

People v Davis

2019 NY Slip Op 32700(U)

August 5, 2019

Supreme Court, Suffolk County

Docket Number: 567-2014

Judge: Mark D. Cohen

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK, CRIMINAL TERM 10**

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

Plaintiff

**BY: HON. MARK D. COHEN
J.S.C.**

- against -

DATED: August 5, 2014

Indictment # 567-2014

BRANDON DAVIS

Defendant

-----X

**THOMAS J. SPOTA, III
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Findings of Fact

- 1) Suffolk County Police Department [SCPD] Detective Ronald C. Tavares is a 26 year veteran of the department. He has been a detective for 17 years and is assigned to the homicide squad where he has worked for nine and a half years.
- 2) On December 25, 2013, Detective Tavares was assigned to investigate a homicide that had occurred earlier that day at 33B Cedarhurst Ave, Medford, Suffolk County, New York.
- 3) On January 22, 2014, at about 2:00 p.m., Detective Tavares spoke with one Cesar Figueroa about this homicide. Mr. Figueroa was under arrest and was in the SCPD's homicide squad located in Yaphank, New York.
- 4) Prior to this interview, Detective Tavares had prepared a police department computer-generated photo-array which was created by inputting certain characteristics of the alleged perpetrator: Male, white Hispanic, 19 years of age, plus or minus three years. Detective Tavares overrode the computer-generated array to obtain the most similar looking subjects.
- 5) This photo-array, introduced in evidence as People's Hearing Exhibit # 1, was showed to Mr. Figueroa at 4:48 p.m. The Court finds that this photo-array, consisting of six photographs, including one of the Defendant, are of similar looking light skinned Latino or African-American males within a consistent age range, with a similar skin hue, complexion and all contained facial hair. The Defendant was positioned in this array as photograph # 5.

6) Detective Tavares read verbatim from the form as follows to Mr. Figueroa:

“You will be asked to look at a group of photographs. The fact that the photos are shown to you should not influence your judgment in any way. You should not conclude or guess that the photographs contain the picture of the person who committed the crime merely because you are being shown these photographs. Keep in mind hair styles, beards and mustache are easily changed. Please do not indicate to other witnesses that you have or have not made an identification.”

7) Mr. Figueroa identified the Defendant shown in photograph # 5 as “Brandon Davis, the guy that robbed and shot and killed the guy at Whitey’s Shop on Christmas morning.” He also indicated that he knew the perpetrator’s name to be Brandon Davis and that he knew him since they had grown up in the same town and had seen him on and off over the years.

8) Detective Tavares indicated this on the form as above and moreover reflected the identification as follows:

“I, Cesar Figueroa, Do Not recognize any photograph above
Do recognize photograph number 5 “

9) Detective Tavares placed the central complaint number of the case, along with his badge number and initials on the form. He signed the form. Mr. Figueroa signed the form as well.

10) Suffolk County Police Department Detective Angel Rivera is a 19 year veteran of the department. He has been a detective for 10 years and is assigned to the homicide squad where he has worked for 4 years.

11) Detective Rivera also participated in the investigation of the Christmas Day murder discussed above.

12) As part of his work, he interviewed one Sabrina Urbancik, on January 22, 2014, also at about 2:00 p.m., who was a “person of interest” in the case in the SCPD 6th Precinct Crime Prevention Interview room. Fellow SCPD Detective Brennan was also present.

13) Prior to this interview, Detective Rivera had prepared another police department computer-generated photo-array (from the Profile System) which was created by inputting certain characteristics of the alleged perpetrator: Male, white Hispanic, 20 years of age, plus or minus two years.

14) This photo-array, introduced in evidence as People’s Hearing Exhibit # 3, was showed to Ms. Urbancik at 5:55 p.m. The Court finds that this photo-array, consisting of six photographs, including one of the Defendant, are of similar looking light skinned Latino or African-American males within a consistent or similar age range, with a similar skin hue and complexion; all contained facial hair. The Defendant was positioned in this array as photograph # 1.

15) Detective Rivera read verbatim from the form as follows to Ms. Urbancik:

“You will be asked to look at a group of photographs. The fact that the photos are shown to you should not influence your judgment in any way. You should not conclude or guess that the photographs contain the picture of the person who committed the crime merely because you are being shown these photographs. Keep in mind hair styles, beards and mustache are easily changed. Please do not indicate to other witnesses that you have or have not made an identification.”

He also said that she should “take a look” and tell him “if she recognized anyone.”

16) Ms. Urbancik identified the Defendant shown in photograph # 1 as “The guy I drove to the shop in Medford on Christmas morning where the guy was shot and killed during a robbery.” She also indicated that she knew his name to be “EE,” and that she had met him the day the before with her boyfriend, Cesar Figueroa and another male.

17) Detective Rivera indicated this on the form as above and moreover reflected the identification as follows:

“I, Sabrina B. Urbancik,

Do Not recognize any photograph above
Do recognize photograph number 1 “

18) Detective Rivera placed the central complaint number of the case, along with his badge number and initials on the form. He signed the form. Ms. Urbancik signed the form as well.

19) On February 20, 2014, Detective Tavares interviewed one Margaret Stewart in reference to this homicide. He had pulled her car over while she was driving in Bellport, New York and she agreed to follow him to police headquarters and speak to him about the case.

20) Prior to this interview, Detective Tavares had prepared a third computer-generated photo-array which was created by inputting certain characteristics of the alleged perpetrator: Male, white Hispanic and of an age range or plus or minus 19 years old years and was different than the photo-array shown to Mr. Figueroa described above. The Defendant was positioned in this array as photograph #2.

21) This photo-array, introduced in evidence as People’s Hearing Exhibit # 2, was showed to Ms. Stewart at 5:20 pm. The Court finds that this photo-array, consisting of six photographs, including one of the Defendant, are of similar looking light skinned Latino or African-American males within a consistent age range, with a similar skin hue and complexion, all contained facial hair.

22) Detective Tavares read verbatim from the form as follows to Ms. Stewart:

“You will be asked to look at a group of photographs. The fact that the photos are shown to you should not influence your judgment in any way. You should not conclude or guess that the photographs contain the picture of the person who committed the crime merely because you are being shown these photographs. Keep in mind hair styles, beards and mustache are easily changed. Please do not indicate to other witnesses that you have or have not made an identification.”

August 5, 2014

23) Ms. Stewart identified the Defendant shown in photograph # 2 as “The guy who called himself ‘EE.’ He was the guy who was holding the black revolver and said he was going to rob Whitey.” She also added that “Cesar said his name was Brandon Davis,” and that she had met him only one time.

24) Detective Tavares indicated this on the form as above and moreover reflected the identification as follows:

“I, Margaret Stewart,

Do Not recognize any photograph above

Do recognize photograph number 2 “

25) Detective Tavares placed the central complaint number of the case, along with his badge number and initials on the form. He signed the form. Ms. Stewart signed the form as well.

26) On March 7, 2014, at about 2:10 p.m., Detective Tavares stopped a car in which the Defendant was a passenger while it was on Route 83 in Medford, Suffolk County, New York. The Defendant had been observed getting into this vehicle and Detective Tavares confirmed that it was him by pulling up along side the Defendant’s car. The Defendant was arrested for the homicide and after being handcuffed was transported to the SCPD homicide squad in Yaphank. Fellow SCPD Detective Joseph Brennan was with Detective Tavares. En route, the Defendant asked what he was being arrested for. Detective Tavares informed him that it was for “murder.” The Defendant then inquired where the murder had happened. Detective Tavares indicated that it was a murder that occurred on Christmas Day from last year. The Defendant then responded that was “not his MO” that he was not involved with murder and that he was “involved in drugs and getting money.” Detective Tavares then asked the Defendant if he had a job to make money. The Defendant replied, “No, I just get money.” Detective Tavares then told the Defendant that they would talk more at police headquarters, if he was willing. No Miranda warnings had been administered or waived at that time.

27) The Defendant later invoked his right to remain silent at police headquarters in Yaphank.

28) The police did not threaten or coerce the Defendant in any fashion.

Conclusions of Law

1) The Court finds that the witnesses called by the People, Suffolk County Police Department Detective Ronald Tavares and Detective Angel Rivera, were credible and accepts their testimony as to the facts surrounding the issues to be resolved at this suppression hearing.

2) The People have carried their burden of establishing that the photo-array identifications by Cesar Figueroa, Margaret Stewart and Sabrina Urbancik were not unduly suggestive so as to give rise to a substantial likelihood of misidentification. *People v. Chipp*, 75 N.Y.2d 327; *People v. Anderson*, 94 A.D.3d 1010; *People v. Seymour*, 77 A.D.3d 976. In so ruling, the Court finds that the three photo-arrays utilized by the police consisted of five filler photographs that were substantially similar to that of the

Defendant's by skin color, hairline, age and size, among other factors. *People v. McDonald*, 82 AD3d 1125 (2nd Dept. 2011); *Manson v. Braithwaite*, 432 U.S. 98; *Neill v. Biggers*, 409 U.S. 188; see generally, *Perry v. New Hampshire*, 132 S.Ct 716.

3) There is, of course, no requirement that a defendant in an identification procedure be surrounded by individuals nearly identical in appearance. Here the fillers used in the photospreads were substantially similar in all material aspects to the extent that the identification procedures were not impermissibly suggestive. Any alleged variations in appearance between the fillers and the Defendant were not so substantial as to render the photospread impermissibly suggestive. *People v. Hicks*, 110 A.D.3d 1488; *People v. Ortiz*, 61 A.D.3d 1003 (2nd Dept. 2009); *People v. Brown*, 47 A.D.3d 826 (2nd Dept. 2008).

4) Notwithstanding that no Miranda warning had been provided to or waived by the police to the Defendant after his arrest, the law recognizes a clear and narrow exception so as to allow the admission in evidence of statements that are spontaneous. *People v. Maerling*, 46 N.Y.2d 289; *People v. Gonzalez*, 75 NY2d 938 (1990). However, this exception does not apply where the responses are solicited or otherwise the product of interrogation, formal or informal. *Id.*; see *Rhode Island v. Innis*, 446 U.S. 291; *Brewer v. Williams*, 430 U.S. 384. "Statements made in response to police questioning or during a long informal discussion are not truly spontaneous." *People v. Rivers*, 56 N.Y.2d 476, 479. The focus is whether the police action would reasonably have anticipated the Defendant to respond. *People v. Lynes*, 49 N.Y.2d 286. Put simply, the question presented is: was the statement made by the Defendant in the police car self generating? *People v. Stoesser*, 53 N.Y.2d 658. Several years ago, the Second Department reviewed the area of the admissibility of spontaneous statements. *People v. Tavares-Nunez*, 87 A.D.3d 1171:

"[T]he special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation" (*Rhode Island v Innis*, 446 US 291, 300 [1980]). "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (*id.* at 301; see *People v Ferro*, 63 N.Y.2d 316, 322 [1984], *cert denied* 472 U.S. 1007 [1985]; *People v Huffman*, 61 N.Y.2d 795, 797 [1984]; *People v. Rivers*, 56 N.Y.2d 476, 480 [1982]). Statements made in response to such police words or actions are inadmissible in the absence of *Miranda* warnings.

In contrast, volunteered statements, meaning those that are "self-generated" (*People v Dunn*, 195 A.D.2d 240, 244 [1994], *affd* 85 N.Y.2d 956 [1995]) and "made without apparent external cause," are admissible even if the defendant was in custody and unwarned (*People v Rivers*, 56 N.Y.2d at 480, quoting *People v Stoesser*, 53 N.Y.2d 648, 650 [1981]; see *People v Maerling*, 46 N.Y.2d at 302-303 [1978]; *People v Dunn*, 195 A.D.2d at 244). For a statement to fall within that category, "the spontaneity has to be genuine and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed" (*People v Maerling*, 46 N.Y.2d at 302-303; see *People v Rivers*, 56 N.Y.2d at 479).

The Court determines that the statements by Detective Tavares while in the police car were not reasonably likely to have elicited an incriminating response. *People v. Morales*, 89 A.D.3d 1111. *People v. Tavares-Nunez*, supra at 1172. In plain words, to the extent indicated, the police do not have to silence a “chatterbox” [*People v. Taylor*, 1 A.D.3d 623].

The Defendant’s motion to suppress his identification in the three photo-arrays, along with the prospective in-court identifications of these witnesses as well as his oral statement given to the police is denied in its entirety.

The foregoing constitutes the decision and order of the Court.



HON. MARK D. COHEN, J.S.C.