

People v Gresham

2013 NY Slip Op 34224(U)

January 3, 2013

County Court, Broome County

Docket Number: 11-542

Judge: Joseph F. Cawley Jr

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STATE OF NEW YORK
COUNTY COURT : : BROOME COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

Indictment No. 11-542

-vs-

FILED

JOVAN T. GRESHAM,

Defendant.

JAN - 3 2013

SUPREME/COUNTY COURT
CLERKS OFFICE

JOSEPH F. CAWLEY, JR., J.

On October 26 and October 30, 2012, *Rodriguez/Wade, Huntley, and Mapp* hearings were conducted in this matter. The People called Binghamton Police Officer David Ely, Investigators Chuck Woody and Rob Peters, and Captain Christopher Bracco. Defendant called no witnesses.

Defendant submitted a post-hearing memorandum dated November 29, 2012, to which the People responded in a memorandum dated December 14, 2012.

The following constitutes the Court's findings of fact and conclusions of law. All findings of fact are beyond a reasonable doubt.

FACTS

On March 17, 2011, at 2:53 a.m., Binghamton Police Officer David Ely was dispatched to Victoria's Restaurant at 153 Susquehanna Street, Binghamton, New York, for a report of shots fired. Officer Ely took a written statement from Gloria Crowder, the owner of Victoria's, wherein she indicated that a male known to her as "Juice" came into the restaurant, but was told to leave because seven (7) months earlier he had "supposedly" shot the DJ in the restaurant's

bathroom. While walking him to the door, "Juice" apologized to Crowder, but indicated that the DJ was "bothering him first." Crowder explained that approximately an hour later, her daughter (Tasheema Crowder) came into the restaurant stating that "Juice" was out front shooting a gun into the air.

Investigator Woody indicated that as part of this investigation, he reviewed video footage from a pole camera located in the area of Victoria's Restaurant. Although the footage did not show the actual shooting, Woody also saw Tasheema Crowder talking with a person near the front door of the restaurant just before shots were fired, corroborating what the Crowders had reported. In her written statement, Tasheema Crowder indicated that she had a verbal confrontation with "Juice"; that he flashed a gun at her; that she went inside the restaurant; and that she then heard shots being fired.

Investigator Woody was able to obtain a photograph of defendant Jovan Gresham, a person known to have used the nickname "Juice", and compared it to the individual depicted on video from the pole camera. Woody testified that it appeared to him that the photograph of Jovan Gresham was consistent with the individual visible on the pole camera video.

Woody returned and spoke again with Victoria Crowder. Crowder confirmed that she had known "Juice" for "about two years", and that she recognized him when he walked into the restaurant on the night in question. She stated that she had met "Juice" on several occasions, that he had been in her restaurant in the past, and that she also recognized him from other establishments in the area. She was shown a single photograph and identified the individual depicted therein [defendant Jovan Gresham] as the person she knew as "Juice".

Based upon the foregoing identification, copies of defendant's photograph were made and distributed to all Binghamton Police patrol units in an "attempt to locate".

Binghamton Police Captain Bracco testified that he was familiar with defendant's photograph from the aforementioned "attempt to locate", which he would review during roll call before each shift. On April 22, 2011, while on patrol, Bracco observed an individual at 1:00 a.m. in the vicinity of the Elks Lodge on Chenango Street in Binghamton, whom he believed to be the defendant. Bracco approached the individual, who had turned to walk into the Elks Club. When defendant reached the vestibule of the club, he [defendant] began to run. Bracco grabbed onto defendant's coat, and a struggle ensued. Bracco was able to subdue the defendant, and thereupon conducted a pat frisk, locating a handgun tucked into defendant's waistband. Defendant was arrested and taken to the Binghamton Police Department.

At the Binghamton Police Station, defendant was asked by Investigator Peters if he was willing to speak with him. Upon defendant's affirmative reply, he was taken into Interview Room 3, where the ensuing interview was recorded.

Investigator Peters began by advising defendant of his *Miranda* warnings, using a pre-printed *Miranda* warning form to go over them with him. Defendant indicated that he understood each of his rights, and was willing to speak with police without the benefit of an attorney being present, as is reflected in People's Exhibit 5.

During the ensuing interview, defendant indicated, *inter alia* that he had been at Victoria's Restaurant on the night in question, and that he did have a gun, but denied firing any shots. Defendant acknowledged that at the time of his arrest he did possess a gun, and noted that seventy percent of the people have guns for personal protection. Defendant also indicated that

he had been present in Victoria's in February 2010 when a DJ had been shot, but denied involvement in that shooting.

IDENTIFICATION

Based upon the statements given to Investigator Woody by Gloria Crowder, it is clear that she was familiar with defendant, albeit by his nickname "Juice". She indicated that she had known him for approximately two years, and that she recognized him when he walked into the restaurant on the night in question. She further indicated that she had met him on several occasions, that he had been in her restaurant in the past, and that she also recognized him from other establishments in the area. Based upon this testimony, it is clear that she was sufficiently familiar with defendant such that there was little or no risk that police suggestion would lead to a misidentification. The Court finds that the viewing by Crowder of a single photograph in this case was confirmatory in nature. She will therefore be permitted to identify defendant at trial.

That said, however, evidence of a pre-trial photographic identification will not be permitted absent an attack of "recent fabrication", or in the event that defendant opens the door to such testimony during a line of questioning on cross-examination (People v. Francis, 123 A.D.2d 714 (2nd Dept. 1986); *see*, People v. Barnes, 93 A.D.2d 864).

PROBABLE CAUSE

Defendant argues that police possessed insufficient information to issue an "attempt to locate" or, consequently, to arrest defendant.

The uncontradicted hearing testimony established that on March 17, 2011, "Juice" (subsequently identified as this defendant) was at Victoria's Restaurant and was asked to leave by the proprietor, Victoria Crowder. She explained that he [defendant] was not welcome there because of an incident which had occurred months prior, when another individual at the

restaurant was shot, purportedly by the defendant. As defendant was leaving, he apologized to Crowder, but indicated that the DJ [victim of that shooting] was “bothering him first”.

A sworn deposition taken from Tasheema Crowder was offered and received in evidence. That sworn statement indicates, *inter alia*, that she encountered “Juice” outside Victoria’s Restaurant as he was trying to re-enter. She denied him access based upon the prior shooting in the restaurant, at which time he became vulgar and “flashed a gun on [her]”. She then entered the restaurant and heard shots fired. Upon their arrival, police located several spent shell casings at the scene.

A review of surveillance footage from a nearby pole camera revealed to Inv. Woody that a person matching the defendant’s appearance was indeed present outside Victoria’s Restaurant at or about the time of the shooting, and had engaged in conversation with Ms. Crowder just prior to the shots being fired.

The foregoing evidence established facts and circumstances which were of such weight and persuasiveness as to convince a person of ordinary intelligence, judgement and experience that it was reasonable likely that defendant possessed a loaded handgun while at Victoria’s Restaurant on March 17, 2011.

Although defendant has raised questions as to the degree and extent of police investigation at the scene, probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt, but merely information sufficient to support a reasonable belief that an offense has been committed, which conclusion is to be made after considering all of the facts and circumstances together (People v. Bigelow, 66 N.Y.2d 417).

In this Court’s opinion, law enforcement had probable cause to issue an “attempt to locate” and/or to arrest defendant for the felony level offense of Criminal Possession of a

Weapon in the Second Degree.

Having determined that law enforcement possessed probable cause to legally arrest defendant, upon such occurrence they were equally entitled to perform a search incident to that lawful arrest, which in this case revealed the presence of an illegal handgun within defendant's possession. Its seizure was in all respects lawful.

Upon defendant's lawful arrest, he was transported to the Binghamton Police Station where he was ultimately questioned by Inv. Peters, *et al.* The Court fully credits the testimony of Inv. Peters that he read the *Miranda* Warning Report (People's Exhibit 5) to the defendant, and accurately recorded his oral waiver of each of the rights referenced therein. This proof established that the defendant was properly advised of and waived his constitutional rights (*see People v. Snider*, 258 A.D.2d 929, *lv. den.* 93 N.Y.2d 979; *People v. Youngblood*, 294 A.D.2d 954, *lv. den.* 98 N.Y.2d 704). The People having so established, the burden then shifts to the defendant to establish by a preponderance of the evidence that the waiver of his rights was not voluntary. No such evidence was offered by defendant.

The Court concludes that the statement given by defendant to Inv. Peters was voluntarily given, and that no coercion, force or duress of any kind was used by detective(s) to entice defendant into making the statements testified to.

The People have met their burden in establishing the voluntariness of the statement of defendant beyond a reasonable doubt. The statements of defendant are therefore admissible. The Court does note that at a point in the interview, specifically at 11:27:54 on the videotape thereof, questioning turns to a purported federal drug investigation. In the event that the prosecutor decides to show the videotape to the jury in the instant case, the Court will, upon request of the defendant to do so, direct that the viewing of the tape be terminated at that point. Any additional

relief with respect to defendant's taped statements must be specifically articulated by defendant prior to trial.

This constitutes the Decision and Order of the Court.

It is So Ordered.

It is so Ordered.

DATED: January 3, 2013
Binghamton, NY


HON. JOSEPH F. CAWLEY
Broome County Court Judge

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