

People v Dimas

2016 NY Slip Op 32708(U)

February 22, 2016

County Court, Westchester County

Docket Number: 14-1618

Judge: Barbara G. Zambelli

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FILED
AND ENTERED

ON
FEBRUARY 22, 2016

WESTCHESTER
COUNTY CLERK

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

THE PEOPLE OF THE STATE OF NEW YORK

- against -

PEDRO DIMAS a/k/a DIMAS PEDRO

Defendant.

-----X
ZAMBELLI, J.

Indictment No: 14-1618

DECISION AFTER HEARING

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FILED
FEB 23 2016
COUNTY OF WESTCHESTER

The defendant has been indicted for the crimes of Attempted Murder in the Second Degree, Assault in the First Degree and Criminal Possession of a Weapon in the Second Degree allegedly committed on or about October 22, 2014, in the County of Westchester.

By decision and order dated September 15, 2015, this court granted defendant's motion solely to the extent of ordering Dunaway, Huntley, Mapp and Wade/ Rodriguez hearings. A Sirois hearing was further ordered following the People's application on January 4, 2016 and January 11, 2016. The following witnesses gave testimony: from the Yonkers Police Department: Detective Dennis Mullin, Police Officer Thomas Braig; Sergeant Marcelo Diaz of the Westchester County Department of Corrections; District Attorney Investigators Latheia Smith, Amin Muhammad, and Edward Salinas; civilian RT;¹ and Assistant District Attorney Shameika Mathurin.

¹ The witness is referred to as "RT" in order to protect his/her identity.

On October 22, 2014, at approximately 9:00 a.m. Detective Mullin responded to the location of the deli/bodega at 27 Lawrence Street in Yonkers on the report of a shooting. He was accompanied by his partner Detective Russell Kilgore. Upon arrival, the detective observed a male, later identified as Sean Chilsolm, behind the counter lying on the floor with three gunshot wounds. Ambulance personnel were providing medical attention. After interviewing witnesses, the detective learned that a witness had chased after the shooter who got into a dark blue older model BMW. The shooter was described by the witness as a tall male approximately six foot, very heavy, wearing dark blue clothing, dark blue pants. The witness told the detective that the BMW traveled eastbound on Lawrence Street, made a right onto an area that used to be a train track area that goes behind some buildings and then turned onto Wolfe Street. The witness had seen the vehicle driving around the block earlier that morning.² The witness knew that the victim had had a fight two weeks prior with Dimas. The witness also saw the shooter get back into the passenger side of the BMW on Wolfe Street.

The Police Tech Unit retrieved video from 27 Lawrence Street, video of the individual exiting the store running eastbound on Lawrence Street. Videos retrieved from before the shooting and after the shooting from the areas described by the witnesses showed the dark blue old model BMW while parking had the driver's side reverse light out. After parking, a male exits the passenger side of the vehicle and walks westbound on

² The witnesses names on the statements had been redacted. The witnesses names were disclosed in camera to defense counsel but not during the public portion of the hearing based in the People's Offer of Proof relating to threats being made to witnesses.

Wolfe Street into the train track area. Another video shows the shooter running into the store and coming out of the store and the same old model dark blue BMW driving around the block. The BMW on the video driving around the block after the shooting appears to be the same BMW that had parked on Wolfe Street where the individual exited the passenger side prior to the shooting. After the shooter exits the deli, the video shows the shooter running eastbound on Lawrence Street, making a right onto the train track area, left onto Wolfe Street, and reentering the same BMW on the passenger side. The videos depict the shooter exiting that vehicle at 73-83 Highland Avenue approximately ten minutes after the shooting which location is approximately a mile and a half from the scene of the crime.

The detective learned from the victim's girlfriend, Brittany Collazo, that the victim had had an issue with "Dimas". She told them Dimas and the victim had been engaged in an ongoing dispute about "dust" and that Sean had walked off with Dimas' "blunt". They had gotten into a fight two weeks before. Dimas hit Sean. Sean was in fear of his safety. He was hiding out in her apartment since the fight because he was scared to come outside. He knew Dimas to carry a gun.

After speaking with the victim's girlfriend the detectives returned to the detective division to search for information about a "Dimas". After asking around, one of the detectives told Detective Mullin that he knew a male named Pedro Dimas. The RIC system was checked. The system consists of everyone who has been arrested and contains pedigree information, addresses, and photos. Dimas' photo was pulled up. His description in the system fit the description provided by the witnesses to the shooting. The

victim's girlfriend confirmed it was Dimas Pedro.³ The description of Dimas Pedro, the description of the BMW including the driver's side broken reverse taillight was relayed through police channels. Detectives Cartegena and Kostewich had a description of the vehicle. At approximately 1:00 - 2:00 p.m. the detectives spotted an old model black BMW vehicle in front of 73-83 Highland Avenue. At approximately 2:00 p.m., an anti-crime unit was sent to the location to surveil the vehicle. The anti-crime unit, Police Officer Braig with his partner Paul Api, were advised it was a BMW, black, 5 series with a broken driver's side reverse light that was used in the shooting. Police Officer Braig was also advised Pedro Dimas was wanted for questioning on the shooting. At approximately 3:30 - 4:00 p.m. the officer saw a male get into the passenger side of the BMW and a female get into the driver's side. The vehicle left the parking spot and drove past the detective's vehicle. The officer did a u turn and followed them. The BMW took a roundabout way out to Broadway and failed to signal when turning from Carolina Street on to Harriet Street and then on to Broadway. The officer effected a traffic stop on Broadway. When the driver of the BMW put the vehicle in park, the officer observed the driver's side reverse light was out. He recognized the passenger as Dimas Pedro who he knew from prior experience. The driver was identified as Artya Green. They were brought into the police department and the vehicle was impounded. Defendant was taken to the detective division as was Ms. Green. The People have withdrawn for all purposes the CPL §710.30 notice alleging defendant made a recorded statement between 5:45 p.m. and 7:00 p.m.

Artya Green gave a statement to the detectives that defendant had taken her car

³ The People did not provide defendant with a pretrial notice of this identification.

that morning without her knowledge. He had stayed with her the night before. He had not been staying with her before that. That morning of October 22 he left and took his clothes. She consented to a search of the apartment.

Detective Mullin went to the hospital to speak to the victim shortly after the shooting but the victim was in surgery. The detective as well as others returned that night at approximately 9:00 p.m. The victim was awake, coherent and alert but in pain. Detective Kilgore spoke to him in Detective Mullin's presence. He told the detective he was hanging out in the deli. He told them Dimas shot him. He told the detective that he knew Dimas. They had known each other for over a year. They were friends at one point, but the relationship had changed because Dimas thought that he had set him up to get arrested by the police. They had had a fight two weeks prior; Dimas punches really hard. Prior to showing the victim a photo array, the detective explained that the pictures shown may not include the person actually wanted for questioning. The persons in the array may be different depending on the time the picture was taken, they may be heavier, they may be lighter. Also, skin tones might be different, hair might be different. The photo array, Exh 1, was shown to the victim. He looked at the photo array, pointed to photo four, and stated "that's Dimas, that's who shot me". He circled the picture and signed it.

Defendant was booked and processed the following morning, October 23, at approximately 7:00 a.m. Pedigree information was taken while he was in the holding cell. He told them his address was 2 Lawrence Street. Asked if he had any markings, scars or tattoos he responded that he had a gunshot wound to his right ankle which caused his to walk to be "messed up". He was swabbed for gunshot residue.

On October 24th the detective returned to the hospital and a typed statement was taken from the victim, Exh 42, on Detective Mullin's laptop. The victim gave the detective the details about the defendant's features that he recognized. He recognized it was Dimas because he could see the complexion of his skin, the bridge of his nose, his eyes, and the start of the braids in his hair that the mask wasn't covering.

CONCLUSIONS OF LAW

The Arrest of the Defendant

Defendant was in custody at the point he was taken to the detective division after the stop of the vehicle for a traffic infraction. Although the detective testified defendant was taken into the department for questioning, the defendant was nevertheless in custody at that point which requires a showing of probable cause. (See, People v Yukl, 25 N.Y.2d 585)

A police officer may arrest and take into custody a person when he has probable cause to believe that person has committed a crime, or offense in his presence (CPL §140.10; People v. De Bour, 40 N.Y.2d 210, 223)

"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 or is being committed or that evidence of a crime may be found in a certain place and that the person being arrested committed the crime or offense (People v. McRay, 51 N.Y.2d 594, 602, 435 N.Y.S.2d 679, 416 N.E.2d 1015, supra; see also, Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879, reh. denied 338 U.S. 839, 70 S.Ct. 31, 94 L.Ed. 513). The legal conclusion is to be made after

considering all of the facts and circumstances together. Viewed singly, these may not be persuasive, yet when viewed together the puzzle may fit and probable cause found (see generally, Illinois v. Gates, 462 U.S. 213, 231–235, 103 S.Ct. 2317, 2328–31, 76 L.Ed.2d 527, *supra*; United States v. Davis, 458 F.2d 819, 821 (D.C.1972); 1 LaFave, Search and Seizure § 3.2 et seq.) (People v. Bigelow, 66 N.Y.2d 417, 423; People v Francis, 44 A.D.3d 788).

Considering all the facts and circumstances, defendant's arrest after the lawful stop of the vehicle for a traffic infraction was supported by probable cause. Specifically, the police had information from an eyewitness providing a description of the shooter. The witness followed the shooter to see the shooter enter the BMW after the shooting. The same vehicle had been seen by the witness earlier in the morning. The witness told them Dimas and the victim had had a dispute two weeks prior. The police were given the physical description of the shooter without facial features. The police had obtained video footage showing the path of the BMW, the shooter exiting the vehicle prior to the shooting and reentering the vehicle after the shooting. The video footage showed the shooter exit the same vehicle, enter 73-83 Highland Avenue and exit the same location. The police had the unique characteristics of the vehicle relayed to the officers in the area. The police officers knew Dimas Pedro and his physical description which matched the description of the shooter. The victim's girlfriend Brittany Collazo provided the motive for the commission of the crime by describing the bad blood between the victim and the defendant. She told them Dimas and the victim had a recent physical altercation; the victim was hiding out in her apartment because he was afraid of Dimas and the victim knew Dimas had a gun.

She explained the dispute was related to drugs. She confirmed that the picture of the defendant in the RICl system was Dimas.

Having been lawfully arrested, his clothing was lawfully taken in evidence as incident to his arrest (See, People v. Payne, 233 A.D.2d 787).

Accordingly, the motion to suppress is denied.

Identification

The identification of the defendant by the victim from the photo array was not suggestive or the product of any improper police conduct (see, People v. Robert, 184 A.D.2d 597, 598). The photo array was merely confirmatory based upon the victim's knowledge of the defendant (see, People v. Rodriguez, 79 N.Y.2d 445 at 450). The motion to suppress is denied.

Chisolm's then girlfriend Brittany Collazo was shown a photo of the defendant which she confirmed was Dimas. The Court sua sponte raised the question about the identification. Defense counsel argued notice was required and objected on the grounds of suggestiveness but did not move to preclude for failure to provide pretrial notice. The Court finds the single photo display was unduly suggestive. An independent source hearing is to be held prior to jury selection.

Statement

Pedigree information routinely taken by members of law enforcement is not subject to suppression. (See, People v. Rodney, 85 N.Y.2d 289; People v. Thomas, 195 A.D.2d 301, app. den. 82 N.Y.2d 897). The motion to suppress is denied.

Evidence of False Alibi

The People seek to elicit testimony during the trial that defendant asked Chantray Williams to provide a false alibi for him which the People contend demonstrates a consciousness of guilt. (See Exh 49) A decision on this application will abide the trial of this case (See, People v. Hernandez, 118 A.D.2d 729).

SIROIS HEARING

On January 4, 2016, the People made an oral application and on January 11, 2016 the People made a written application for a Sirois hearing. The People allege that defendant's misconduct has induced the victim, Sean Chisolm, to be unavailable for trial and therefore the victim's grand jury testimony and sworn statement to the police should be admitted at trial as evidence in chief pursuant to People v. Geraci, 85 N.Y.2d 369.

The Law

Under the Sixth Amendment of the US Constitution and article I section 6 of the State Constitution, a criminal defendant has the right to be confronted with the witnesses against him (see U.S. Const. Amend.VI; N.Y, Const, art I s 6) However, a defendant through his misconduct forfeits his constitutional right to confront a witness and the right to assert otherwise viable evidentiary rules barring the use of hearsay as evidence in chief when the defendant procures a witness's silence by threats, trickery, violence, misconduct including intimidation and bribery and the use of a relationship to improperly procure a witness's silence (See, People v Geraci, 85 N.Y.2d 359; People v. Cotto, 92 N.Y.2d 68; People v. Encarnacion, 87 A.D.3d 81; People v. Jernigan, 41 A.D.3d 331). This limited forfeiture by misconduct exception to the fundamental right to confront witnesses is

"dictated by sound public policy" because "the law will not allow a person to take advantage of his own wrong" (Geraci supra at 366). Moreover, courts have a paramount duty to protect "the integrity of the adversary process by deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness (id).

The standard for the granting of a Sirois hearing is where "the People allege specific facts which demonstrate a "distinct possibility" that a criminal defendant's misconduct has induced a witness' unlawful refusal to testify at trial or has caused the witness' disappearance or demise, the People shall be given the opportunity to prove that misconduct at an evidentiary hearing." (Matter of Holtzman v. Hellenbrand, 92 A.D.2d 405, 415).

At the hearing, the People "must demonstrate through clear and convincing evidence that the defendant engaged in misconduct aimed at least in part at preventing the witness from testifying and that those misdeeds were a significant cause of the witness's decision not to testify." (People v. Smart, 23 N.Y.3d 213, 220).

"Because witness tampering is a surreptitious activity rarely admitted by the defendant or the witness, few cases will involve direct evidence of this causal link between the defendant's misconduct and the witness' refusal to testify or failure to appear in court (citations omitted) Therefore at a hearing held pursuant to Sirois and Geraci, the court may infer the requisite causation from the evidence of the defendant's coercive behavior and the actions taken by the witness in direct response to or within a close temporal proximity to the misconduct" (Id). The evidence must be sufficient to support a determination that the defendant either was responsible for or acquiesced in the conduct that rendered the

witness unavailable for trial (id).

Thus the courts have upheld the admission of grand jury testimony where it was established that the defendant wrongfully made use of his relationship with the victim in order to pressure her to violate her duty to testify (People v Jernigan, supra); even where a defendant after threatening a witness wavered in his desire to stop the witness from testifying, the totality of phone calls between the witness and the defendant revealed his desire a least in part to forestall the witness's potential trial testimony (People v. Smart, supra); where the witness physically available but defendant caused the witness to recant (People v. Turnquest, 35 Misc. 3d 329); evidence of recorded conversations of defendant while incarcerated with a person outside of the jail in which defendant gave the person the phone number of the witness in question and stated that he could not have that witness appear at his trial (People v. Clarke, 55 A.D.3d 1447); the witness's original version of the crime which she had testified to before the grand jury changed as a result of improper influence by the defendant (People v. Encarnacion, 87 A.D. 3d 81); defendant wrongfully made use of his relationship with the victim in order to pressure her to violate her duty to testify (People v. Jernigan, 41 A.D.3d 331); where in addition to extensive evidence concerning the defendant's conduct toward the missing witness,"the court properly considered evidence of defendant's unsuccessful attempt to tamper with other witnesses since this evidence established a common scheme or plan to tamper with as many witnesses as possible" (People v. Leggett, 107 A.D.3d 741); where defendant used his close relationship with his sister to persuade or pressure her into not testifying (People v. Evans, 2015 N.Y. slip op 02782; decided April 1, 2015); where there was a history of

domestic abuse relevant to show defendant 's degree of control over witness who refused to testify (People v. Byrd, 51 A.D.3d 267); where numerous phone calls, two letters, four jail visits established defendant's attempt to manipulate the witness into recanting her previous testimony and invoking her fifth amendment right not to answer questions (People v. Brown, 38 Misc. 3d 1210); a chain of circumstantial evidence led to the inescapable conclusion that defendant was responsible for threatening the witness (People v. Alston, 27 A.D.3d 311, 312).

Sean Chisolm's statements to law enforcement identifying Dimas as the shooter form October, 2014 - December 2015

As set forth, supra, Detective Mullin spoke to the victim on the night of the crime. Mr. Chisolm told them Dimas had shot him and identified defendant's picture in the photo array as the person who shot him. Thereafter, on October 24, Chisolm gave a signed statement to Detective Mullin wherein he stated that Dimas shot him, how he knew it was Dimas, and the problems the two of them had had in the past. (Exh 42).

On December 10, 2014, Assistant District Attorney Mathurin and Detective Kilgore met with the victim at the Helen Hayes Rehabilitation Center. Mr. Chisolm is approximately 5 foot six inches and confined to a wheelchair. Mr. Chisolm was advised that he would be asked to testify before the grand jury. Assistant District Attorney Mathurin asked him to tell her what happened the day he was shot. He told her in sum and substance that he was behind the counter inside the deli at 27 Lawrence on the morning of October 22, 2014 when an individual walked into the store with whom he made eye

contact. Mr. Chisholm recognized the individual as the person he knew by the name of Dimas. Although Dimas was wearing a hooded sweatshirt and a mask covered the bottom portion of his face, he saw Dimas' eyes, the top of his nose, his forehead, his skin and the beginning of his braids. He knew it was Dimas. Asked if he was certain, he told her he was one hundred percent certain it was Dimas.

Mr. Chisolm thereafter testified before the grand jury on December 29, 2014. In the grand jury, he was asked if he recognized the person who shot him. He answered "Dimas". Asked how he recognized the person as Dimas he answered, "Because he had like kind of the bottom half mask, but I know him for a long time so I know his face. I know him for like a whole year. I noticed the upper half of his face and the braids". He noticed the top half of his nose, eyes, braids, forehead. They looked at each other right in the face when he pulled a gun out and shot him. He tried to run but he had already been shot so he fell on the floor and more shots went off. (Exh 39 at p 102-103). He then called his girlfriend and told her he got shot.

On December 16, 2015, Detective Muhammad and Assistant District Attorney Mathurin met with the victim at a residential rehab facility. In preparation for the impending trial, they spoke with him about the shooting. He reiterated that he was 100 percent certain that it was Dimas who shot him. Dimas' attorney had evidently indicated he wanted to speak to the victim. The victim was asked by Assistant District Attorney Nagler if he wanted to speak to Dimas' lawyer to which he responded he did not want to speak to Dimas' lawyer.

Sean Chisolm's statements in late December, 2015 - January, 2016

On December 29, 2015, Investigator Smith and Assistant District Attorney Nagler met with Sean Chisolm after the defendant's attorney had contacted Assistant District Attorney Nagler on December 28, 2015 to advise her that Chisolm had told him that he did not want to testify against Dimas and couldn't make an identification of the individual who shot him. Upon speaking to Chisolm on December 29, 2105, they learned that he had received the phone number of Dimas' attorney from a friend of his, Orlando. He refused to provide further information concerning Orlando. Chisolm told them he had told the defense attorney that he would not testify, or he didn't want to testify and if he had to testify he couldn't make an identification. He did not know who shot him. He told them that he had been speaking with Orlando by phone and he explained to Orlando that he did not want to testify and Orlando gave him the defense attorney's phone number. Chisolm told Orlando he was afraid for himself and for his family. Dimas' family and brothers were in the city of Yonkers and Chisolm still had family there as well. He explained he could get shot again. Chisolm denied that anyone had contacted him or made any threats to him but he said anything was possible. There is no protection 24//7. He told them there are people in Yonkers who would do anything for Dimas and Dimas had family members there.

Investigator Smith met again with Chisolm the following day, December 30, 2015 to further the investigation about Orlando. Investigator Smith obtained a photo (Exh 74) of Orlando Johnson which she showed to Chisolm. Chisolm denied the photo was of Orlando. She asked him again if anyone had contacted him and he repeated that he would not testify to the person who shot him. (T69). On December 31, 2015, Investigator

Smith spoke with Chisolm's mother, Sherry Aimes, by phone. Chisolm's mother told Investigator Smith that her son had told her in November, 2015 he was afraid for her life and safety as well as that of his ex-girlfriend, Brenda Collazo. He would not testify because of that. She expressed her anger with that to Investigator Smith. Investigator Smith went to Chisolm to confront him with what his mother had said. Smith again showed him the photo of Orlando and he confirmed that it was the Orlando he had spoken with. He also provided Orlando's phone number and Orlando's street name, "Gutta". He repeated what he had previously said about his family and added that he was aware of an incident where his cousin was shot at by Dimas. She told him he shouldn't go back to Yonkers if he doesn't testify to which he replied, "I am not stupid. I know he shot me. I am not going back there."

On January 4, 2016 pre trial hearings began in this case.

On January 8, 2016, Investigator Muhammad and the Assistant District Attorney's met with Chisolm in the District Attorney's office. The following information was provided to the Investigator and the Assistant District Attorney's at that time: Chisolm told him that he had received a call from Shamika Pettiford in early 2015. She told him that Orlando wanted to contact him.⁴ She gave Chisholm a profile name of Orlando's girlfriend's facebook account. Chisholm contacted the girlfriend through the Facebook account. Later, Orlando contacted him, Chisolm. Orlando was not in jail at the time. Sometime after Orlando Johnson was incarcerated on January 30, 2015, Shameika Pettiford reached out

⁴ Orlando is also a Pettiford, Exh 68a at p 3 and also goes by the name of "Gutta" or "Gutter" (Exh 63) and the court infers he is referred to as "El Niche," Exh 68c in the recorded conversations in from the jail.

to Chisolm to tell him Orlando wanted to talk to him and she arranged a three way phone call with Orlando who was in jail. Orlando spoke to Chisolm through Chisolm's girlfriend's phone while in jail. Orlando told him (Chisolm) that he ran into Dimas in jail and that he (Orlando) was going to fight Dimas, but Dimas then told him he (Chisolm) was going forward with the case and so Orlando didn't fight Dimas. Orlando told him that "he (Chisolm) was going to do the right thing." Chisolm did not understand what Orlando meant. Orlando told him "is what people saying about you is true?" and told him "we don't do that. We don't do that on the street". Orlando then told Chisolm "I know you are going to do the right thing."

At this meeting, Chisolm also told them that Orlando called Chisolm to tell him Dimas' attorney wanted to speak to him. Orlando gave Chisolm Dimas' attorney's phone number. Chisolm told Muhammad he did not call the attorney. Orlando again called Chisolm to ask if he had called Dimas' attorney and Chisolm again said no. Orlando told him he knew Chisolm had testified before the grand jury and that he had given a statement. Orlando told him not to go to court. Orlando told him they can't force you to go to court. Chisolm told Muhammad that he was fearful, he was very afraid because he felt Dimas' brothers would reach out to him and even Orlando would harm him because he was a snitch. He was concerned because his ex girlfriend's, (Brittany Collazo), baby's father is related to Orlando which was another reason to be concerned for his safety. Asked about testifying, he said he did not think it was smart to testify against Dimas. Chisolm called Dimas' attorney on December 26, 2015 and met with Dimas' attorney on December 28.

On January 15, 2016, the date of the continued hearing herein, Chisolm had been subpoenaed and was transported by ambulance to the District Attorney's office. After the morning session of the court, Investigator Muhammad returned to the office and spoke to Chisolm. He told him that he, Chisolm, was to be brought before the court to testify in the hearing. Chisolm told the Investigator he would not testify. Having been told Dimas Pedro would be in the courtroom, Chisolm told them he didn't want to be in the same building let alone the same courtroom as Dimas Pedro. Chisolm was told that he could be moved to Missouri for his protection. Chisolm responded that they could find him in Missouri. Chisolm told him Dimas is known to be crazy on the street. He had been assaulted by Dimas in the past and Chisolm's cousin was shot at by Dimas over some type of dispute. He said he wasn't afraid of Dimas who was in jail. He was afraid of what Dimas can do - he could pick up a phone. He told Assistant District Attorney Nagler he would not go to court. If he was forced to go he would not say anything.

Based on the foregoing, the People have established that Sean Chisolm has become unavailable as a witness. He is refusing to testify truthfully because he is fearful for his own safety and the safety of his family. If forced to appear, he will not tell the truth. The People must demonstrate through clear and convincing evidence that the defendant either was responsible for or acquiesced in misconduct that rendered Sean Chisolm unavailable for trial (See, People v. Cotto, 92 N.Y.2d 68, 77; People v. Smart, 23 N.Y.3d 213, 220).

RT testified that on April 14, 2015 he was produced in the courtroom of the undersigned on charges unrelated to defendant's charges. He was being held in the

holding cell along with defendant who was produced on the instant case and both defendants were in the holding cell adjacent to the courtroom. Jail records and court records confirm that both defendants were produced in court on April 14, 2015. A couple of weeks prior to April 14, RT and defendant had spoken at the county jail. Defendant knew RT's co-defendant. RT knew defendant's cousin Chi Chi from the Bronx. While in the holding cell on April 14, RT was talking to defendant about his, RT's, case. He told defendant he was being offered 12 years and asked defendant whether he thought RT should take it. Defendant said if they have a lot of evidence, he should take the 12 years. Defendant then talked about how he, defendant, was locked up for a body. He explained that he, a b***h he was f*****g with and his man hopped in a V (vehicle). He went looking for some opp (opposition) n***a meaning a person he had a beef with. (Exh 70) Defendant told RT that he ran down on him at the deli and lit him up. Asked what he meant, defendant did a hand gesture like a gun. He thought he was going to beat trial because they don't have any evidence, it is just circumstantial. He said he wore extra clothing to make himself look baggy, appear baggy to disguise his appearance. He said he had some things in play so the witness would not show up when it came time for trial. RT told Assistant District Attorney Prisco in May, 2015 the conversation he had with defendant.⁵ RT met with Assistant District Attorney Prisco on May 13, 2015 and June 8, 2015. A proffer was made and a cooperation agreement was entered into. On November 9, 2015, RT gave a written statement to the District Attorney's office, Exh 70. RT pled guilty to two attempted gun

⁵ Assistant District Attorney Nagler corrected the dates when RT met with Assistant District Attorney Prisco.

point robberies, VTL 511 as an E felony, and Obstructing Governmental Administration. He is to receive a sentence of seven years. He was originally offered 12 years but if he cooperates the sentence will be 7 years. If convicted of two robberies in the first degree after trial he faced considerably more time. He is also cooperating in another matter. He has been sent into special housing while at the jail because of several incidents of misconduct including an assault.

Sergeant Diaz of the Corrections Department produced documents establishing that defendant and Orlando Johnson were housed in the county jail from January 30, 2015 - September 21, 2015. From February 23, 2015 - April 18, 2015 they were housed in the same unit diagonally across from each other. He explained that inmates easily communicate with one another across the galley from their cells and have access to each other during recreation time. That the two of them had spoken is evidenced by the recorded conversation between defendant and a female on September 9, 2015, Exh 68a, " ... "I was gonna punch that same kid in the face when I first came in here. He a Pettiford.....And then Raul (defendant's brother) was like "don't do that' cause then you gonna make yourself-make shit complicated for yourself. He tellin' me he spoke to him and stuff , but - he's a older guy.)

The conversations between defendant and others during defendant's incarceration in the county jail are recorded and the speakers are notified the conversations are recorded.⁶

⁶ Where "little n***a" , little guy, kid, "John Doe" is mentioned, the context reveals it is Chisolm.

On April 15, 2015 (Exh 68 b), defendant had a conversation with a person described as his brother. The following was said

Defendant:"Then I gotta f- g I gotta begin trial, There's no coming (inaudible) after that. Next week is crunch time."

Brother: Alright, that's why I'm working on it now my n***. You heard?

Defendant: Yeah

Brother: I'm on that shit now my n***

Defendant: Yeah, Yeah.

On October 30 (Exh 68 g) a recorded conversation between defendant and his brother, Raul, refers to Chisolm's medical records, a discussion concerning the name assigned to Chisolm while in the hospital after the shooting and a girl that was spoken to by El Niche, "that was in here", (ie, Orlando).

Raul: Orlando knows a girl that is talking to the "little guy" (ie Chisolm).

Dimas: and you spoke to El Niche (Orlando) That said he would speak to "John Doe" (Chisolm).

November 7 (Exh 68 h) defendant and his brother spoke about Orlando (El Niche) about getting the number for the kid (Chisolm) to give it to the lawyer.

November 26 (Exh 68 c) defendant spoke to his brother. The brother spoke to Orlando. Defendant asked what Orlando said. The brother: "He said leave that little n***a alone (ie Chisolm). You feel me? He said what he said and he gonna see what's up. So I said alright say no more then.

Defendant: Yeah, yeah. Well see it's crunch time.

Brother: Yeah you gonna see it on the 9th.

December 11 (Exh 68 d), - Defendant and his brother are talking about the delay, the conversation with the defense attorney about the expert fee for the identification and the delay in the trial and that Chisolm does not want to talk to the defense attorney.

December 16 (Exh 68f) defendant and his brother are talking about Artya Green and the efforts by law enforcement to get her to talk. She joins the conversation. Defendant wants to know what they (law enforcement) are telling her. He told her he got the statement she wrote (wherein she told the police she did not give defendant permission to take her BMW the morning of the shooting and she did not know he took her car) She told them that because they were trying to say she was there (at the crime scene)

Defendant:(p 12-13) Yeah, Yeah, The cameras are right there. They don't they don't even wanna show no cameras but the cameras show you was in the house whenever they say that s**t happened anyway. I'm about to start..

Artya: So why they still calling me?

Defendant : I know cause they trying to build a case on me. I'm a I start next month.....

Defendant: (p 13-14) You said I took the car.

Artya: So don't f****n talk to me

Defendant: You said that I took the car key, I read the statement, I took the car key without you knowing. Now what are you talking about?

Artya: I didn't know.

Defendant: What are you talking about? I took the car keys- what are you talking about. It wouldn't even matter because you didn't do nothing. You keep talking about you

jeopardizing yourself. It doesn't matter what you say or not because the cameras was right there when you was in the building at the time you said that happened. So how you jeopardized? You think-you think they didn't want to put you in jail.

Artya: What the f*** you talking bout right now? I didn't know you took my- You acting like I knew you took my car. I didn't know that.

Defendant: You gave me the keys to go get the c- What are you talking about? To go get the car.

Artya: I forgot, I forgot.

Defendant: I know you forgot, I know you forgot. I know. You keep talking jeopardizing your sh***. If you were jeopardized you woulda been in jail right now. Look I told you from the jump don't say nothing like, 'cause I didn't do nothing. You didn't do nothing. They seen the cameras.

December 16 (Exh 68 e) Defendant and his brother are talking about Orlando trying to get in contact with Chisolm and defendant's brother waiting for Orlando to call him, the brother, back. A third party is added to the conversation. They discuss the impending trial and the date for jury selection.

The third party asks: O alright, alright, is they talkin' bout- Sean gonna do the right thing?

Defendant: They say they say that's what Gutta (Orlando) said. Listen Im a see though. We gotta see when the time come.

Third Party: Alright, Alright say no more say no more.

Defendant: That's my brother's number right there, just in case he call you when you get your feet wet, so you can, you already know, save my life.

CONCLUSION

Although there is no direct evidence of threats made against Sean Chisolm, the circumstantial evidence establishes by clear and convincing evidence that defendant orchestrated or at a minimum acquiesced in the concerted efforts by Orlando to intimidate and instill fear in Sean Chisolm of the consequences to Chisolm himself and his family should he testify.

RT testified that defendant told him he, defendant "had some things in play" so that the witness would not show up to testify. RT has an extensive criminal history and is offered a favorable deal in exchange for his testimony. However, his demeanor on the witness stand together with the details of defendant's crime set forth in RT's statement lend credibility to his testimony. Additionally, RT's testimony is independently corroborated by both Chisolm's account of his conversations with Orlando and the recorded conversations between defendant and his brother.

Thus, as early as April, 2015, defendant was planning a way to secure the unavailability of the sole witness who could identify him as the perpetrator of the crime.

It is an inescapable conclusion that defendant was using his brother to get to Orlando as the means to intimidate Chisolm and instill in him fear of the consequences of testifying. Orlando connected with defendant while incarcerated which is born out by the jail records and confirmed by the recorded conversations wherein defendant repeatedly asked his brother about Orlando's contact with Chisolm. The defendant and his brother's use of the alias "John Doe" to refer to Chisolm demonstrates their knowledge of the fact that the conversations were recorded and the need for them to conceal who they were

speaking about, thus evidencing a consciousness of guilt. Chisolm told the Investigators that Orlando warned him more than once to do the right thing, that “we don’t do that on the street”, are what people are saying (about Chisolm) true. Chisolm’s statement is directly corroborated by defendant’s December 16 phone conversation (Exh 68 e) with his brother and a third party, wherein the third party expressly refers to the victim by name (“Sean”) and asks if Sean is going to “do the right thing”.

Defendant is feeling the pressure of the impending trial and is pressuring his brother to find out what is happening with Orlando, Chisolm and the lawyer, as indicated by his references to “crunch time” and his admonitions that he was about to “start” trial. Chisolm did not want to speak to the defendant’s lawyer. When Chisolm resists speaking to defendant’s lawyer, Orlando increases the pressure on him by informing him that defendant had his statement and grand jury testimony, which given that this statement and testimony were in the possession of the defense, also demonstrates defendant’s participation in and acquiescence in the efforts to prevent Chisolm from testifying. Defendant was insistent that his brother get Orlando to get Chisolm’s number to give it to the lawyer.

As further evidence that defendant was orchestrating the destruction of evidence against him, he told Artya Green he had read her statement to the police. He pressured her to change what she told the police to make her say that she must have forgotten that she gave him the keys to her car which was plainly contrary to the statement she gave to the police on the day of the crime.

Accordingly, Sean Chisolm’s grand jury testimony and his prior written statement

to the police is admissible on the People's case in chief.

The foregoing constitutes the decision and order of the court.

Dated: White Plains, New York
February 22, 2016



BARBARA G ZAMBELLI
COUNTY COURT JUDGE

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