

**People v Picart**

2016 NY Slip Op 32714(U)

June 3, 2016

County Court, Westchester County

Docket Number: 15-0758

Judge: Barry E. Warhit

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JUAN PICART,

Defendant.

-----X

WARHIT, J.

**FILED  
AND  
ENTERED**  
ON June 3 2016  
WESTCHESTER  
COUNTY CLERK

**DECISION & ORDER**

Indictment No.: 15-0758

**FILED**  
JUN 03 2016  
TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

The defendant, Juan Picart, has been indicted for having committed the crimes of Attempted Murder in the second degree, Assault in the first degree, Criminal Use of a Firearm in the first degree, Criminal Possession of a Weapon in the second degree for conduct alleged to have occurred on June 1, 2015 and the crimes of Criminal Possession of a Weapon in the second degree and Criminal Possession of a Firearm for conduct alleged to have occurred on June 22, 2015.

Pursuant to the decision of this Court (Neary, AJSC), filed and entered November 2, 2015, *Wade, Map and Huntley* hearings were ordered to be held prior to trial. This Court held such hearings on June 1, 2016. At this hearing, the People called Detective Jason Connelly and Detective Enzo Baia, both of the Mount Vernon Police Department. Defendant did not call witnesses. The following exhibits were received into evidence during the hearing: three (3) original color photographic arrays, a written consent a Voluntary Waiver to Search and Seize, *Miranda* Warning- Your Rights

form and a videotaped interview between Defendant, Detective Baia and his partner.

This Court had the unique opportunity to observe the detectives' demeanor, to hear their testimony and evaluate their credibility and finds each testified credibly in all respects. Upon the record adduced, this Court makes the following findings of fact and reaches the following conclusions of law.

### **FINDINGS OF FACT**

On or about June 1, 2015, James Howell sustained multiple gun shots wounds inside the Top Deli Market located in the vicinity of 3<sup>rd</sup> Street and 3<sup>rd</sup> Avenue in the City of Mount Vernon in the County of Westchester and State of New York.

Detective Jason Connelly, a sixteen year veteran of the Mount Vernon Police Department, testified that, on June 9, 2015, he and another detective employed by the City of Mount Vernon Police Department spoke to James Howell at the Jacobi Medical Center. Detective Connelly testified that Ms. Howell was shown a photographic array containing pictures of the defendant and five fillers and directed to look at each photograph and, if he recognized anyone, to tell them who and why. According to Detective Connelly, nearly immediately upon being shown the photographic array, James Howell identified the defendant, whose photograph was in position six (6) of the array, as the individual who shot him. Despite having made this verbal identification, Detective Connelly reported that James Howell was unwilling to circle the photograph of the individual he had identified or sign his name to the array.

The photographic array shown to Mr. Howell was preserved and admitted into evidence for purposes of this hearing. Each of the individuals depicted in the array is a

light skinned, adult Hispanic male. All of the males have dark hair and some degree of facial hair.

In addition to the identification procedure conducted with Mr. Howell, Detective Connelly testified that on June 9, 2015, he was present for an identification procedure with Mr. Barakat, a witness to the shooting in at the Tip Top Deli. Detective Connelly testified that, as Mr. Barakat was concerned about being seen cooperating with the police, he and his fellow detective met with Mr. Barakat in the bathroom of the Tip Top Deli. According to Detective Connelly's testimony, nearly immediately upon observing the photographic array, Mr. Barakat became excited and stated, words to the effect of, "That's him. That's the guy who killed Capo". Mr. Barakat indicated he was referring to the individual depicted in photograph number 1. Detective Connelly testified that Mr. Barakat circled his selection and signed the photographic array and that the person depicted in photograph one is Juan Picart.

This original photographic array shown to Mr. Barakat was preserved and admitted into evidence for the purposes of the suppression hearing. The array consists of a photograph of Juan Picart and five (5) other adult Hispanic males each of whom has light skin, dark hair and some facial hair.

Detective Connelly testified that he and a fellow detective conducted a third identification procedure on June 9, 2015 with a Miss Anderson. This procedure was conducted in an unmarked police vehicle within the confines of the City of Mount Vernon. According to Detective Connelly, Miss Anderson was shown a photographic array and instructed to look at each photograph and to let them know if she was able to identify anyone. Detective Connelly testified that, upon viewing the array, Miss

Anderson put her hands to her face, gasped, and said words to the effect of “that’s him; he shot the guy in the store.” Miss Anderson identified the person she was referring to as the individual depicted in photograph 3 of the array. Detective Connelly testified that the person she identified is Juan Picart.

This original photographic array shown to Miss Anderson was preserved and admitted into evidence for purposes of the suppression hearing. It contains a photograph of Juan Picart and five (5) fillers. Each of the six men depicted appears to be a light skinned adult Hispanic male. Each has dark hair and some quantity of facial hair.

Detective Enzo Baia, a nearly 18 year veteran of the City of Mount Vernon Police Department and a detective with this department for the past 13 years, was also assigned to investigate the shooting at the Tip Top Deli. In this regard, on June 22, 2015, he and other detectives of the Mount Vernon Police Department went to apartment G3<sup>1</sup> located within 445 South 4<sup>th</sup> Avenue in the City of Mount Vernon in an attempt to locate Mr. Picart. According to Detective Baia, the police had reason to believe that Mr. Picart might be located at this residence as electronic surveillance revealed that a phone number Mr. Picart was known to use was located within that apartment.

Detective Baia testified that, upon arriving at apartment G3, he knocked on the apartment door and a female, identified as April Diatta, opened the door. She indicated that the apartment was hers and denied that Mr. Picart resided at that location or that

---

<sup>1</sup>Throughout the hearing the apartment was referred to interchangeably as G3 and 3G.

he was present there. According to Detective Baia, Ms. Diatta's son, Timothy Mickely, also came to the door and also denied that Juan Picart was present in the apartment.

Detective Baia testified that, based upon this information, he turned from the door of the apartment and started walking down the stairs. As he did so, a detective who had remained by the door to the apartment informed him that Timothy Mickely had "produced" Juan Picart from inside the apartment. Juan Picart was placed under arrest in the hallway.

According to Detective Baia's testimony, subsequent to Mr. Picart's arrest, Ms. Diatta, who had previously acknowledged that apartment G3 was hers, gave written consent to permit a search of her apartment. A copy of said written consent was received into evidence for the purpose of this pre-trial hearing.

Detective Baia further testified that, despite Ms. Diatta's initial denial that Juan Picart was in her apartment, after he exited from it, she acknowledged that, from time to time over the week or weeks preceding June 22, 2015, he had stayed in her apartment overnight on the couch.

Based upon Ms. Diatta's consent, members of the Mount Vernon Police Department including Detective Baia conducted a search of the apartment. Detective Baia testified that from the toilet tank in the only bathroom located within the apartment, he recovered a .45 caliber handgun and two magazines therefore. Detective Baia testified that during the search, he did not observe any personal items belonging to Juan Picart.

Subsequent to his arrest, Juan Picart was transported to the Mount Vernon Police Department. The uncontradicted testimony revealed that prior to transport and

during same, no questions were asked of Defendant. Within approximately one hour of his having arrived at the Mount Vernon Police Department, Detectives Baia and Driscoll joined Defendant in an interview room. Detective Baia testified that he administered *Miranda* warnings to Juan Picart from a pre-printed *Miranda* form that he characterized as the internal form utilized by the Mount Vernon Police Department. The original form was entered into evidence without objection in connection with this suppression hearing.

Specifically, Detective Baia testified that he informed Mr. Picart that he had the right to remain silent, that anything he said could and would be used against him in a court of law, that he had the right to speak to a lawyer and have a lawyer present with him while being questioned and that if he could not afford an attorney, one would be appointed to represent him prior to any questioning if he wished. According to Detective Baia's testimony, Mr. Picart verbally indicated he understood each of these rights and also checked the "yes" box and signed his name on the *Miranda* warnings to indicate his understanding and willingness to speak to the detectives.

According to Detective Baia, after Mr. Picart indicated he was willing to speak to them, he left the interview room for the purpose of activating a video and audio recording system. The resulting recording was received into evidence and a portion of same was played. The video commences with Detective Baia entering an interview room which is already occupied by Detective Driscoll and Mr. Picart. Thereupon, while pointing to the *Miranda* form, Detective Baia says to Mr. Picart, ". . . You understand this right? You want to cooperate in this manner?" In response, Mr. Picart states: "Uh, I need my lawyer because I don't know what's going on." Detective Baia then confirms

with Mr. Picart that he understood the rights previously read and his signature on the *Miranda* warnings. The detective then inquires of Mr. Picart, whether having the rights in mind, he wanted to speak to the detectives "in regards to why you're here." Mr. Picart answered this question in the affirmative and a conversation ensued.

### **CONCLUSIONS OF LAW**

With regard to the *Wade* aspect of the within motion, 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 (*U.S. v. Wade*, 388 US 218). At this hearing, the People bore the burden to establish the reasonableness of the police conduct and the lack of any undue suggestiveness in the pre-trial identification procedure (see, *People v. Chipp*, 75 NY2d 327 [1990]). The burden then shifted to 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.*). The People met their burden. Defendant did not.

Under the totality of the circumstances, the photographic arrays at issue were not so "impermissibly suggestive as to give rise to a substantial likelihood of ... misidentification" (see, *Neil v. Biggers*, 409 US 188 [1972]; and see, *People v. Ragunauth*, 24 AD3d 472 [2005], *lv. denied* 6 NY3d 779 [2006]). The law does not require that a defendant be surrounded by people nearly identical in appearance to him (see, *Chipp*, 75 NY2d at 336).

Each of the three photographic arrays at issue consisted of Defendant and five filler. Like arrays have been found to be permissible (*see*,; and *see*, *People v. Campbell*, 149 AD2d 719 [2d Dept. 1989]; *People v. Rolston*, 109 AD2d 854 [2d Dept. 1985]). Further, Defendant and each of the fillers depicted is an adult, light skinned male of apparent Hispanic ethnicity. Each has dark hair and some degree of facial hair. Upon consideration, this court finds the fillers bear a sufficient likeness to Defendant in age and general appearance such that there existed little likelihood of Defendant being singled out based upon particular characteristics (*see*, *People v. Avent*, 29 AD3d 601 [2d Dept. 2006], *appeal denied* 9 NY3d 1004 [2007]; *see also*, *People v. Flores*, 102 AD3d 707 [2d Dept. 2013]). Further, this Court finds the minor differences in skin tone and the fact that the solid backgrounds of the photographs were distinct, when considered in conjunction with their similarity of age and facial features, are insufficient to create a substantial likelihood that Defendant would be singled out for identification. (*see*, *People v. Henderson*, 170 AD2d 532 [2d Dept. 1991]).

Moreover, and significantly, the record is devoid of any evidence that the police implied Defendant's identity to any of the witnesses verbally or made attempts to prompt an identification in any manner. Further, the testimony adduced demonstrates each of the witnesses was directed to view all of the photographs in the array and that each witness identified Defendant immediately or nearly so.

Having found that the People have met their burdens of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness in the pre-trial identification procedure and having further found Defendant has failed to provide proof, by a preponderance of the evidence, that any of the identification

procedures at issue was unduly suggestive and conducive to an irreparably mistaken identification, this Court need not reach a determination as to whether an independent basis exists for any of the witnesses' in-court identifications of Defendant (*see, Chipp*, 75 NY2d at 335).

As to the *Mapp* portion of this hearing, the People bear the burden of setting forth credible evidence tending to show that law enforcement officers acted lawfully while the defense bears the burden of proving, by a preponderance of the evidence, that the actions of law enforcement were illegal. The People have met their burden.

An overnight guest has been found to have an expectation of privacy in premises which are not his own (*see, People v. Ortiz*, 83 NY2d 840 [1994]; *and see, People v. Williams*, 181 AD2d 474 [1<sup>st</sup> Dept. 1992]). Nevertheless, "[a] defendant seeking suppression of evidence has the burden of establishing standing by demonstrating a legitimate expectation of privacy in the premises or object searched" (*People v Ramirez-Portoreal*, 88 NY2d 99 [1996]). In this case, Defendant has not established a legitimate expectation in the object searched.

The record clearly establishes that Defendant was merely permitted to sleep on the couch in a main area of Ms. Diata's residence and that no personal items belonging to Defendant were observed within the apartment. No evidence was adduced to demonstrate that Defendant was entitled to unfettered access to any or all areas of the apartment (*see, People v. Leach*, 21 NY2d 969 [2013])(finding a defendant who resided in his grandmother's apartment lacked standing to contest the search of an extra guest bedroom therein in which he did not reside). Moreover, the record unequivocally

establishes that the Diata residence had but a single bathroom for the use of Ms. Diata, her son, his significant other and their children. Upon these facts, Defendant has failed to meet his burden of demonstrating that he possessed a legitimate expectation of privacy in the bathroom or within the tank of the toilet therein (*Ramirez-Portoreal*, 88 NY2d 99).

Even if Defendant could be found to have standing, it is significant that, prior to entering the residence, the police received the written consent of Ms. Diata, the rightful leaseholder, to enter the apartment and conduct a search thereof. It is well settled under the law that law enforcement may conduct a warrantless search of premises upon obtaining the consent of any party who possesses the requisite degree of authority and control over the premises (*see, People v. Cosme*, 48 NY2d 286 [1979]; *People v. Jackson*, 105 AD3d 866 [2013]). It is without question that Ms. Diata not only had authority over the apartment searched but that her right to the premises was superior to that of Defendant herein. Consequently, as the People have met their burden of proof and as Defendant has not established, by a preponderance of the evidence, the lack of propriety of the police conduct, the defendant's motion to suppress tangible and physical property is denied.

Concerning the issues presented during the *Huntley* portion of this hearing, the People must establish the voluntariness of the statements attributed to Defendant beyond a reasonable doubt. The People have not met this burden.

A defendant's waiver of his Miranda rights must be knowing, voluntary, and intelligent (*Miranda v Arizona*, 384 US 436, 444 [1966]; *People v Dunbar*, 24 NY3d 304, 314 [2014] ). In this case, subsequent to indicating that he understood each of his rights

under *Miranda* and signing the *Miranda* form indicating his willingness to speak to Detective Baia and his fellow officer, Defendant stated "Uh, I need my lawyer because I don't know what's going on."

A defendant's request for an attorney will invoke his or her indelible right to counsel if the request is unequivocal. Police may not continue to question a suspect in custody who unequivocally invokes the right to counsel, and any purported waiver of the right thereafter is ineffective if it is made without counsel present (*see, People v. Jemmott*, 116 AD3d 1244 [2014]).

Nevertheless, whether a defendant's invocation of counsel is unequivocal "is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant" (*People v Glover*, 87 NY2d 838, 839 [1995]; *see, Jemmott*, 116 AD3d 1244).

The relevant inquiry is whether a reasonable police officer would have understood the statement in question as a request for an attorney (*Jemmott*, 116 AD3d 1244, *citing, Davis v United States*, 512 US 452, 459 [1994]). In this case, the exchange between Defendant and the detectives is recorded. It is without question that Defendant stated ""Uh, I need my lawyer because I don't know what's going on." Detective Baia's reaction to this comment is also recorded. Detective Baia immediately questioned Defendant as to whether he had understood the rights which had been read to him and whether, in fact, he had signed the *Miranda* form and then inquired of Defendant whether he wanted to "speak to us in regards to why you're here".

Significantly, Detective Baia did not ask Defendant to elaborate upon the source of his confusion nor did he inquire as to whether Defendant's confusion had been allayed or whether he still wanted his attorney. Consequently, while recognizing that the words uttered might not in every circumstance constitute an unequivocal request for counsel, this Court finds that, upon the facts of this case, they did (*see, People v. Porter*, 9 NY3d 966 [2007])(finding a defendant's statement that "I think I need an attorney" constituted an unequivocal invocation of defendant's right to counsel). Thus, the statements made by Defendant after police questioning continued require suppression.

Accordingly, and based upon the foregoing, Defendant's motion to suppress the prospective identification testimony of any witness and any physical evidence recovered is denied whereas Defendant's motion to suppress statement evidence is granted.

The foregoing constitutes the opinion, decision and order of the court,

Dated:           White Plains, New York  
                    June 3, 2016

  
\_\_\_\_\_  
HON. BARRY E. WARHIT  
Westchester County Court Judge