

People v McDonald
2017 NY Slip Op 33203(U)
April 28, 2017
County Court, Orange County
Docket Number: 135/2017
Judge: Craig Stephen Brown
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 ORIGINAL

STATE OF NEW YORK
 COUNTY COURT: ORANGE COUNTY

-----X
 THE PEOPLE OF THE STATE OF NEW YORK,

-against-

RUSSELL McDONALD, JR.,
 RASHAWN McDONALD, and
 RUSSELL McDONALD, SR.,

Defendants.

-----X
CRAIG STEPHEN BROWN, Judge:

DECISION AND ORDER

Index # 135/2017

UPON reading and filing the within Order to Show Cause, dated the 13th day of April, 2017, based upon the application of Neal E. Eriksen, Esq., Assistant District Attorney for the County of Orange, the Affirmation in Opposition and Cross Motion for a Protective Order of Bruce D. Townsend, Esq., attorney for RUSSELL McDONALD, JR., dated April 14, 2017, the Affirmation in Opposition and for a Protective Order of James W. Winslow, Esq, attorney for RUSSELL McDONALD, SR, dated April 20, 2017, the Affirmation in Opposition of Raymond D. Sprowls, Esq., attorney for RASHAWN McDONALD, dated April 19, 2017, the proceedings held in open Court on April 21, 2017, and the Supplemental Affirmation of Neal E. Eriksen, Esq., dated April 24, 2017, People's application is decided as follows:

Defendants are charged in the City Court of the City of Newburgh with Criminal Possession of a Weapon in Second Degree. It is alleged that they possessed a Taurus Model 85 revolver which was seized during the execution of a search warrant on December 29, 2016 at 41 Benkard Avenue, City of Newburgh, Orange County, New York. The District Attorney brought this Order to Show Cause to compel defendants to permit the District Attorney to take buccal swabs from their mouths to compare their DNA profile to a DNA profile found on the firearm. According to the affirmation of Assistant District Attorney Neal E. Eriksen, all three defendants

were in the premises during the execution of a search warrant when the firearm was recovered . A Grand Jury has returned an Indictment relative to certain controlled substances recovered during the execution of this same search warrant at the same location. However, any prospective charges relating to the purported recovery of the firearm was not considered by the Grand Jury.

In the *Matter of Abe A.*, 56 NY2d 288 (1982), the Court of Appeals upheld a Court Order to compel the production of a suspect's non-testimonial evidence provided: a) probable cause exists to believe that the suspect committed a crime, b) a clear indication exists that relevant material evidence would be found, and c) the method used to secure the evidence is safe and reliable. *Abe A.*, supra. held that compelling a defendant, who was not even under arrest, to submit a blood sample was authorized and well within the provisions of the search warrant statute (See, *Matter of Abe. A.*, supra., at page 294).

According to the allegations made by the Assistant District Attorney, which were based on conversations he had with witnesses to the crimes described herein and police officers involved in the investigation of these cases, as well as the files maintained by the City of Newburgh Police Department and District Attorney's Office, a search was conducted at 41 Benkard Avenue, City of Newburgh, Orange County, New York. An Accuint Search¹ revealed that RUSSELL McDONALD, JR., RASHAWN McDONALD, and RUSSELL McDONALD, SR., each listed their residence as 41 Benkard Avenue. At the time the search warrant was executed, RUSSELL McDONALD, JR. was found to be in a second floor bedroom, RUSSELL McDONALD, SR. was found to be in a second floor bedroom, and RASHAWN McDONALD was found to be in the first floor living room. The Taurus Model 85 revolver was found on the

¹An Accuint Search is a search of a database maintained by Lexis Nexus, for law enforcement, that compiles data of a person's pedigree information, including addresses, by accessing billing information associated with that person.

floor of the living room near a wall behind a couch. The living room was a “common area” in the residence and accessible by any occupant in the residence. The firearm was sent to the New York State Police Laboratory for analysis.

A State Police Laboratory Report, dated April 10, 2017, indicated that an analysis for the presence of DNA on the firearm was conducted and a DNA profile was found on its grips, trigger and cylinder. The forensic examiner determined that the sample was consistent with DNA from an unknown male donor.

Mere presence of a person in a building containing contraband does not, without more, constitute that person’s constructive possession of the contraband. However, in this case, the firearm was located in a common area of a dwelling which each defendant listed as his residence, at a location accessible by all occupants. In addition, according to the Assistant District Attorney’s representation made in open court on April 21, 2017, each defendant was present in the house at 6:00 A.M., the time the search warrant was executed, evidencing that each of them resided in the house. The Court finds that the District Attorney has provided sufficient facts to establish reasonable cause to believe that each defendant resided in the premises searched and, as such, had constructive possession of the Taurus revolver.

In light of the State Police Laboratory Report dated June 10, 2017, the Court is satisfied that there is a clear indication that relevant material evidence will be found upon defendants’ providing a sample of their DNA. Comparing defendants’ DNA to the DNA profile on the firearm would be relevant and material evidence. Whether defendants’ DNA is available elsewhere is irrelevant.

The Court takes Judicial Notice that the methods used to secure saliva samples are safe and reliable.

[* 4]
Based on the foregoing, the People's application is granted.

Orders signed herewith.

The aforesaid constitutes the Decision and Order of the Court.

Dated: April 28, 2017
Goshen, New York

ENTER.



HON. CRAIG STEPHEN BROWN
COUNTY COURT JUDGE

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