

People v Wyche

2016 NY Slip Op 32694(U)

June 1, 2016

Supreme Court, Erie County

Docket Number: 01407-2015

Judge: Russell P. Buscaglia

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

The People of The State of New York

vs

Robert Wyche,

Defendant.

INDICTMENT NO.
~~01760-2015~~

01407-2015

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DECISION AND ORDER

RUSSELL P. BUSCAGLIA, J.S.C.

The defendant is charged by this Indictment with Kidnaping in the Second Degree, Penal Law § 135.20 and Robbery in the Second Degree, an Armed Felony, Penal Law § 160.20. The defendant moves to suppress the identification made of him and the physical evidence seized pursuant to Section 710.20 of the Criminal Procedure Law. A hearing was conducted pursuant to United States v. Wade , 388 U.S. 218 (1967), Mapp v. Ohio, 367 U.S. 643 (1961) and Dunaway v. New York, 442 U.S. 200 (1979). The defendant further moves to merge the Kidnaping count with the Robbery count pursuant to People v. Cain, 76 NY2d 119 (1990). Lieutenant Dana Cadwallader of the Town of Cheektowaga Police

Department, Officers James Refermat and Nathan Turner of the Village of Depew Police Department and Craig Burlin testified at the hearing.

The credible testimony at the hearing revealed that on August 13, 2015, at approximately 2:15 a.m. police officers from three separate jurisdictions, the Town of Cheektowaga, the Town of Lancaster and the Village of Depew Police Departments, responded to a robbery at gun point alleged to have occurred at a 7-Eleven at the corner of Transit Road and Genesee Street in the Town of Cheektowaga. The victim, Craig Burlin, was at the scene and gave a description of the individuals who had robbed him to the officers. He told the officers that he met a young black female at Pharaoh's, a strip club located in the Town of Cheektowaga approximately 1/4 mile from the 7-Eleven. Shortly thereafter, Burlin and the black female left in her car and proceeded to a near-by Motel 6 around the corner from the 7-Eleven. Once at the Motel 6, the black female suggested that Burlin and she take a shower together. After exiting the shower, the victim saw the defendant, a black male, in his room, along with a white female and the black female who had accompanied him to the motel and had exited the shower before him. The defendant demanded money from the victim, pointing a gun at him. When the victim went to his wallet it was empty. The victim said that before he entered the shower he had money in his wallet that he had obtained from an ATM machine at a 7-Eleven earlier in the evening. However, when he retrieved his wallet, there was no longer any money inside. The victim told the defendant that he had no money to give him, accusing him of already taking the cash he had in his wallet while he was in the shower. The defendant then directed the victim to a white Ford Sedan and told him they would go to the 7-Eleven so he could withdraw more money out of the ATM machine. The defendant then took the

victim's shoes and directed him to the back seat of the car. The defendant got into the back seat with the victim and continued to point the gun at him. Once at the 7-Eleven, the victim was able to flee and immediately called the police from the store bathroom. The victim then told police that the defendant, the black female who had accompanied him to Motel 6 and the white female fled the scene in the white Ford sedan.

After the investigation at the scene was completed, Officer Cadwallader drove to Pharaoh's where the victim said he met the black female who he later took to the Motel 6. At Pharaoh's, Officer Cadwallader spoke to the club manager who said that he saw the victim leave with a black female in a white Ford sedan. They were followed by a black male and a white female who drove off behind them in a red SUV. The manager told Officer Cadwallader that he believed the black male and white female were following the victim. This information regarding the white Ford sedan and the red SUV was then broadcast over the radio by Officer Cadwallader.

At approximately 3:15 a.m., Officer Nate Turner was in the Tops plaza on Transit Road near Rehm Road in his marked police Ford Explorer. He noticed a red SUV enter the parking lot and stop in the entrance before slowly pulling forward into the lot and parking in a marked spot near Officer Turner's vehicle. After calling for backup, Officer Turner and Officer Refermat pulled up behind the SUV on either side of it. Both officers then approached the SUV, with Officer Refermat approaching the defendant on the passenger side of the vehicle. A white female was driving the SUV and a black female was also in the SUV. Officer Refermat immediately noticed a bag of marijuana in the center console of the SUV. The defendant said to Officer Refermat that the substance was marijuana and was asked to produce identification. The defendant then pulled a brown

wallet from his left pocket, set it on his lap and then proceeded to pull out a non-driver identification card from his right pocket which he gave to the officer. Officer Refermat asked the defendant if his identification was in the wallet he pulled out and the defendant replied that it was not.

Shortly thereafter, Lancaster Police came on the scene and asked the defendant to step out of the vehicle. When he did this, the brown leather wallet which he had taken out of his left pocket was placed on the passenger seat in plain view. Thereafter, Officer Refermat inspected the brown wallet and ascertained that it belonged to the victim.

At approximately 3:50 a.m. Officer Cadwallader conducted a show-up identification procedure at the parking lot in the Tops parking lot. There were approximately 10 -12 officers present in the parking lot near the red SUV. The defendant was shown by one officers within 15 to 20 feet to the victim. There was either a spotlight or a flashlight shone on the defendant so that he was well illuminated. The defendant was in handcuffs at the time of the show-up identification procedure. Upon seeing the defendant, the victim immediately indicated that he was the individual who pulled a gun on him.

The People have the initial burden of going forward to establish that the identification procedure was not unduly suggestive and that burden is minimal, People v. Ortiz, 90 NY2d 533 (1997). If the People meet their burden, the defendant has the burden of persuasion by a preponderance of the evidence to establish a basis for suppression, People v. Berrios, 28 NY2d 361 (1971). Show-up identifications are inherently suggestive and disfavored unless conducted in close temporal and geographical proximity to the crime, People v. Duuvon, 77 NY2d 541 (1991). A simultaneous show-up identification of a defendant to a robbery victim and a witness near the crime scene and within several

minutes of the robbery was not unduly suggestive, People v. Alexander, 226 AD2d 548 (2nd Dept. 1996). This defendant was shown under good lighting, with the parking lot lights illuminated and a spot light having been shown on the defendant from a distance of between 15 to 20 feet from the victim, with no obstruction of his view, close in time and place to the crime. The fact that he was handcuffed behind his back and in the presence of police officers, while weighing in the defendant's favor, is of no moment in light of such proximity, People v. Davis, 48 AD3d 1120 (4th Dept. 2008), People v. Gil, 21 AD3d 1120 (2nd Dept. 2005) and People v. Junco, 223 AD2d 927 (3rd Dept. 1996). The defendant was not shown with stolen property or the gun which was recovered and the victim was not told his personal identification and property were recovered. No evidence was adduced to demonstrate that the victim was influenced by any outside factors and the show-up identification occurred with an hour and thirty minutes of the alleged crime. There was nothing that even suggested the victim identified the defendant for any reason but his independent recollection of the defendant who was the individual who had participated in the robbery against him. Furthermore, the victim did not identify the black female and was unable to positively identify the white female, both of whom were also viewed by him, further evidencing the lack of a suggestive procedure. Therefore, under the totality of the circumstances, the show-up identification was not unduly suggestive, See, People v. Tarangelo, 258 AD2d 305 (1st Dept. 1999) and People v. Green, 256 AD2d 85 (1st Dept. 1998). In any event, the victim had an independent basis for his identification, People v. Wilson, 43 AD3d 1409 (4th Dept. 2007) and People v. Campbell, 200 AD2d 624 (2nd Dept. 1994).

Persons are protected against unreasonable search and seizures and the corollary to these protections is that all searches and seizures are not per se unreasonable. The police may interfere with a person's privacy and liberty interests only to the extent necessary to conduct any lawful inquiry, People v. DeBour, 40 NY2d 210 (1976). A police officer may approach a parked vehicle when there is some objective, credible reason to do so, People v. Ocasio, 85 NY2d 982 (1985). The description of the red SUV and its last known location were broadcast over the radio as a vehicle that was wanted in connection with a robbery a short time prior in the general vicinity of where the officers located it. The officers who came upon the SUV in the Tops parking lot noticed it come to a complete stop in the lane entering the parking lot when it appeared the driver noticed the marked police vehicle. When Officer Cadwallader approached the passenger side of the SUV, he immediately noticed marijuana sitting in the front center console. The defendant admitted that the substance was in fact marijuana. These facts distinguish People v. Hightower, 136 AD3d 1396 (4th Dept. 2016) upon which the defendant relies and, therefore, the police conduct was permissible.

A passenger in a parked car lacks standing to challenge the search of the vehicle, People v. Tillman, 283 AD2d 944 (4th Dept. 2001). A person must allege standing to suppress evidence by establishing a reasonable expectation of privacy in the place or items searched, People v. Ramirez-Portoreal, 88 NY2d 99 (1996). This Court must identify the object of the defendant's expectation of privacy and determine whether the defendant exhibited an expectation of privacy in it and evaluate whether the circumstances would lead society to regard defendant's expectation as reasonable, Ramirez-Portoreal, supra. The defendant was a passenger in the SUV and voluntarily left or abandoned the victim's

wallet on the front passenger seat in plain view. Since the defendant had no expectation of privacy in a wallet that did not belong to him and that he abandoned, he has no standing to challenge the legality of the police conduct.

The merger doctrine mandates that a kidnaping charge be merged with another charged crime when the kidnaping is based on acts integral to the commission of another crime, People v. Carmichael, 155 AD2d 983 (4th Dept. 1989). Specifically, where the asportation of a victim for a relatively short time is incidental to a robbery, rape or assault, the kidnaping charge merges into the other substantive crime, precluding a conviction for kidnaping, Carmichael, supra. The People recognize the doctrine and cite Cain, supra, acknowledging that when a defendant's asportation of the victim is inseparable from the over-all scheme to steal money, no kidnaping occurred. The detention of the victim was incidental and inseparable from the underlying crime of robbery and, therefore, merges with that charge.

Accordingly, the defendant's motion to suppress the identification of him and the physical evidence seized is **DENIED**. The defendant's motion to have the Kidnaping count merge with the Robbery count is **GRANTED**.

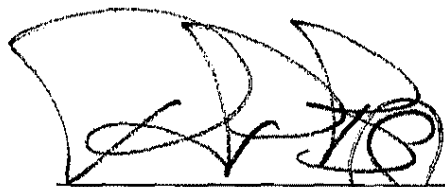
This decision constitutes the Order of this Court.

DATED: Buffalo, New York

June 1, 2016

GRANTED

JUN 01 2016
BY: *Diane M. Smith*
DIANE M. SMITH
COURT CLERK



RUSSELL P. BUSCAGLIA
Supreme Court Justice