

**People v Irizarry**

2015 NY Slip Op 32554(U)

December 2, 2015

County Court, Wayne County

Docket Number: 15-44

Judge: Daniel G. Barrett

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At a Term of the County Court held in and for the County of Wayne at the Hall of Justice in the Village of Lyons, New York on the 20<sup>th</sup> day of October, 2015.

PRESENT: Honorable Daniel G. Barrett  
County Court Judge

STATE OF NEW YORK  
COUNTY COURT COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF NEW YORK

DECISION  
MAPP/HUNTLEY/  
WADE/DARDEN  
Ind. No. 15-44

-vs-

MICHAEL IRIZARRY,

Defendant

Appearances - People - ADA Christopher Bokelman, Esq.  
Defendant - Robert A. DiNieri, Esq.

This matter is before the Court regarding pre-trial hearings regarding Mapp, Huntley, Wade and Darden.

The Court did conduct a Darden hearing and interviewed the confidential informant on the record on the above date. The Court did provide to both counsel a Darden Report. A transcript of the confidential informant's testimony has been ordered and upon receipt will be sealed.

The first witness for the People is Deputy Robert Manzell of the Wayne County Sheriff's Department. Previously he was assigned to the plain clothes drug investigation for approximately eighteen months. He began using a confidential informant against the Defendant in approximately February, 2015.

Deputy Manzell testifies that the confidential informant made a first buy of crack cocaine from the Defendant February 28, 2015 at the Defendant's residence in Clyde, New York. Text messages between the confidential informant were admitted into evidence as Exhibits 1, 2 and 3. At the first buy the confidential informant was shown a picture of the Defendant and the CI identified him as the Defendant and he knew the Defendant as "Beano". When the CI came out he turned over the crack cocaine to the deputy. The deputy searched the CI for any drugs and found none.

The CI did a second buy from the Defendant on March 3, 2015. The same procedure was used as on February 28, 2015. The CI was again shown a photo and the CI identified the Defendant Michael Irizarry as "Beano". That contained a series of four photos.

There was a third purchase by the CI from the Defendant on March 21, 2015. The same procedure was used as on February 28, 2015 and March 3, 2015.

Deputy Manzell based upon the last purchase on March 21, 2015 by the CI applied for a Search Warrant as shown by Exhibit 4. The Search Warrant was signed by Judge Heald of Galen Town Court. This allowed the search of the Defendant's entire apartment for drugs and contraband. The Defendant's address at the time was 111 Glasgow Street, apartment B, Clyde, New York. The Search Warrant was signed on March 24, 2015 and was executed by the Wayne County Sheriff's Department and Wayne Net on March 26, 2015. The Emergency Response Team of the Wayne County Sheriff's Department went in first. When Deputy Manzell and other investigators appeared at the apartment they found the Defendant, his girlfriend, an unknown female and young child in the livingroom.

Deputy Manzell states they collected crack cocaine on the dresser in the front bedroom. They found a 22 assault rifle under a dresser in the secondary bedroom.

On cross-examination Deputy Manzell admits that the crack cocaine that was found was not packaged for sale. That in addition he does not know if the Defendant actually sent the text messages to the CI as shown by Exhibits 1,2 and 3. He only knows it came from the Defendant's phone number.

Officer Brian Richie, Officer in Charge with the Clyde Police Department, then testified. On or about February 28, 2015 Investigator Roger LaClair of the Wayne County Sheriff's Department asked him to go to the Defendant's apartment to identify the person who was in the apartment. He went to the apartment. He met a black female who answered the door and he knew her as Iesha Streeter. He saw the Defendant and was able to identify him. He had known the Defendant from previous contacts. In addition there was a young child in the apartment. He advised Investigator LaClair of his observations. He was shown photographs and identified both Iesha Streeter and the Defendant.

Investigator Roger LaClair of the Wayne County Sheriff's Department then testified. He is the drug investigator for the Sheriff's Department. He was in charge of Deputy Manzell for the eighteen months. He was involved in the investigation of the Defendant also known as "Beano" at 111 Glasgow Street, apartment B, Clyde, New York.

Investigator LaClair met the CI in this case. The CI was introduced to him by Investigator Scott Knapp. The CI had some traffic charges and wanted to get those charges to go away and/or be given favorable consideration. Investigator LaClair arranged for the CI to purchase drugs from the Defendant. The CI advised Investigator LaClair that he had known the Defendant from previous purchases of drugs, that he and the Defendant had been friends and that he knew the Defendant as "Beano".

When Deputy Manzell drove the CI to the Defendant's apartment to buy the drugs on three occasions, Investigator LaClair would watch from a vantage point. He was also listening in on an electronic device that the CI had. Each time the CI went into the apartment to buy the drugs from the Defendant, the CI identified the Defendant by a photograph. The same procedure was used all three times. The photo that the investigator produced to the CI for identification was from the Defendant's Face Book account.

The three photos that were shown to the CI and by which the CI identified the Defendant as "Beano" are shown by Exhibits 9 and 10. The CI wrote down that the person known in the picture was known to him as "Beano" and he placed his initials on said Exhibits on February 28, 2015 and March 21, 2015.

Investigator LaClair was part of the search team that entered the Defendant's apartment on March 26, 2015. He does admit that while the Defendant was handcuffed in the kitchen that he asked the Defendant if he had any guns and where they were. He said the gun was found in a secondary bedroom under a dresser and the gun was not lawful because it had a removal magazine, collapsible stock and a forward grip.

The Defendant was arrested at his apartment on March 26, 2015 and taken to the Sheriff's Department. Investigator LaClair reviewed the Miranda Warnings with the Defendant. The Defendant signed the same indicating he understood those warnings and that in fact he agreed to talk. The Defendant signed a statement as shown by Exhibit 13.

In addition apparently Chief Colella of the Macedon Police Department who is part of Wayne Net asked the Defendant if there were any weapons in the house and the Defendant replied yes that there was a weapon in the bedroom. A 22 assault rifle was found underneath the dresser in the secondary bedroom. A picture of said 22 assault rifle is shown by Exhibit 6.

In addition Investigator LaClair testifies that there was crack cocaine found in the main bedroom off the livingroom. Crack cocaine was loose and not packaged for sale.

Investigator LaClair reiterates on re-direct that the drugs were in plain view as well as the gun. He also advised the Search Warrant allowed for the search of the entire apartment.

The Court also notes from the Darden Report that the CI testifies that he knew the Defendant approximately a year and one-half to two years before he made the first buy from the Defendant for the Wayne County Sheriff's Department on or about February 28, 2015. He knew the Defendant through a friend named Scott. The CI actually performed some mechanical work on the Defendant's truck and in consideration of that the Defendant gave the CI crack cocaine. He testifies he next saw the CI approximately two to three weeks later after he worked on the truck and he bought drugs from him at that time. He further testifies he purchased drugs from the Defendant well over 100 times all at the Defendant's apartment, apartment B at 111 Glasgow Street, Clyde, New York. The last time he purchased crack cocaine from the Defendant was approximately six months before February 28, 2015. The CI testifies he knew the Defendant by the name of "Beano".

The Court finds that the identification of the Defendant was proper and not suggestive. The identification of the Defendant by the CI was merely confirmatory. That is the CI knew the Defendant for years and in fact had interacted with the Defendant on more than 100 occasions. The CI signed pictures of the Defendant as shown by Exhibits 9 and 10, also indicating he knew the Defendant as "Beano". There was no undue suggestive procedure by the police regarding the identification of the Defendant.

The prosecutor has the burden of establishing the Defendant was confirmatory, People v Thomas, 225 A.D. 2d 641. In this case the burden was met. The Defendant then has the burden to show that the identification was undue suggestive and the Defendant has not met the burden in this case.

At the conclusion of the hearing the Defendant's attorney argues that the seized guns and drugs should be suppressed due to the fact that the police had conversations with the Defendant in the kitchen of his home. The Defendant was handcuffed at the time and was spoken to by at least Investigator LaClair and Chief Colella as to any weapons in the house and he replied that in fact there was a weapon in the bedroom. The Defendant's attorney argues that was custodial interrogation. Miranda Warnings were not given to the Defendant until he was taken to the Sheriff's Department as shown by Exhibit 11 and as testified to by Investigator LaClair.

ADA argues the Search Warrant covered the entire apartment and that the gun and the drugs were in plain view. That in addition the People are not offering into evidence any statements made by the Defendant at his apartment. Rather the People are seeking to find that the statement made by the Defendant at the Sheriff's Department as shown by Exhibit 13 is admissible.

The People also argue that with regard to the issue of the Search Warrant, that it is the Defendant's burden to show that the Warrant was either obtained illegally or that the search was illegal or that the search was not pursuant to the Warrant. The People argue that the defense has not met the burden.

The Court does find the statement made by the Defendant at the Sheriff's Department on March 26, 2015 was voluntarily made after he was advised of his Miranda Warnings. The Defendant reviewed and signed the statement. Therefore the Court finds said statement to be admissible.

The application for the Search Warrant as shown by Exhibit 4 and the Warrant itself was Exhibit 5. The affidavit by the Search Warrant was prepared and signed by Deputy Manzell and relates the purchases of the crack cocaine from the Defendant by the CI on February 28, 2015, March 3, 2015 and March 21, 2015.

The Warrant itself allows the search of the Defendant's apartment and authorized the search for and to seize cocaine and other items involved in the sale and trafficking of cocaine.

The Court finds the Search Warrant was issued pursuant to probable cause. The investigation by Deputy Manzell and Investigator LaClair is specific as to the date, time and procedure used to buy the crack cocaine from the Defendant by the CI. The Court finds the CI to be credible. The search and seizure of the crack cocaine was pursuant to the Search Warrant.

At a Mapp Hearing the People have the initial burden of going forward to establish the legality of the police conduct. The defense has the burden of proving the illegality of the search and seizure. As to the seized crack cocaine the Court finds the People have met their burden and the defense has not met its burden.

Therefore the Court finds the crack cocaine seized on March 26, 2015 be pursuant to the Warrant and admissible at trial. The crack cocaine was not only seized pursuant to the Warrant but was also in plain view of the search team. The drugs seized are pursuant to reliable information provided by the CI.

The Court next addresses the issue of the seized 22 assault rifle.

To review the rifle was found in a spare bedroom under a dresser. There is no real testimony as to how the weapon was found and/or who actually found it. Deputy Manzell testified the rifle was found under a dresser in a secondary bedroom. Investigator LaClair who was not actually searching the apartment testified the gun was found under a dresser. This testimony is consistent with the Grand Jury testimony.

Investigator LaClair admits that he and Chief Colella of the Macedon Police Department both asked the Defendant whether he had any weapons in the apartment and he stated that he did. Investigator LaClair acknowledges that he had not given the Defendant his Miranda Warnings until the Defendant was back at the Sheriff's Department. There is no question that the Defendant was in handcuffs in the kitchen and therefore was in custody and that any questions asked of him were in fact custodial interrogation.

The Defendant argues that the statement regarding the weapon is not admissible since he was not given his Miranda Warnings while under custodial interrogation and that anything found pursuant to statements regarding the weapon are fruits of the poisonous tree. The People argue that the Search Warrant allowed for the search of the entire apartment and that the 22 assault rifle would have been found in any event without the Defendant's statement.

Since the 22 assault rifle that was part of the items to be seized under the Search Warrant the question is was the 22 assault rifle in “plain view”. This exception to the normal requirement of a Search Warrant has to be requirements: that the police are lawfully in position to view the object; the police have lawful access to the object and the object’s incriminating nature is immediately apparent, People v Stein, 306 A.D. 2d 943; People v Bishop, 11 A.D. 3d 1034. Seizure of property cannot be justified under the plain view doctrine where the incriminating nature of the object is not readily apparent, People v Michael A.D., 289 A.D. 2d 1036.

In the case of the People v Justin A. Grow, 85 A.D. 3d 1319, is instructive. In that case the police officers entered into the defendant’s apartment in the course of executing their Arrest Warrant for an unrelated incident and observed several items in an order leading them to suspect that a marihuana growing operation was being conducted on the premises. While conducting the arrest an officer saw a knuckle knife on a table. Based upon their observations the police obtained a Search Warrant allowing them to search for and seize any items relating to marihuana packaging, processing consumption or distribution. The warrant allowed them to search the apartment of the defendant including any safes or lock boxes which may contain records, etc.. In the course of the subsequent search the police saw a locked cabinet which they opened with a key located on a nearby desktop and found inside an unassembled sawed off shot gun and two shells. The Defendant was subsequently indicted on Criminal Possession of a Weapon 3<sup>rd</sup> degree. The Appellate Division found that although the firearms were not included in the Search Warrant, discovery of the shot gun was in the scope of the Warrant as it specifically allowed the police to open and search the locked cabinet. Upon lawfully opening the cabinet and inadvertently discovering the gun, its incriminating character was immediately apparent thus the plain view doctrine applied to its discovery, People v Brown, 96 N.Y. 2d 80.

Where there was no showing that the contents of a protruding plastic bag could be inferred from its outward appearance, plain view doctrine did not apply, People v Dobson, 41 A.D. 3d 496.

In People v James, 27 A.D. 3d 1089, police found baggies protruding from a shaving bag and the police then opened the compartment and found more drugs. Discovery of the drugs by unzipping the closed compartment was not inadvertent.

In this case the police were lawfully in the Defendant's apartment and the police had lawful access to the object, that being the 22 assault rifle. The Search Warrant involved the search of the Defendant's entire apartment. However the warrant was limited to seizure of cocaine and any evidence that intends to demonstrate that a drug related offense was committed or that a particular person participated in the commission of such offense. It did not allow for the search of weapons of any kind. Therefore the issue is whether the Defendant's statements were illegally obtained and therefore the seizure of the gun must be precluded and/or if the statements of the Defendant had nothing to do with the seizure of the 22 assault rifle and was in fact the 22 assault rifle in plain view. The testimony is clear that the 22 assault rifle was found underneath a dresser in a spare bedroom. However there is no testimony or evidence of any kind how in fact the 22 assault rifle was found underneath the dresser, that is did the officer look underneath it and observe it in plain view and immediately saw the illegal nature of the rifle or did the officer feel under the dresser and then pull the weapon out or was in fact the weapon in any way covered underneath the dresser with any kind of item such as a blanket, etc.. The issue is the Court does not have enough testimony to make that determination. There is not testimony who actually found the 22 assault rifle and what was observed at the time the rifle was found and/or taken into custody. There is a picture of the rifle, Exhibit 6, however that shows the rifle on apparently the spare bedroom floor. It does not show it underneath the dresser.

The Court has also considered the inevitable discovery doctrine. The Courts have refused to suppress evidence if it can be shown by a very high degree of probability that the evidence sought to be suppressed would inevitably have been discovered irrespective of the initial wrong. Like the independent source and attenuated connection exceptions to the exclusionary rule, the inevitable discovery exception is based upon the perception that in certain circumstances the interest of society is better served by having relevant and material evidence admitted in criminal cases than by determining police misconduct through the exclusion of evidence unlawfully acquired, Nix v Williams, 467 U.S. 431. However New York courts have never applied the rule where, as here the evidence sought to be suppressed is the very evidence obtained in the illegal search, People v Stith and Newton, 69 N.Y. 2d 313 and People v Fitzpatrick, 32 N.Y. 2d 499. Evidence can be allowed as admissible if it was obtained indirectly or as a result of leads or information gained from primary evidence which was obtained illegally. In this case the discovery of the 22 assault rifle is not the secondary evidence but is the very evidence obtained in the illegal search. Therefore the seizure of the gun is suppressed.

The Court also did consider the plain touch doctrine pursuant to People v Diaz, 81 N.Y. 2d 106. However that doctrine does not apply if the defendant is not in a position at the time he is detained to get at the object. Also see Matter of Marhonda G., 81 N.Y. 2d 942.


The Defendant's statement that in fact there was a weapon in the apartment put the police on alert while they were searching to in fact search for and/or find a weapon.

Therefore the Court finds that the statement of the Defendant in the kitchen is suppressed and that even if not suppressed that the finding of the weapon is not pursuant to the Warrant and was not pursuant to the plain view doctrine or inevitable discovery doctrine.

Therefore the Court finds as follows: that the identification of the Defendant was not in any way suggestive and said identification was lawful and admissible at trial; that the confidential informant was found to be reliable and his testimony credible; that the statement taken from the Defendant at the Wayne County Sheriff's Department as shown by Exhibit 13 is admissible; that the 22 assault rifle seized is hereby suppressed from evidence due to the fact it is fruits from the poisonous tree and/or was not in plain view.

This constitutes the Decision of the Court.

Dated: December 2, 2015  
Lyons, New York



Daniel G. Barrett  
County Court Judge