station house that insured that he would not see either the Zahiruddin or the stand-ins before viewing the line-up. In arranging the positions of the stand-ins and Zahiruddin the detective placed Zahiruddin in position number four at the latter's request. Each of the participants wore a hat and a bandage around his neck to obscure Zahiruddin's unique hairstyle and neck tattoo. The victim viewed the line-up and identified Zahiruddin as a perpetrator of the November 11 robbery at the restaurant. Zahiruddin was formally placed under arrest.

## LAW

By the early morning hours of November 12, during their initial investigation into the November 11 robbery, the police possessed information sufficient to provide them with probable cause to believe that defendants Turner and Solano had been participants in the crime. After questioning Turner and examining the contents of Solano's cell phone—and conducting further investigation—the police had probable cause to believe that defendant Zahiruddin was the third participant. The primary issues raised by the defendants' motions concern the legality of the

questioning of Turner; the warrantless examination of Solano's cell phone; and the legality of Zahiruddin's arrest and subsequent identification in a line-up.

### *Turner*

When police first encountered defendant Turner on the morning of November 12, they had reason to know the following: The night before a violent robbery was committed at the restaurant at which Turner worked by two masked men, one of whom was his co-worker, David Solano. Solano and the other man gained access to the restaurant's offices through a locked exterior door that Turner had propped open shortly before the robbery. Turner further manipulated an elevator that eased the robbers' entry and exit from the offices. During the robbery itself Turner remained near the offices—a location at which his job as dishwasher would not require him to be. Finally, when the police arrived after the robbery was reported, Turner left the restaurant, even though he had stayed past his shift while the robbery was in progress. Based on this information the police could have properly concluded that it was “reasonably likely” that the defendant was a participant in the robbery. CPL §70.10(2). Instead of arresting the defendant on the morning of November 12, however, the police asked the defendant to come to the station house to be interviewed and the defendant agreed.

The defendant accompanied the police voluntarily. Once at the station house the defendant was asked to wait in an interview room—in which he waited for the next seven hours before being interviewed by detectives. During this time, the police made periodic assurances to the defendant that he would be seen as soon as the assigned detective began his shift. The “police did not use handcuffs or any other means of restraint, and they left defendant alone in an unlocked interview room.” *People v. Hernandez*, 25 A.D.3d 377, 378 (1<sup>st</sup> Dept. 2006). Though

an inordinate amount of time passed before the defendant was questioned and, ultimately, placed under arrest, this was not due to any subterfuge or misconduct by the police. The defendant Turner's long wait was due only to the course the investigation had taken, which required the assigned detective to stay awake all night and then to take a break to sleep at the precinct before being ready to interview Turner. Under the particular facts of this case an innocent person in Turner's position would not have felt himself to be in custody. That Turner may have "felt obliged to cooperate with the police in order maintain his façade of innocence" does not alter this conclusion. *People v. Yuki*, 25 N.Y.2d 585, 591 (1969).

When Turner was finally interviewed, it was only after he knowingly and voluntarily waived his constitutional rights. Though he was warned by the police that they regarded his behavior the night before with suspicion, he consented in writing to a search of his cell phone and work locker. Turner remained voluntarily at the police station, speaking with detectives, until he observed the arrest of co-defendant Solano, when he then confessed to his role in the crime and was placed under arrest.

Turner's motions to suppress evidence of his statements to police and any evidence derived from the search of his cell phone and employee locker are therefore denied.

### *Solano*

The defendant David Solano was arrested after the police had established that the robbery victim recognized one of the masked robbers' voices as that of his co-worker "David." Investigation revealed that "David" was David Solano. Details of the crime corroborated the victim's assertion that one of the participants was familiar with the restaurant's layout and location of the business safe. When Solano was brought into the station house during the

evening of November 12, the police had probable cause to believe that Solano was one of the masked participants in the robbery. At the precinct, Solano was searched incident to the lawful arrest and his cell phone, among other items, was recovered.

At some point after the recovery of the cell phone, Turner told the police that the third robbery participant was known by the name “Echo.” The police thereupon examined the cell phone which they thought belonged to Turner—who had consented to the examination of his phone. The phone in fact belonged to Solano, who had given no such consent. There they found contact information for a person identified as Echo, which they then linked to the defendant Zahiruddin.

This warrantless search of Solano’s cell phone, though inadvertent, was unlawful. The police had probable cause to believe that information linked to the name, “Echo,” would be found within Turner’s cell phone. Turner had just begun to admit his role in the robbery after several attempts at denial. The police were therefore entitled to conclude that information corroborating Turner’s admissions—for instance, details about the identities of his accomplices and communications between them—would be found in his cell phone. Having obtained Turner’s permission to search his phone, the detective’s directive to his colleague to conduct such a search was lawful. In addition, based on the surveillance video, on the identification of Solano by his co-worker and robbery victim, and now on Turner’s admissions, the police had probable cause to believe that evidence of the identity of “Echo” could be found in Solano’s cell phone as well. Lacking Solano’s consent, however, the police could not search inside Solano’s phone without first obtaining a warrant.

The issue then arises whether the illegal entry by the police into Solano’s cell phone bars admission into evidence at trial the possession by Solano of information linked to the identity of

his accomplice. Because “it is inappropriate to suppress evidence lawfully seized simply because the police have blundered in a way wholly unrelated to the seizure of that evidence,” this court concludes that there is no such bar here. *People v. Arnau*, 58 N.Y.2d 27, 37 (1982). In this case the police, after linking the information in Solano’s phone to Zahiruddin’s name—and, presumably, learning of their mistake in the ownership of the phone—obtained a warrant authorizing their search of Solano’s phone. Significantly, the affidavit in support of the warrant did not cite any information gathered as a result of the police’s inadvertent unlawful entry into Solano’s phone. The affidavit alleged only facts that were known to the police *before* their entry into the phone: the actions of Solano and his accomplices as revealed by the surveillance video; the information supplied by the robbery victim; the admissions by Turner; and the fact that the phone was recovered from Solano upon his arrest (*see* Search Warrant #N1074-2010 November 13, 2010, affidavit signed by Detective Robert Reid before Hon. Felicia Mennin, ¶¶6-9). In this case “there is not the slightest hint that the search warrant was in any way tainted by the illegal entry or that the police exploited the entry in an effort to obtain evidence.” 58 N.Y.2d at 33.

Though the police had apparently begun the process of linking the information inside Solano’s phone to Zahiruddin before obtaining the warrant, Zahiruddin was not located until afterward. Most importantly, he was not identified as one of the perpetrators of the robbery until November 17, when, first, Detective Reid saw him at the station house and, then, when the victim identified him in the line-up. There is no evidence in this case of the police “exploiting” or “benefitting” from their illegal entry in order to obtain the search warrant for Solano’s phone. Where, as here, the search warrant provides a true “independent source” for the evidence of Solano’s guilt, that evidence is free of the taint of the initial unlawful entry and is therefore admissible at trial. *People v. Burr*, 70 N.Y.2d 354, 361 (1987).

The defendant Solano's motion to suppress evidence derived from the search and seizure of his cell phone and other items found in his possession is therefore denied.

*Zahiruddin*

When the police encountered Zahiruddin on November 17 at his parole officer's office, they were in possession of the following reliable information: the November 11 robbery had been committed by Turner, Solano, and an associate of Solano's known as Echo; Echo's phone number was linked to Zahiruddin; Zahiruddin's criminal records contained a photo and a description and the fact that Zahiruddin was currently on parole. In addition, Detective Reid had viewed the surveillance footage of the robbery repeatedly and was familiar with the appearance of the perpetrator whose mask was removed during the struggle with the victim. The police who picked up Zahiruddin at his parole office had probable cause to believe he was the third perpetrator—Turner had identified his accomplices as Solano and "Echo," and information contained in Solano's phone and in telephone records identified "Echo" as Zahiruddin. This was confirmed when, within moments of being brought into the station house, Zahiruddin was recognized by Detective Reid as the third perpetrator from the surveillance footage.

The defendant was searched and his cell phone seized. The police then interviewed defendant after he knowingly and voluntarily, and in writing, waived his rights to remain silent and consult with an attorney. The defendant admitted knowing about the robbery in advance but denied participating in it. During the interview the defendant inadvertently supplied police with additional evidence of his guilt when he pointed out a highly visible tattoo on his neck and challenged the police to find such a tattoo on any of the robbers as they appeared on the

surveillance video. During a later interview with the defendant's mother, the police learned that Zahiruddin had acquired the tattoo during the days after the robbery.

Zahiruddin's interview ended when he refused to answer any more questions. The detectives then began preparations for a line-up to be viewed by the robbery victim. The line-up procedures effectively kept the defendant and the stand-ins separated from the witness until the witness viewed the line-up. The composition of the line-up was fair and did not suggest the defendant as the perpetrator.

Zahiruddin was taken into custody upon probable cause and was held several hours until his formal arrest after being identified in a line-up by the victim/eyewitness to the robbery. The defendant Zahiruddin's motions to suppress evidence of his statements and identifications as well as any evidence derived from the search of his person are denied.

This shall constitute the decision and order of this court.

New York, New York  
August 2012

AUG 10 2012  
PART 42



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MAXWELL WILEY, J.S.C.  
HON. MAXWELL WILEY