

People v June

2012 NY Slip Op 33771(U)

January 6, 2012

Supreme Court, Albany County

Docket Number: DA 569-11

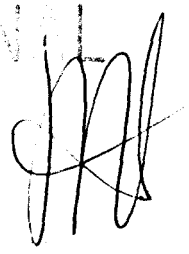
Judge: Dan Lamont

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

FILE

ORIGINAL



**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DIAMON JUNE

Defendant.

DECISION/ORDER

Indictment # 15-3789
Index # DA 569-11

Albany County Clerk
Document Number 11102047
Rcvd 03/05/2012 2:49:37 PM



APPEARANCES:

For the People:

HONORABLE P. DAVID SOARES
Albany County District Attorney
Albany County Judicial Center
Albany, New York 12207

DAVID A. GONZALEZ, ESQ.
Assistant District Attorney, of Counsel

For the Defendant:

THOMAS N. DULIN, ESQ.
Albany County Alternate Public Defender
112 State Street, Suite 1220
Albany, New York 12207

MATTHEW ALPERN, ESQ.
of Counsel

DAN LAMONT, J.

The Indictment accuses the defendant of committing the crimes of Robbery in the Second Degree in violation of Penal Law § 160.10(1), a class C violent felony; and Robbery in the Second Degree in violation of Penal Law § 160.10(2)(b), a class C violent felony. The charges are that on June 17, 2011, at approximately 12:11 a.m., in front of 29 Wilkins Avenue, in the City of Albany, County of Albany, the defendant Diamon June did forcibly steal money, food and a cell phone from a pizza delivery man while aided by another person actually present and while displaying what appeared to be a rifle or shotgun.



REMEDY SOUGHT BY DEFENDANT

(a) Statements:

Defendant moves this Court for an order suppressing oral statements allegedly made by him to the police upon the ground that such statements were the product of an unlawful seizure and arrest of the defendant and/or that such statements were involuntarily made within the meaning and intent of CPL § 60.45.

(b) Identification Testimony:

Defendant moves this Court for an order excluding the prospective identification testimony at trial of Zekriya Bazmohammad upon the ground that the photo array identification procedure was the product of an unlawful stop and seizure of his person and/or upon the ground that photo array identification was improperly made and suggestive.

(c) Tangible Evidence:

Defendant claiming to be aggrieved by an unlawful arrest and unlawful search and seizure has made a motion for an Order suppressing tangible property seized from his person.

BURDEN OF PROOF

(a) Statements:

[1] Where the defendant contends that his statements are the product of an illegal and unauthorized seizure of the defendant's person, the People have the burden of going forward to show the legality of the police conduct in the first instance; however, a defendant who challenges the legality of the seizure of his person bears the ultimate

burden of proving by a preponderance of the evidence that the seizure of his person was unauthorized and illegal.

[2] An admission or confession will not be received in evidence at trial unless the People prove beyond a reasonable doubt that such statement was knowingly, freely, and voluntarily made by the defendant.

(b) Identification Testimony:

[1] Where the defendant contends that the police arranged identification procedure was the product an illegal and unauthorized stop of defendant and seizure of his person, the People have the burden of going forward to show the legality of the police conduct; however, a defendant who challenges the legality of the seizure of his person bears the ultimate burden of proving by a preponderance of the evidence that the stop and seizure of his person was unauthorized and illegal.

[2] The People have the burden of going forward to show that the pre-trial identification procedure was not constitutionally impermissible. The defendant, however, bears the burden of proving by a preponderance of the evidence that the identification procedure was impermissible.

(c) Tangible Evidence:

Where a defendant challenges the admissibility of tangible physical evidence and makes a motion to suppress, the People bear the burden of going forward to show the legality of the police conduct in the first instance. However, the defendant bears the ultimate burden of proving by a preponderance of the evidence that the tangible evidence seized constitutes the product of an unlawful search and seizure by the police and should not be used against him.

CREDIBILITY FINDINGS

A pre-trial suppression hearing was conducted before the undersigned on December 9, 2011. Detective Michael Nadoraski ("Det. Nadoraski") and Detective Lawrence Heid ("Det. Heid") from the City of Albany Police Department testified on behalf of the People. The detectives each appeared frank, candid, and trustworthy, and their testimony had the general force and flavor of credibility. The People's Exhibits received in evidence are found authentic, reliable and worthy of consideration by the Court.

The defendant did not testify at the hearing. The Defendant's Exhibit received in evidence is also found authentic, reliable and worthy of consideration by the Court.

Based upon the evidence adduced at the suppression hearing, the undersigned makes the following findings of fact:

FINDINGS OF FACT

On May 31, 2011, Det. Nadoraski became involved in the investigation of a pizza delivery man robbery that occurred in front of 44 First Street in the City of Albany involving one to three suspects. On June 6, 2011, Det. Heid became involved in the investigation of a pizza delivery man robbery that occurred on Second Street in the City of Albany. Zekriya Bazmohammad ("Baz") was the pizza delivery man. Baz stated that he was flagged down by an individual and then approached by another individual displaying a gun. On June 6, 2011, Det. Heid provided Baz with his cell phone number. Det. Heid and Det. Nadoraski then began to investigate the pizza delivery robberies together and developed Tyler Amos and defendant Diamon June as potential suspects based upon cell phone records.

On June 17, 2011 at approximately 12:11 a.m., in front of 29 Wilkins Avenue in the City of Albany, Baz was again robbed by two individuals. One individual flagged him down and the other approached him displaying a gun. On June 17, 2011 at approximately 8:30 p.m., Baz called Det. Heid on his cell phone and told him that while he was doing a pizza delivery on Theatre Row, he had just seen one of the robbers sitting on the steps of a house on Theatre Row. Baz told Det. Heid that he made the initial observation of the defendant, returned to the pizza shop, and then had the pizza shop manager drive him by the area--where Baz again observed the defendant before calling Det. Heid. Baz provided Det. Heid with a detailed description of the defendant in the area of 9 Theatre Row: a 5'6" black male, wearing a white t-shirt, dark pants and a wooden cross, with chin hair and black tattoos on his left and right forearms.

Det. Heid relayed the information to other units. Det. Heid told the other police officers to go to the area and identify the individual described by Baz. Det. Heid further informed the officers to pick up the individual if the person was Tyler Amos or defendant Diamon June. Det. Ruecker and Det. Vennard received the information and went to the area of 9 Theatre Row. Det. Ruecker observed the defendant matching the description provided sitting on the front porch area of 12 Theatre Row. When defendant identified himself as Diamon June, Det. Ruecker and Det. Vennard placed him in custody and transported him to the police station. The defendant was placed in Interview Room #5--which was audio-video recorded during the entire time that the defendant was present therein (People's Exhibit #6).

On June 17, 2011 at approximately 9:53:10 p.m., Det. Heid entered Interview Room #5 and introduced himself to the defendant. Det. Heid briefly asked the defendant some pedigree questions. At approximately 9:55:22 p.m., Det. Heid read the defendant

his Miranda rights from an investigator's notepad (People's Exhibit #7). When asked if he understood his rights, defendant stated: "Yes." Det. Heid then stated: "Give me two seconds and I'll come back and we'll talk alright?" The defendant then stated "Ok." Defendant answered Det. Heid's questions immediately upon Det. Heid returning to the interview room.

After a break in the questioning at approximately 11:26:52 p.m., Det. Heid and Det. Nadoraski re-entered the interview room and asked the defendant if the police could take his photo so that the police could get him "New York identified." The defendant agreed and signed a written consent to take his photo (People's Exhibit #4). The defendant was removed from the interview room for approximately 10 minutes to be photographed and was then left alone in Interview Room #5 for about an hour and a half. On June 18, 2011 at approximately 12:43 a.m., Det. Heid and Det. Nadoraski returned to the interview room and continued to question the defendant. At approximately 1:25:48 a.m., the defendant stated: "I'm not saying nothing else. I'm not saying nothing else. I'm not saying nothing else." The detectives asked the defendant a few more questions and then decided to place the defendant under arrest.

Det. Nadoraski prepared a photographic array consisting of six (6) color photographs of African-American males with similar complexions, hair styles and ages (People's Exhibit #1). During the late evening hours of June 17, 2011, Det. Nadoraski met Baz at a pizza restaurant on the corner of Central and Quail. On June 18, 2011 at approximately 12:16 a.m., Det. Nadoraski asked Baz to take a look at the six photos and tell him if he recognized anyone. Det. Nadoraski also asked Baz to let him know where he (Baz) recognized anyone from. Baz looked at the photo array for approximately two

minutes and then identified the defendant in photo number 5 as the person whom he had described to Det. Heid earlier that night and the person who had robbed him the evening before. Baz circled the defendant's photo and placed his initials below the photo of defendant (People's Exhibit #1).

DISCUSSION

(a) Statements:

[1] On June 17, 2011 at approximately 8:30 p.m., Baz told Det. Heid that he observed the defendant sitting on the porch in the area of 9 Theatre Row; that the defendant was one of the participants in the June 16, 2011 robbery; and also provided Det. Heid with a detailed description of the defendant. Since Det. Heid believed that Diamon June and Tyler Amos were suspects in several pizza delivery man robberies, Det. Heid requested that either of those individuals should be taken into custody—if he matched the description of the individual identified by Baz. Within a half an hour, Det. Ruecker found the defendant, matching the description provided by Baz, sitting on the porch of 12 Theatre Row. When the defendant identified himself as Diamon June, he was placed in custody and transported to the Albany Police Station. This Court holds and determines that on June 17, 2011 at approximately 8:55 p.m., when the defendant was taken into custody and transported to the Albany Police Station, Det. Ruecker (through information relayed to other officers from Det. Heid) had probable cause to arrest the defendant for the alleged robbery on June 16, 2011 involving the victim Baz (see, People v. Beriquette, 84 NY2d 978 [1994]; see also, People v. Morales, 36 AD3d 957 [3rd Dept. 2007]; People v. Tunstall, 278 AD2d 585 [3rd Dept. 2000]). This Court further determines that the Albany Police had probable cause to arrest the defendant based upon the identification by the victim (Baz)

alone—without any need to delve into the additional information that Det. Heid was aware of regarding cell phone records. Accordingly, this Court holds and determines that defendant's motion to suppress any and all of his statements to the police as the fruits of an unlawful arrest should be and the same is hereby denied.

[2] On June 17, 2011 at approximately 9:53:10 p.m., Det. Heid entered Interview Room #5 and introduced himself to the defendant. Det. Heid briefly asked the defendant some pedigree questions. At approximately 9:55:22 p.m., Det. Heid read the defendant his Miranda rights from an investigator's notepad (People's Exhibit #7). When asked if he understood his rights, defendant stated: "Yes." Det. Heid then stated: "Give me two seconds and I'll come back and we'll talk, alright?" The defendant then stated "Ok." The defendant did not request an attorney. Det. Heid did not read the waiver portion of the Miranda warning contained on People's Exhibit #7, to wit: "Having these rights in mind, do you wish to talk to us now?" However, this Court holds and determines that defendant knowingly, voluntarily, and explicitly waived his Miranda rights when Det. Heid said: "I'll come back and we'll talk, alright?", and defendant responded "Ok". Beyond defendant's explicit waiver of his rights, the defendant's conduct of answering Det. Heid's questions clearly also demonstrates an implicit waiver of his Miranda rights (see, People v. Sirno, 76 NY2d 967 [1990]; see also, People v. Garcia, 79 AD3d 1248 [3rd Dept. 2010]; People v. Nunez, 176 AD2d 70 [3rd Dept. 1992], aff. 80 NY2d 858 [1992]).

This Court holds and determines that the defendant asserted his right to remain silent on June 18, 2011 at approximately 1:25:48 a.m., by stating: "I'm not saying nothing else. I'm not saying nothing else. I'm not saying nothing else." The detectives asked the defendant a few more questions and then decided to place the defendant under arrest. Accordingly, this Court based upon proof beyond a reasonable doubt holds and

determines that the defendant's statements to Det. Heid and Det. Nadoraski on June 17, 2011 through June 18, 2011, up until the defendant first asserted his right to remain silent at 1:25:48 a.m., were knowingly, freely and voluntarily made within the meaning and intent of CPL § 60.45.

(b) Identification Testimony:

[1] This Court has previously determined hereinabove that the police had probable cause to place the defendant in custody when he was picked up in the area of 12 Theatre Row. Accordingly, this Court holds and determines that the police were permitted to take a photograph of the defendant, which was later used in a photo array identification procedure. In addition, the defendant gave oral and written consent to be photographed (People's Exhibit #4). This Court further holds and determines that the People established by clear and convincing evidence that the defendant while lawfully in custody freely and voluntarily consented to having his photograph taken.

The test to be used in determining the propriety of any pre-trial identification procedure is one of fundamental fairness and lack of any undue suggestiveness (see, People v. Logan, 25 NY2d 184, 191 [1969]). Det. Nadoraski prepared a photographic array consisting of six (6) color photographs of African-American males with similar complexions, hair styles and ages (People's Exhibit #1). This Court finds and determines that the six photographs used in the photographic array are sufficiently similar to constitute a fair photographic array.

During the late evening hours of June 17, 2011, Det. Nadoraski met Baz at a pizza restaurant on the corner of Central and Quail. On June 18, 2011 at approximately

12:16 a.m., Det. Nadoraski asked Baz to take a look at the six photos in the array and to tell him if he recognized anyone. Det. Nadoraski also asked Baz to let him know where he (Baz) recognized anyone from. Baz looked at the photo array for approximately two minutes then identified the defendant in photo number 5 as the person whom he had described to Det. Heid earlier that night and as the person who had robbed him the evening before. Baz circled the defendant's photo and placed his initials below the photo of defendant. Det. Nadoraski did not indicate to Baz that any particular individual was contained in the photographic array. This Court holds and determines that the photographic identification procedure conducted by Det. Nadoraski with Baz was fundamentally fair and without any suggestiveness whatsoever (see, People v. Chipp, 75 NY2d 327 [1980], cert. den. 498 US 833 [1990]; People v. Stackhouse, 226 AD2d 822 [3rd Dept. 1996], app. den. 88 NY2d 995 [1996]). Accordingly, the defendant's motion to suppress the prospective identification testimony of Baz at trial should be and the same is hereby denied.

(c) Tangible Evidence:

This Court has previously determined that the police had probable cause to arrest the defendant on June 17, 2011. Accordingly, this Court holds and determines that seizure of tangible evidence from defendant's person at the police station was lawful pursuant to a search and seizure incident to a lawful arrest (see, Chimel v. California, 395 US 752 [1969]; People v. Whitaker, 64 NY2d 347 [1985]). Accordingly, this Court holds and determines that defendant's motion to suppress tangible evidence seized from his person should be and the same is hereby denied.

CONCLUSIONS

(a) Statements:

This Court holds and determines that the defendant's motion for an order suppressing oral statements allegedly made by him to Det. Heid and Det. Nadoraski on June 17, 2011, up until defendant first asserted his right to remain silent at approximately 1:25 a.m. on June 18, 2011, should be and the same is hereby denied. Any statements made by the defendant to the police thereafter are hereby suppressed.

(b) Identification Testimony:

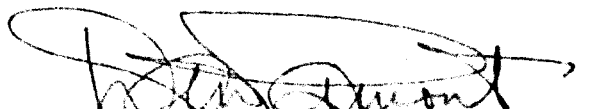
This Court holds and determines that the defendant's motion for an Order suppressing prospective identification testimony at trial by the victim, Baz should be and the same is hereby denied.

(c) Tangible Evidence:

This Court holds and determines that the defendant's motion for an order suppressing tangible property seized from his person should be and the same is hereby denied.

The foregoing constitutes the Opinion, Decision, and Order of this Court.

Dated: Albany, New York
January 6, 2012



DAN LAMONT, Acting J.S.C.

cc: David A. Gonzalez, Esq., Asst. District Attorney
Matthew Alpern, Esq., Asst. Alternate Public Defender

Albany County Clerk
Document Number 11102047
Rcvd 03/05/2012 2:49:37 PM

