

People v Arnold
2012 NY Slip Op 33838(U)
June 12, 2012
Supreme Court, Kings County
Docket Number: 9556/2010
Judge: John G. Ingram
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 21

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THE PEOPLE OF THE STATE OF NEW YORK,

Decision and Order
Indictment No. 9556/2010

-against-

SHELDON ARNOLD.,

Defendant.

-----X

INGRAM, J.

Defendant is charged with Burglary in the First Degree and related charges. The Defendant has filed motion to suppress physical evidence recovered by police, statements made to police and identification procedures. On May 8, and May 24 2012, the Court held a combined Dunaway, Mapp, Wade, and Huntley hearing. Based on the evidence adduced at the hearing, legal arguments of counsel, written memoranda of law submitted by counsel, and applicable law, the suppression motion is denied in its entirety.

Findings of Fact

The People's first witness, Detective Maureen Sheehan, is a twenty-one year veteran of the New York City Police Department. This Court, having had the opportunity to observe the character and demeanor of this witness, fully credits her testimony. On September 29 2010, she was assigned to the investigation of a home invasion that occurred at 1081 East 59th Street in Brooklyn. She spoke with Abraham Jean Baptiste, the complainant. He informed Detective Sheehan that he was at his residence, waiting for his female friend, Nicole, to come over. He heard a knock on the door. He assumed it was Nicole and opened the door without

checking. As he opened the door, two males pushed open the door at gunpoint. They told him not to look at them and forced him to lay his head on the kitchen stove. They tied him up with cords and removed property from his residence. They removed a laptop, cell phone and miscellaneous jewelry. He said that one of the males was light-skinned, and approximately 5'8". The other individual was darker and the same height. Crime scene officers responded to the location to gather evidence, including fingerprints. Fingerprints were recovered and sent to the Latent Print Section. One of the sets of prints that they lifted from the location was from Sheldon Arnold, later identified as Defendant. Detective Sheehan asked Mr. Jean Baptist if he knew Defendant, and he stated he did not. Detective Sheehan conducted a background check on Defendant and discovered an address for Defendant – 1001 East 37th Street. On October 26, 2010 she responded to that location at approximately 7:15 a.m. She knocked on the door and a female answered the first door. Detective Sheehan asked her if she could come inside and she said yes. Detective Sheehan showed her a picture of Defendant and asked her if he was there. She said yes and pointed to the back bedroom. Detective Sheehan knocked on the bedroom door and a female, later identified as Kesha, opened the door. Detective Sheehan asked if Defendant was there, and she pointed to the bed and said that he was sleeping on the bed. Detective Sheehan asked him to get out of the bed and wanted him to come to her office in regard to an investigation. Defendant was not wearing any clothes. Kesha got some clothes for him and handed them to Detective Sheehan so she could conduct a patdown of the clothes. In the brown leather jacket, she recovered a cell phone that resembled the cell phone Mr. Jean Baptiste reported was stolen. Defendant got dressed and Detective Sheehan put handcuffs on him, for safety reasons. Detective Sheehan stated that he was not free to leave and let him know that he

was not free to leave. He accompanied Detective Sheehan to the Brooklyn Robbery Squad.

Detective Sheehan read him his Miranda rights. After each right, she asked him if he understood and he wrote the word "yes" and put his initials next to it. She asked him if he knew anyone that lived at 1081 East 59th Street and he said that he knew a female named Nicole DeFazzio that he thought lived at that residence. Detective Sheehan said that she didn't think she lived at that residence and then he stated "no, no she lives at East 29th Street". She asked him where he got the cell phone and he stated that he had bought it out on the street. He then stopped answering questions. On October 26, 2010, at approximately 4:15 p.m., Detective Sheehan conducted a lineup procedure. Defendant was given the choice of the seat to sit in for the lineup. He chose seat number three. Defendant and all the fillers were given baseball hats and white T-shirts to wear. Mr. Jean Baptiste came to the precinct and was taken to a third floor lounge. Mr. Jean Baptiste did not come into contact with Defendant when he was brought to the third floor. Detective Sheehan told him that he was going to view a lineup and that the person that robbed him may or may not be there. Mr. Jean Baptiste identified number three, Defendant, as the person that robbed him. Defendant was placed under arrest.

Detective Sheehan stated that ADA Horowitz had called her and told her that on August 2, 2011 Mr. Jean Baptiste was standing on the corner waiting for a bus and he was approached by Defendant and Defendant stated "Listen, I am sorry I robbed you." Detective Sheehan contacted Mr. Jean Baptiste and he confirmed what ADA Horowitz stated. She then went to Defendant's residence and left her business card. She was contacted by Defendant's attorney and she informed him that he and Defendant needed to come to her office. On August 11, 2011, they came to her office and she conducted a lineup. Mr. Jean Baptiste and Defendant were kept

separate at all times prior to the lineup. She asked Defendant what number he wanted to be seated in. He selected seat number five. Defendant and all the fillers were given white T-shirts and baseball hats to wear. She stated to Mr. Jean Baptiste that he was going to view a lineup and that the person that approached him may or may not be in the lineup. He identified Defendant, number five, as the person that approached him on the street corner. Defendant was then placed under arrest.

Defendant took the stand in his own defense. He testified that he lived at 101 East 37th Street in Brooklyn. His parents owned the residence. He lived in the basement with other tenants, named Marcia and Carmel. According to Defendant, the tenant's apartment has its own entrance. A boiler room separates the two apartments. There is a lock between the tenant's apartment and Defendant's apartment. There is a door between the studio apartment and the boiler room. According to Defendant, someone could enter from the tenant's apartment and knock on the door of Defendant's apartment.

Kesha Thomas also took the stand on behalf of Defendant. Ms. Thomas is the fiancée of Defendant. She has been in a relationship with him since 2006. She helps him run his record label, Boilerplate Records, LLC. On October 26, 2010, she was sleeping in Defendant's home, located on 37th Street. She woke up and saw flashlights and detectives inside the apartment. She testified that the officers never knocked on the door before they entered the apartment. Ms. Thomas stated that she never answered the door and never gave the officers permission to enter the apartment. The officers entered the apartment through the unlocked door that separates the two living areas. Ms. Thomas was pregnant with Defendant's child at the time the police entered

the apartment. She stated that she was not living in the apartment at that time, but stayed there on occasion. She did not have any personal items in the apartment.

The People called Lieutenant Garfield Brown as a rebuttal witness. Lieutenant Brown has been a member of the New York City Police Department for twenty years. On October 26, 2010, he became involved in the investigation of a burglary suspect for a burglary which occurred in September 2010. He was involved in the apprehension of Defendant. He, Detective Sheehan and four other detectives went to 1001 East 37th Street. One or more of the other officers went to the back of the apartment. They knocked on the door, and a lady answered the door. They informed her that they were looking for Defendant. She directed them to a back door that led to a bedroom. He does not remember having to go through a second door. They knocked on the bedroom door. Another female, Kesha, who was pregnant, answered the door. They told her that they were looking for Defendant and they saw him on the bed. Kesha let them into the room. She never told them they could not come in or physically prevented them from entering. They instructed Defendant to get up and put his clothes on. Lieutenant Brown stated that they did not have an arrest warrant. Lieutenant Brown did not believe that there were two separate apartments.

Defendant was recalled to the stand. He testified that there is no separate door from the tenant's apartment that leads into his apartment. He stated that the only way to get into his apartment from the tenants' apartment is through two doors adjacent to the boiler room. He also stated that mail gets delivered to the front entrance of the apartment, not to his separate apartment.

Conclusions of Law

Defendant argues that all evidence must be suppressed as a result of the alleged unlawful, warrantless arrest of Defendant in his apartment. Pursuant to the holding in Payton v. New York, 445 U.S. 573 (1980), law enforcement personnel are not permitted to enter a suspect's home to make a warrantless arrest absent a showing of consent, exigent circumstances or the existence of an emergency. Defendant claims that the police unlawfully entered his apartment. The People allege that the police received consent to enter the apartment. It is well settled that "when the People rely on consent to justify an otherwise unlawful police intrusion, they bear the 'heavy burden' of establishing that such consent was freely and voluntarily given". People v Zimmerman, 101 AD2d 294, 295(2d Dept. 1984); see also, People v Gonzalez, 39 NY2d 122(1976). The People must meet their burden through "clear and positive evidence," and the voluntariness of the consent is to be evaluated from the totality of the circumstances. See Schneekloth v Bustamonte, 412 US 218 (1973). Moreover, consent may be established by conduct as well as by words. People v Satornino, 153 AD2d 595(2d Dept. 1989).

It is clear that the police obtained consent to enter the apartment from a person they believed to be a resident of the apartment. See People v Adams, 53 N.Y.2d 1 (1981)(holding that "where searching officers rely in good faith on apparent capability of an individual to consent to a search and the circumstances reasonably indicate that individual does, in fact, have the authority to consent, evidence obtained as the result of such a search should not be suppressed"); People v Richards, 119 AD2d 597(2d Dept. 1986). A female opened the door and directed the

police to the location of Defendant. Once inside the apartment, the police were directed to Defendant's apartment or what the police believed was Defendant's bedroom. There was nothing improper in the police officers' entry of the apartment. People v. Johnson, 202 A.D.2d 966, 966 (4th Dept. 1994)(holding that police officers had no duty to inquire into woman's authority to consent to police entering apartment.)

According to the officers, they knocked on the door and Defendant's girlfriend, Kesha, answered the door and when she was asked about Defendant, she pointed to the bed. Defendant was informed by the police that they wished to question him regarding a robbery. The officers consistently maintained that they only wished to question defendant concerning the robbery.

Because Defendant failed to raise "even the slightest objection to the [detective's] entry or continued presence in the [bedroom]," a consensual entry was established. People v Smith, 239 AD2d 219, 221(1st Dept. 1997) (compliance with officer's request and failure to object to entry and continued presence); see also, People v Brown, 234 AD2d 211(1st Dept. 1996) (holding "while the police may not have received express permission to enter the premises, [defendant's] gesture of opening the door, leaving it wide open, and then walking away from it could certainly only be interpreted by the police to consist of tacit approval for them to enter") ; People v Washington, 209 AD2d 817 (3rd Dept. 1994) (holding Defendant's "testimony alone demonstrated that she tacitly consented to the officers' entry by her conduct in stepping aside and failing to direct them to leave or otherwise indicate that they did not have permission to stay"). Therefore, based on the evidence, the police had authority and permission to enter the apartment.

Defendant alleges that the property recovered from the police, a cell phone inside of his leather jacket, should be suppressed. However, the police were going to transport Defendant, a suspect in an armed robbery, to the precinct for questioning. The issue here is the safety of the police officer. It is clear that the action of Detective Sheehan was limited in scope to that objective. It was proper for Detective Sheehan to conduct a pat down of Defendant's clothing based on the alleged crime. See People v. Zambrano, 2003 WL 22922437 (Sup. Ct. New York Cty 2003). Therefore, Defendant's motion to suppress the recovery of the cell phone is denied. Based on the totality of the circumstances, they were authorized to take Defendant into custody.

Turning to the admissibility of the statement made to Detective Sheehan, Defendant answered in the affirmative as to whether he understood the Miranda warnings read from a pre-printed document detailing the rights of a defendant in custody. Further, Defendant initialed each of the sentences. Thus, under the totality of the circumstances, this Court finds that Defendant knowingly, intelligently and voluntarily waived his Miranda rights before making the statements. See, People v Washington, 155 AD2d 635 (2d Dept. 1989) see also, People v Davis, 55 NY2d 731(1981). The statement noticed by the People will therefore be admissible at trial.

In a motion to suppress the lineups and lineup identifications, the People have the burden of going forward to show that the pretrial identification procedures were not constitutionally impermissible. Defendant, however, bears the burden of establishing, by a preponderance of the credible evidence, that the procedures were unduly suggestive.

People v. Chipp, 75 NY2d 327 (1990). “Corporal lineups, properly conducted, generally provide reliable pretrial identification procedure and are properly admitted unless it is shown that some undue suggestiveness attached to the procedure.” People v. Chipp, 75 NY2d at 335. To determine whether a lineup is fair, some of the factors to be considered by the Court are the “physical characteristics of the subject such as skin color, height, weight, clothing, hairstyle, age, and whether the subject is clean-shaven or has facial hair.” People v. Gonzalez, 173 AD2d 48, 578 (2d Dept.1991). While the fillers must be similar to the defendant in appearance, there is no requirement that they be nearly identical in appearance. People v. Chipp, 75 NY2d 327 (1990).

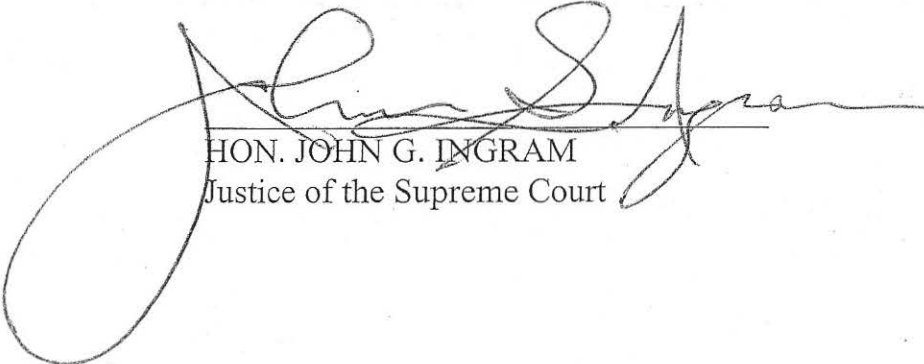
An inspection of lineup photographs at the hearing confirms that the participants were sufficiently similar to the Defendant in appearance so that he was not singled out for identification. The five “fillers” were all black males of approximately the same age, weight and body shape as Defendant. Precautions were taken to ensure that the participants, including the witnesses, did not come into contact with or see the lineup participants or Defendant prior to the viewing or after the viewing. Therefore, there is nothing to suggest that the lineups were tainted. People v. Bradley, 268 AD2d 591 (2d Dept.2000). The People have met their burden of showing the legality of the police conduct in effecting the arrest of Defendant and that the lineups were not conducted in an unduly suggestive manner. Defendant failed to show by a preponderance of the evidence that the procedures employed by the police were “so unnecessarily suggestive as to create a substantial likelihood of misidentification.” People v. Duuvon, 77 N.Y.2d 541(1991).

After Defendant was picked out of the lineup, he was placed under arrest. Therefore, Defendant's motion to suppress the identifications is denied.

Based on the foregoing, Defendant's suppression motion is denied in its entirety.

This opinion constitutes the Decision and Order of the Court.

Dated: June 12, 2012
Brooklyn, New York



HON. JOHN G. INGRAM
Justice of the Supreme Court