

**People v Perez**

2020 NY Slip Op 34916(U)

October 16, 2020

County Court, Westchester County

Docket Number: Indictment No. 19-1120

Judge: Susan Cacace

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This opinion is uncorrected and not selected for official publication.

COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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

**FILED and ENTERED**

**WESTCHESTER  
COUNTY CLERK**

**FILED**

**OCT 16 2020**

**TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER**

**HEARING DECISION**

Indictment No. 19-1120

-against-

TONY PEREZ,

Defendant.

-----X  
CACACE, J.

Under the instant indictment, defendant stands charged with a single count of the crime of Attempted Robbery in the First Degree, a single count of Criminal Possession of a Weapon in the Third Degree, and Menacing in the Second Degree, all of which are alleged to have occurred in the area of New Main Street and Anne Street in the City of Yonkers at approximately 1:00 PM on October 23, 2019. In support of these charged crimes it is alleged by the People that the defendant brandished an opened folding knife at the female victim, Adrian Hess, while demanding that she give him her dog that she was walking with at that time, and that the defendant had been previously convicted of the crime of Attempted Criminal Obstruction of Breathing on May 3, 2017 in the City Court, City of Yonkers.

By Decision and Order, filed and entered on June 30, 2015, the County Court, Westchester County (Minihan, J.) ordered a pre-trial hearing pursuant to *Mapp v Ohio* 367 US 643) and *Dunaway v New York* (442 US 200) in order to address the defendant's challenge to the propriety of any search resulting in the seizure of property from his person, a pre-trial hearing

pursuant to *People v Huntley* (15 NY2d 72) in order to address defendant's challenge to both the voluntariness and trial admissibility of his noticed statements within the meaning of CPL 60.45 and the defendant rights under the Fourth Amendment to the United States Constitution, and a pre-trial hearing pursuant to *United States v Wade* (388 US 218) to address the defendant's claim that the identification procedure utilized with respect to the noticed identification was unduly suggestive. In accordance with the foregoing, this Court conducted these pre-trial suppression hearings on October 8, 2020 to address and determine the defendant's respective challenges to the admissibility of the knife and box-cutter which were seized from the defendant's person, as well as those statements and the identification which were noticed by the People pursuant to CPL 710.30.

During this combined hearing, Police Officer James McGartland and Detective Matthew Courtien of the Yonkers Police Department (YPD) testified on behalf of the People, and I give credence to their testimony. Based upon the testimonial and documentary evidence adduced during this hearing on behalf of the People, I make the following findings of fact and conclusions of law:

#### FINDINGS OF FACT

On October 23, 2019, at approximately 1:15 PM, P.O. McGartland was working as a uniformed YPD patrol officer in a marked patrol vehicle, when he received a radio call from his YPD dispatcher advising that a man was waving a knife in the Getty Square area of the City of Yonkers. Upon responding to that area, P.O. McGartland observed a female pedestrian named

Adrian Hess, the victim, who was walking with her leashed dog on Palisade Avenue at its intersection with New Main Street while waving her arms toward him. Upon approaching the victim, P.O. McGartland observed her point toward a male pedestrian, the defendant, walking along the opposite side of Palisade Avenue, when she verbally advised that she had just been threatened with a knife by that individual when he had attempted to steal her dog. In response, P.O. McGartland exited his patrol vehicle, approached the defendant on foot and asked him to place his hands upon the wall of Martin's Department Store, asked him for his name and patted down his outer clothing. Upon patting down the defendant's outer front right pants pocket, P.O. McGartland felt what he believed to be a knife and proceeded to remove same therefrom, resulting in the seizure of a folding knife and a box cutter. At that time, P.O. McGartland heard the defendant spontaneously state, in substance, that he had taken the knife out because of the rapist, despite the absence of any questioning to elicit that statement. As P.O. McGartland was interacting with the defendant, the victim stood nearby and stated, in substance, that the orange/black folding knife recovered from the defendant's pants pocket was the same knife that he had used to threaten her when he had attempted to steal her dog approximately 15 minutes earlier.

In response to these events, P.O. McGartland placed the defendant under arrest just as P.O. Dellacamera and P.O. Atkinson pulled up to the scene in their respective vehicles, one of whom subsequently transported the defendant to the YPD Headquarters. Upon arriving at YPD Headquarters, the defendant was escorted to a conference room within the Detective Division which was wired with an active audio-visual recording system, where he was left alone, cuffed in

front and seated at a conference table for several minutes.<sup>1</sup> While remaining seated within the 8' by 12' conference room, the defendant spontaneously began speaking loudly to himself, stating, in substance, that he didn't do anything wrong, that he had a work blade, that he had to call his boss, and that he was not going down like this. After making those statements while alone in the conference room, Detectives Matthew Courtien and Villanueva entered the room at approximately 3:24 PM, and Det. Villanueva offered to get the defendant some water. In response to the defendant's affirmative reply, Det. Villanueva left Det. Courtien in the conference room with the defendant and Det. Courtien advised the defendant that the conference room was under surveillance, as was reflected in writing upon a sign he pointed to on the wall located to the defendant's right.<sup>2</sup> In response, the defendant stated, in substance, that the rapist kept approaching him, and that the rapist came up from behind him, despite the absence of any questioning by Det. Courtien.

Upon Det. Villanueva's return to the conference room within a few minutes, he handed the defendant a cup of water and both detectives took seats at the conference table across from the defendant, who remained seated and cuffed. Det. Courtien began speaking with the defendant and advised him that he wanted to first advise him of his *Miranda* rights, which prompted the defendant to state, in substance, I have to get a lawyer if you read my rights to me. As Det. Courtien commenced reading the defendant his *Miranda* rights from a pre-printed card, the defendant repeatedly spoke over him, and stated, in substance, that he wanted to hire his

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<sup>1</sup>Notably, a compact disc containing the audio/visual recording of the defendant while he was situated within the conference room was admitted into evidence during this hearing as People's Exhibit #1.

<sup>2</sup>Notably, this sign was admitted into evidence during this hearing as People's Exhibit #2.

lawyer right then, that he never opened the knife, that he doesn't know who the rapist is, and that he did not do anything wrong. After Det. Courtien had finished reading the defendant his *Miranda* rights, he asked the defendant if he would agree to speak with him without a lawyer present, and after the defendant agreed to do so, Det. Courtien presented him with the pre-printed card from which he had been reading the defendant's *Miranda* rights, and the defendant signed same at approximately 3:23 PM.<sup>3</sup>

Thereupon, Dets. Courtien and Villanueva left the defendant alone in the conference room for a few minutes, until they returned and confronted him with the victim's claim that he had attempted to steal her dog. In response thereto, the defendant stated, in substance, that he had not seen any lady with a dog. Det. Courtien then advised the defendant that he was being placed under arrest, cuffed him behind his back, and escorted him from the conference room to accommodate his request to make a phone call.

#### Conclusions of Law

Turning first to consider that branch of the defendant's suppression application which concerns the corporeal identification which was made by the victim in the area of the intersection of Palisades Avenue and New Main Street in the City of Yonkers, the Court finds that this identification was not made pursuant to a police-arranged identification procedure, but rather was spontaneously made by the victim without any prompting or invitation by the police. Specifically, the record reveals that P.O. McGartland was traveling on Palisade Avenue in his

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<sup>3</sup>Notably, this card was admitted into evidence during this hearing as People's Exhibit #3.

patrol vehicle in response to a dispatch alerting him to a reported incident involving a man with a knife in the area of Getty Square, when he observed the victim standing in the roadway while attempting to wave him down. As P.O. McGartland neared the waving victim in his patrol vehicle, he observed her point to the defendant, who was standing nearby in front of 2 Palisade Avenue, and heard her shout that the defendant was the man who had just threatened her with a knife while trying to steal her dog. As the victim had acted on her own initiative when she approached P.O. McGartland and pointed out the defendant as her assailant, the evidence within the record leads this Court to conclude that this identification of the defendant was not made pursuant to a police-arranged procedure, but rather was entirely spontaneous in nature (*see generally People v Clark*, 85 NY2d 886; *People v Williams*, 85 NY2d 868; *People v Dixon*, 85 NY2d 218; *People v Gillman*, 219 AD2d 505, 506 [identification made by witness who was already chasing the defendant when the police arrived at location was not police-arranged]; *People v Rumph*, 248 AD2d 142, 142 [identification made by witness who saw the defendant, called the police and pointed out the defendant when they arrived at his location was not police-arranged]; *People v Shoukran*, 234 AD2d 400; *People v Burgos*, 219 AD2d 504). Consequently, as the identification of the defendant made by the victim in the area of the crime scene was not police-arranged, nor prompted by the police in any manner, same falls beyond the purview of CPL 710.30 and is not subject to suppression under a suggestiveness analysis (*see People v Whisby*, 48 NY2d 834; *see also People v Velez*, 188 AD2d 670, 671, *lv. denied* 81 NY2d 891; *People v Harris*, 171 AD2d 882, 883, *app. denied* 78 NY2d 955). In any event, as the identification of the defendant by the victim was made in the absence of any prompting by the police, in conjunction with the close temporal and spatial proximity of the identification to the

crime, the Court finds that this identification of the defendant was not the product of an unduly suggestive police-arranged identification procedure (*see People v Duuvon*, 77 NY2d 541; *People v Spruill*, 232 AD2d 278, *lv. denied* 89 NY2d 946; *People v James*, 192 AD2d 496).

Accordingly, to the extent that the defendant's instant suppression application seeks the suppression of the noticed identification made by the victim in the area of 2 Palisade Avenue in the City of Yonkers on October 23, 2019, same is denied.

Turning next to consider the defendant's suppression application with regard to the noticed statement he allegedly made in the area of 2 Palisade Avenue at approximately 1:15 PM on October 23, 2019, when he related that he had displayed his knife because of the rapist, his initial argument is grounded upon his claim that this noticed statement was obtained in the absence of so-called *Miranda* warnings and his knowing and voluntary waiver of the rights derived therefrom. In this regard, the Court notes with significance that since the evidence adduced during this hearing does reveal that the defendant was not advised of his so-called *Miranda* rights prior to his utterance of this noticed statement, the Court's inquiry must focus upon whether this statement was the product of interrogation by law enforcement officials, or its functional equivalent, thereby implicating the requirement that the police advise the defendant of his *Miranda* rights in advance of such questioning. Pursuant to the standard set forth by the Court of Appeals in *People v Bryant* (59 NY2d 786), interrogation consists of both express questioning and also any words or actions on the part of the police which the police knew, or should have known, were reasonably likely to elicit an incriminating response.

Here, the adduced evidence demonstrates to the satisfaction of the Court that the noticed statement made by defendant in the area of 2 Palisade Avenue on October 23, 2019 was not made

in response to any questioning, nor or any comment which was reasonably likely to elicit an incriminating response, but rather was spontaneously made by the defendant subsequent to, and seemingly in response to, P.O. McGartland's seizure of a folding knife and a box cutter from his pants pocket. Based upon consideration of the totality of the objective circumstances present when the defendant made the noticed statement at issue, the Court finds that this statement was neither the product of express questioning nor any comments or actions on the part of the police which they knew, or should have known, were reasonably likely to elicit an incriminating response (*see People v Rivers*, 56 NY2d 476; *see also People v Overby*, 251 AD2d 163; *People v Parker*, 299 AD2d 859). As a result, the failure of the police to advise the defendant of his so-called *Miranda* rights in advance of his utterance of this noticed statement does not violate the requirements established by the United States Supreme Court in *Miranda v Arizona* (384 US 436).

Turning next to consider the defendant's alternative argument that the noticed statement he made in the area of 2 Palisade Avenue on October 23, 2019 was obtained by the police pursuant to his unlawful arrest in violation of his rights under the Fourth Amendment to the United States Constitution. In this regard, the Court has considered the adduced evidence indicating that the police did not have any interaction with the defendant until he had been positively identified by the victim, an identified civilian witness, who had maintained visual contact with the defendant while awaiting the arrival of the police at her location. Under the totality of these circumstances, this Court finds that the victim's positive identification of the defendant had provided P.O. McGartland with more than the quantum of evidence he required to lawfully stop, detain and pat down the defendant's outer clothing for his own safety (*see People v*

*Nieves*, 26 AD3d 519; *see also People v Roldan*, 37 AD3d 300, 301), and to then lawfully remove the folding knife and box cutter from the defendant's pants pocket and seize same before placing him under arrest (*see People v Flores*, 88 AD3d 902, *lv. denied* 18 NY3d 858; *see also People v Armsworth*, 27 AD3d 571, *lv. denied* 7 NY3d 752; *People v Ramos*, 74 AD3d 991; *People v Mobley*, 58 AD3d 756). Consequently, as the adduced evidence reflects that the defendant did not make the noticed statement in the area of 2 Palisade Avenue on October 23, 2019 until P.O. McGartland had already begun effectuating his lawful arrest, the Court finds that this noticed statement was uttered by the defendant, and was thereby obtained by the police, in the absence of any violation of the defendant's rights under the Fourth Amendment to the United States Constitution, and the defendant's motion to suppress this noticed statement upon that ground is denied. Accordingly, to the extent that the defendant's instant suppression application seeks the suppression of the noticed statement he made at approximately 1:15 PM on October 23, 2019 in the area of 2 Palisade Avenue in the City of Yonkers, same is denied.

Turning next to consider the defendant's challenge to the trial admissibility of the series of noticed statements he is alleged to have made within a YPD Detective Division conference room during formal police questioning at approximately 3:30 PM on October 23, 2019, the Court notes with significance that the evidence adduced during this hearing revealed that the defendant had unequivocally invoked his right to counsel as Det. Courtien was in the midst of advising him of his so-called *Miranda* rights, and that no counsel was provided to the defendant during any subsequent questioning on that occasion. Accordingly, as conceded by the People at the conclusion of this hearing, this Court finds that these noticed statements were obtained by the police in violation of the defendant's right to counsel under the New York State Constitution,

and therefore, the defendant's instant suppression motion is granted to the extent that the People will not be permitted to introduce evidence of the noticed statements made by the defendant at the YPD on their direct case at trial (*see People v Harris*, 93 AD3d 58, 70, *aff'd* 20 NY3d 912; *see also People v Cunningham*, 49 NY2d 203; *People v Carrino*, 134 AD3d 946, 946).

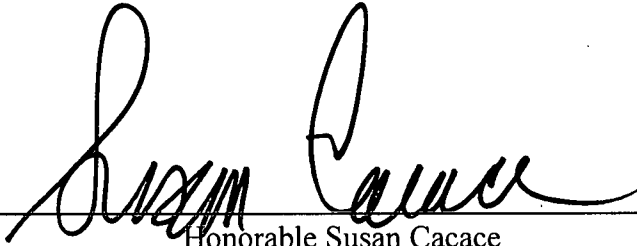
Turning last to consider the defendant's challenge to the seizure of the folding knife and the box cutter from his right front pants pocket, the Court finds that since P.O. McGartland was lawfully permitted to conduct a pat-down frisk of the defendant's outer clothing for weapons following the victim's positive identification of him as her knife-wielding assailant (*see People v Bamisile*, 66 AD3d 507; *see also People v Holmes*, 36 AD3d 714), or to otherwise proceed directly to making an arrest of the defendant for the alleged criminal conduct related to the victim (*see People v Read*, 74 AD3d 1245), and to thereupon retrieve and seize the folding knife and box cutter from the defendant's pocket, without the need for a search warrant, as either a search incident to that pat-down frisk for safety (*see People v Hicks*, 68 NY2d 234), or as a search incident to his arrest (*see People v DeSantis*, 46 NY2d 82).

Based upon the foregoing, the defendant's suppression applications concerning the victim's noticed identification made on October 23, 2019, the folding knife and box cutter seized from within his pants pocket, and the noticed statements he made on October 23, 2019 at approximately 1:15 PM are hereby denied and the People will consequently be permitted to introduce such evidence on their case-in-chief at trial; however, the defendant's suppression application concerning the noticed statements he made at approximately 3:30 PM on October 23, 2019 is hereby granted to the extent that the People will not be permitted to introduce evidence of those statements on their direct case at trial, yet will be permitted to make use of such statement

evidence during cross-examination of the defendant in the event that he should elect to testify on his own behalf at trial pursuant to *Harris v New York* (401 US 222) and *People v Washington* (51 NY2d 214).

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York  
October 16, 2020



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Honorable Susan Cacace  
County Court Judge

**HON. SUSAN CACACE  
WESTCHESTER COUNTY  
COURT JUDGE**

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