

**People v Cruz**

2015 NY Slip Op 32820(U)

July 16, 2015

County Court, Westchester County

Docket Number: 14-1341

Judge: David F. Everett

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FILED/ON  
7/14 2015  
WESTCHESTER  
COUNTY CLERK

COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

ALEX HUMBERTO CRUZ,

EVERETT, J.:

TR  
FILED  
JUL 14 2015  
Defendant  
TMC  
COUNTY CLERK  
MI  
COUNTY OF WESTCHESTER

Decision and Order  
Indictment No.: 14-1341

The defendant stands accused under Indictment No. 14-1314, of one count of assault in the first degree (Penal Law § 120.10 [1]), one count of assault in the first degree (Penal Law § 120.10 [2]), and one count of criminal possession of a weapon in the third degree (Penal Law § 65.02 [2]). By decision and order dated March 2, 2015, this Court granted defendant's motion to suppress evidence to the extent of granting pre-trial *Dunaway/Huntley/Mapp/Wade* hearings as well as a *Sandoval* hearing. On June 29, 2015 and June 30, 2015, this Court conducted a joint suppression hearing. The People called one witness, Detective Claudio Carpano of the New Rochelle Police Department. No witness was called by the defense. During the hearing, this Court had the unique opportunity to hear the witness's testimony and observe his conduct. Having found the witness credible in all respects, based upon the evidence adduced, this Court makes the following findings of fact.

Findings of Fact

On the evening of August 4, 2014, Detective Claudio Carpano (Det. Carpano), an 18 year year veteran of the New Rochelle Police Department and 10 year veteran of the Department's General Investigation Unit, responded to the scene of a recent assault in the vicinity of the El Sabor De Mi Tierra Restaurant (El Sabor), located at 324 Huguenot Street in New Rochelle.

Upon his arrival, Det. Carpano observed a large crowd gathered outside the restaurant and further observed a significant amount of blood on the sidewalk to the west of the restaurant. Det. Carpano, who speaks both English and Spanish, interviewed various people at the scene. Among those he spoke to was Ruben Escobar (Escobar).

Det. Carpano testified to the substance of the information Escobar shared with him. Specifically, Det. Carpano reported that Escobar advised him that he had been with the alleged victim, Cesar Ramirez (Ramirez), at the restaurant and that the two had left after Ramirez and a male patron had an altercation. Escobar informed Det. Carpano that upon leaving, he and Ramirez went to a residence located about 70 feet from the restaurant. Escobar reported that they were sitting on the stoop when the male patron with whom Ramirez had the altercation approached them and struck Ramirez several times. Escobar reported that he observed this male to be in possession of a knife, which he saw the male fold and put away before he fled. Escobar described the male as being about 5'8"-5'9" and weighing about 200 pounds. Further, Escobar noted that the male had facial hair and had been wearing khaki shorts and a blue tee-shirt. Subsequent to having provided the above information to Det. Carpano on scene, on August 5, 2014, Escobar met with Det. Carpano at police headquarters. There Escobar gave a statement regarding his observations, which Det. Carpano memorialized in a police report. At that time, Escobar informed Det. Carpano that he had seen the male who had assaulted Ramirez at El Sabor on two or three prior occasions.

Det. Carpano testified that he had occasion to speak to Ramirez about the incident after Ramirez was out of surgery. According to Det. Carpano, Ramirez confirmed the account

provided by Escobar. Additionally, Ramirez informed Det. Carpano that prior to the night of the incident he had never seen or met the man who had stabbed him. Ramirez acknowledged that he and the male who allegedly stabbed him had an altercation in the vicinity of the restaurant's restroom.

Det. Carpano testified that in addition to speaking to Escobar and Ramirez, he also spoke with other anonymous individuals who had been at or near El Sabor at the time of the incident. As a result of these interviews, Det. Carpano testified that he had been told that the suspect he was seeking was believed to be named "Alex" and was also believed to work at a pizza shop in Mount Vernon or Pelham. As part of the investigation into the stabbing of Ramirez, Det. Carpano testified that interior surveillance video was obtained from El Sabor.

Det. Carpano testified that, although he was not the one who downloaded the video footage obtained, he was present when that was done. Det. Carpano testified that the footage depicted the stabbing suspect but that it did not capture the altercation between the suspect and Ramirez. Still frames of the individual who matched the description given of the suspect were downloaded from the El Sabor surveillance video. Det. Carpano used these still photographs in his investigation. Specifically, he showed them to employees of numerous pizza shops in nearby villages and inquired whether anyone recognized the suspect. Ultimately, on August 12, 2014, an employee at Village Pizza & Pasta in Mamaroneck, New York, recognized the individual in the still photos. This employee confirmed that the individual was named "Alex." He also reported that Alex was scheduled to work a shift starting at 4:00 p.m. that day and that he travels to work via bus and gets off at Palmer Avenue.

Det. Carpano testified that, based upon this information, he and Detective Herring went to the bus stop on Palmer Avenue. Det. Carpano testified that he recognized a passenger who got off the bus to be individual depicted in the still frame photos obtained from the footage of El Sabor. As such, with his badge in plain view on his hip, Det. Carpano approached this individual and called out "Alex." According to Det. Carpano, the male who had gotten off the bus turned toward him and reached for his waist. In response, Det. Carpano drew his weapon and issued a verbal warning. In compliance with the detective's command, the defendant placed his hands on a parked car. A pat down was conducted and a pocket knife was recovered from the area of the defendant's belt.

Det. Carpano testified that at that point, and prior to the defendant having been transported to police headquarters, he advised him of the *Miranda* warnings from memory. In reply to the prosecutor's question: "[a]nd when you orally recited these constitutional warnings to him on Palmer Avenue, did he indicate any understanding?" Det. Carpano replied "[h]e did." When the prosecutor asked "[d]id he ever indicate whether or not he wished to speak to you at that time?" he replied "[n]o, he did not." Defendant was asked no questions and made no statements during the car ride to police headquarters.

Upon arriving at the New Rochelle Police Department headquarters, the defendant was taken to an interview room. The events which transpired were captured on a video recording which was admitted into evidence at the combined-suppression hearing. As can be seen in the video, Det. Carpano used a *Miranda* card to advise the defendant of his *Miranda* rights. After identifying himself, Det. Carpano stated, in relevant part: [y]ou have the right to remain silent.

Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and to have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish one. You are also allowed to make three phone calls.” Then, departing from the text of the *Miranda* card, which was received in evidence at the hearing, Det. Carpano stated “It says three. You can make as many as you need and there is no restrictions. Alright. You understand that?”

Defendant replied “[y]es,” and Det. Carpano began questioning him about the events of August 4, 2014. Defendant’s responses during that interrogation are the subject of the instant *Huntley* motion.

Upon the completion of the interrogation, defendant was fingerprinted and photographed. A copy of this booking photo was used to prepare two separate color photo arrays. Each array contained a photograph of the defendant in addition to photographs of five fillers. Although the arrays contained all of the same photographs, the pictures in the respective arrays were arranged in different order.

Det. Carpano testified that on August 13, 2014, he went to Ramirez’s residence for the purpose of showing one photographic array to Ramirez and the other to Escobar. His testimony revealed that he showed the arrays to Ramirez and Escobar separately and that Ramirez did not speak to Escobar prior to Escobar viewing the second photographic array.

Specifically, according to Det. Carpano’s unimpeached testimony, he first met with Ramirez. Det. Carpano testified that prior to showing Ramirez the array, he advised him of the importance of being sure about any identification he might make and he also informed him that

the person who had assaulted him may or may not be depicted in the array. Det. Carpano testified that he then had Ramirez look at the array and that immediately upon doing so, Ramirez pointed to the defendant, who was depicted in position 1 of the array, and identified him as the man who had assaulted him. At Det. Carpano's request, Ramirez signed and dated the photograph to indicate the individual he had selected. The photographic array viewed by Ramirez was maintained and admitted into evidence at the suppression hearing.

Det. Carpano testified to having followed a similar procedure with Escobar. Prior to Escobar viewing the photographic array, Det. Carpano advised him to look at it carefully and cautioned him that a photograph of the person who allegedly assaulted Ramirez may or may not be included in the array. Det. Carpano testified that promptly upon looking at the array, Escobar identified the defendant, who was in position 4, as the individual he had seen assault Ramirez. Escobar signed and dated the photo he had selected. The photo array shown to Escobar was maintained and admitted into evidence at the suppression hearing.

### Conclusions of Law

#### Suppression of Physical Evidence (*Dunaway/Mapp*)

As to the *Dunaway/Mapp* portion of the hearing, the People bear the burden of going forward to establish the legality of the police conduct. Should the legality be established, the defendant has the ultimate burden of proving the illegality of the police conduct by a preponderance of the evidence (*People v Berrios*, 28 NY2d 361 [1971]).

In this case, this Court finds that the People presented ample evidence to meet their

burden and to demonstrate that law enforcement was possessed of evidence sufficient to establish probable cause.

The evidence adduced demonstrates that upon responding to the scene of the past assault, Det. Carpano observed blood outside the restaurant. At that time, Det. Carpano had the opportunity to speak to an identified civilian (Escobar) who informed the detective that he had observed a male, armed with a knife, strike Ramirez multiple times. This civilian provided Det. Carpano with a description of the perpetrator, which included details as to his height, weight, and facial features and which also included a description of the assailant's clothing. Two additional anonymous civilians who were present at the scene indicated that the perpetrator was named "Alex." One indicated a belief that "Alex" worked at a pizzeria in either Mount Vernon or Pelham. During the ensuing investigation, Det. Carpano spoke directly to the alleged victim whose account of the event was consistent with that provided by Escobar.

The detective acquired a video recording showing the interior of El Sabor on the night in question. The recording revealed an individual who matched the description of the perpetrator. Still photographs were downloaded from the video. Det. Carpano showed the still photographs to employees of a number of pizzerias. On August 12, 2014, an employee of Village Pizza & Pasta in Mamaroneck, New York, identified the individual depicted as "Alex." This employee informed Det. Carpano that Alex was scheduled to work at 4:00 p.m., and that he takes the bus to work and gets off on Palmer Avenue. Consequently, Det. Carpano and another detective waited at the Palmer Avenue bus stop shortly before 4:00 p.m. When the bus arrived, Det. Carpano recognized one of the passengers to be the individual depicted in the still photos. He called out

“Alex.” The individual turned and, apparently observing Det. Carpano, reached for his waist. The defendant was detained and patted down. A knife was recovered from the vicinity of his belt.

Information provided by an identified informant that a particular individual committed a crime is sufficient to form the basis of probable cause for arrest (*see People v McLendon*, 204 AD2d 661 [2d Dept 1994], *appeal denied* 84 NY2d 824 [1994]; *People v Idlet*, 208 AD2d 651 [2d Dept 1994], *appeal denied* 84 NY2d 1012 [1994]). Accordingly, the knife was recovered from the defendant’s person pursuant to a proper search incident to a lawful arrest (*see People v Ralston*, 303 AD2d 1014, 1014-1015 [2003], *lv denied* 100 NY2d 565 [2003]; *People v Welch*, 289 AD2d 936, 734 NYS2d 768 [2001], *lv denied* 98 NY2d 641 [2002]).

Even if it could be argued that the police lacked probable cause to arrest the defendant, the police were entitled to stop the defendant and frisk him (*see People v Benjamin*, 51 NY2d 267, 271 [1980] [holding that even where police have a mere right of inquire, if a defendant makes a furtive movement which the officer reasonably believes indicates a possible threat to his safety, a frisk is appropriate]). In this case, as Det. Carpano began to approach, the suspect reached for his waist. Det. Carpano, who was aware that the defendant was alleged to have committed a violent crime with a weapon, drew his firearm, cautioned the defendant, and directed him to place his hands upon a parked car. Defendant was then frisked and the knife was revealed.

Upon the foregoing, this Court finds the People have met their burden of going forward to establish the legality of the police conduct and further finds that the defendant has not met his

ultimate burden of proving the illegality of the police conduct by a preponderance of the evidence. Accordingly, the defendant's motion to suppress the knife recovered from his person is denied.

#### Suppression of Statement Evidence (*Huntley*)

At a pretrial *Huntley* hearing, the People bear the burden of proving the voluntariness of statement evidence beyond a reasonable doubt (*People v Huntley*, 15 NY2d 72, 78 [1965]; *People v Witherspoon*, 66 NY2d 973, 973-974 [1985]). Here, the evidence presented at the pre-trial hearing does not substantiate the People's assertion that the defendant waived his *Miranda* rights and voluntarily made statements during Det. Carpano's interrogation of him at police headquarters.<sup>1</sup>

Det. Carpano's testimony at the hearing revealed that at the time the defendant was taken into custody at the bus stop, he had been advised by the detective of his *Miranda* rights. However, the testimony of Det. Carpano was less than clear as to whether the defendant understood those rights. Further, the defendant did not indicate at that time whether he wished to speak with the detective.

As regards the video recording, there is no way of telling, when defendant replied "yes," whether his response meant that he understood his *Miranda* warnings, or whether defendant's response was directed solely to that portion of the detective's advisement that pertained to the

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<sup>1</sup> The People gave notice of testimony the defendant gave before the grand jury. These statements are not the proper subject of suppression or a suppression hearing as testimony given before a grand jury pursuant to a waiver of immunity may never be suppressed (CPL 60.45 [2] [a]).

phone calls. In addition, this Court specifically finds that the defendant was never asked the question whether he waived his right to remain silent. By adding information about telephone calls to the tail end of the *Miranda* warnings, without asking the defendant whether he understood his *Miranda* rights, and if so, whether he waived such rights, Det. Carpano created unnecessary confusion, rendering both his questions and defendant's response ambiguous.

Furthermore, as no other evidence was offered at the pretrial hearing to establish the validity of defendant's purported waiver of his *Miranda* rights, this Court is constrained to find that the defendant's responses to Det. Carpano (at both the bus stop and police headquarters) amount to neither a valid waiver of his right to remain silent nor a consent to be questioned (*People v Breland*, 145 AD2d 639, 641 [2d Dept 1988], *appeal denied* 73 NY2d 1011 [1989]). Defendant's motion to suppress statement evidence must be granted

#### Suppression of Identification Evidence (*Wade*)

Defendant moved to exclude any identification testimony at trial on grounds that the pre-trial identification procedures were unduly suggestive. It is well settled that a suggestive or otherwise improper identification procedure violates due process and is not admissible to determine the guilt or innocence of a defendant (*US v Wade*, 388 US 218 [1967]). Where an identification procedure is challenged, the People bear the burden of establishing the reasonableness of the police conduct and that the pre-trial identification procedure was not unduly suggestive (*People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]). The burden then shifts to the defendant to establish, by a preponderance of the evidence, that the

identification procedure employed was impermissibly suggestive and conducive to an irreparably mistaken identification (*id.*).

Through the testimony adduced at the combined pre-trial hearing and the introduction of the original photographic arrays into evidence, this Court finds the People have met their burden of establishing that the identification procedures at issue were neither unduly suggestive, nor conducive to irreparably mistaken identification. Under the totality of the circumstances, the photographic array was not so "impermissibly suggestive as to give rise to a substantial likelihood of . . . misidentification" (*Neil v Biggers*, 409 US 188 [1972]; *People v Duuvon*, 77 NY2d 541 [1991]; *People v Reed*, 171 AD2d 707 [2d Dept. 1991]).

The arrays, which each consisted of the defendant and five fillers, were appropriate (*see People v Campbell*, 149 AD2d 719 [2d Dept 1989]). The law does not require that the defendant be surrounded by people nearly identical in appearance (*People v Chipp*, 75 NY2d at 336). The defendant and the fillers are males of a similar weight and age. Each has a similar skin tone and each has facial hair including a moustache and a goatee type beard. The five fillers depicted in the photographic arrays were similar enough to the defendant in age and general appearance such that there existed little likelihood that the defendant would be singled out based upon a particular characteristic (*see People v Avent*, 29 AD3d 601 [2d Dept. 2006], *lv denied* 9 NY3d 1004 [2007]; *People v Ragunauth*, 24 AD3d 472 [2d Dept. 2005], *lv denied*, 6 NY3d 779 [2006]).

Moreover, the evidence adduced at the pre-trial hearing does not support a finding that Det. Carpano prompted the alleged victim or witness to select a particular photo, nor does the evidence demonstrate that the detective implied the defendant's identity in any manner (*see, People v Garcia*, 219 AD2d 541, 542 [1<sup>st</sup> Dept 1995], *appeal denied* 88 NY2d 847 [1996]).

To the contrary, the testimony clearly demonstrates that Det. Carpano cautioned each witness about the importance of making a careful selection and warned them both that the alleged perpetrator might not be included in the array.

Therefore, this Court finds the People have met their burden of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness in the pre-trial identification procedure. The defendant did not meet his burden to establish, by a preponderance of the evidence, that the identification procedure used was unduly suggestive (*People v Chipp*, 75 NY2d at 327). Consequently, this Court need not determine whether there exists an independent basis for either the alleged victim's or the witness's identification of the defendant (*see People v Keller*, 299 AD2d 915 [4<sup>th</sup> Dept 2002], *appeal denied* 99 NY2d 583 [2003]). Accordingly, the defendant's motion to suppress the identification and the prospective identification testimony of Ramirez or Escobar is denied.

Based on the foregoing, the defendant's pre-trial suppression motions are granted only as to the noticed statement evidence obtained at the New Rochelle police headquarters and are otherwise denied.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York  
July 16, 2015

  
HON. DAVID F. EVERETT, J.C.C.