People v Torres
2021 NY Slip Op 31557(U)
April 29, 2021
Supreme Court, Bronx County
Docket Number: 0069/2020
Judge: Ralph Fabrizio
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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY, PART 11
--x
THE PEOPLE OF THE STATE OF NEW YORK

Decision and Order
Indictment No. 0069/2020

-against-

MATTHEW TORRES,
Defendant
---x

Christine Scaccia, Assistant District Attorney, Bronx County District Attorney's Office

Kyle Watters, Queens, New York, for Defendant.

FABRIZIO, J.

Cameras in public places are ubiquitous in Bronx County, and most urban areas. The New York City Police Department monitors cameras at many intersections. Banks capture images of individuals who utilize their cash machines. Grocery stores, pharmacies, fast food and other restaurants have cameras that capture images of every customer. Yellow cabs and rideshare vehicles record images of the passengers who flag them down and travel to their destinations. Public buses and subways record the day to day movements of passengers. Cameras capture a vehicle's license plate at a toll plaza. Private buildings have cameras inside and outside for many security-based reasons. As we all understand, everyone is watching.

While the overwhelming majority of images captured show law abiding individuals going about their daily routines, mostly oblivious to the fact that they are being recorded as they do so, some recordings have come to serve an important if not indispensable law enforcement purpose: they now often capture and preserve images

of crimes in progress, and lead to the arrest and apprehension of a perpetrator of a crime who may have eluded capture. In an increasing number of cases, the recordings provide the only visual evidence of a specific person's involvement in a criminal act. Thus, the lens of the camera becomes the eyewitness, and the video stores and reports the memory of the observations. But, in many cases, images depicted on a video are subject to, and may even require, interpretation offered through opinion evidence. At times, the law allows individuals who were not present at the scene of a crime or were not themselves witnesses to a particular event to offer opinion evidence to be considered by a fact-finder to aid in the fact-finder's determination. This decision addresses what this Court believes to be the outer limits of a purely video-recording-based grand jury presentation with accompanying police testimony.

Defendant is charged as a principle and accomplice with Murder in the Second Degree, and related crimes. It is alleged that on December 27, 2019, defendant and an accomplice shot and killed Devon McFarlane. The People allege one perpetrator shot Mr. McFarlane as that victim stood next to the passenger window of a car, after the car suddenly came to a stop in the middle of a Bronx street. They allege defendant was the driver of that car, and that he was acting in concert with an unapprehended individual who sat in the front passenger seat. At the time, the person operating the car stopped it in front of 2066 Morris Avenue in Bronx County, where the street and sidewalks were under the view of more than one video surveillance camera. Videos recovered during a detailed police investigation that captured the shooting, as well as the movements of a car linked to the shooting and the movements of the occupants of that car after the

shooting were downloaded to a flash drive that was received in evidence before the grand jury.

The only witness to testify in person before the grand jury was Detective Rahman Wiltshire of the 46th Precinct. The detective never personally witnessed any part of the crime, or what preceded the crime, or its immediate aftermath. The People submitted additional physical evidence: a business record report from a different police officer who saw Mr. McFarlane as he lay shot and mortally wounded on Morris Avenue, and later identified his body at the morgue, and the death certificate signed by the medical examiner who determined that Mr. McFarlane died as a result of a gunshot wound. Thus, the manner of death is not in dispute; this is a homicide.

An issue raised specifically by the defense after review of the grand jury minutes concerns Detective Wiltshire's testimony relating to what was depicted on certain parts of the video as it was being played. These clips purport to show defendant's movements at and around the crime scene and various other locations in the Bronx. Defendant argues that this testimony usurped the fact-finding function reserved for the grand jurors themselves, and thereby impaired the integrity of the entire grand jury presentation. This Court disagrees.

As background, this is actually the second grand jury presentation in this matter. The first indictment was dismissed by a different judge who found that the testimony provided by that same detective before another grand jury, which consisted, as it does here, of much opinion evidence, impaired the integrity of that grand jury. Citing People v. Huston, 88 N.Y.2d 400, 407 (1996), that judge found the "testimony regarding the video evidence . . . 'usurped the function of the Grand Jury, which remains the exclusive

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judge of the facts with respect to any matter before it.'" The judge further found this testimony prejudiced the defendant because the People had not given "a curative instruction, informing the Grand Jurors that despite hearing testimony regarding the video surveillance evidence, that they can accept or reject that testimony and that they are free to draw their own conclusions about that evidence." (Decision, Indictment 0069-2020, dated September 24, 2020 at pages 2 – 3). The judge gave the People leave to re-present their case to a new grand jury.

The People began that re-presentation on October 28, 2020. After Detective Wiltshire properly authenticated the videos contained on the flash drive and established their relevance to the matter before the grand jury, which the prosecutor referred to as "an investigation into the death of Devon McFarlane," the prosecutor delivered the limiting instruction that had been missing from the first grand jury presentation. The prosecutor said, "I am going to instruct you that narration during the course of playing these video surveillance tapes, it is the tape itself or the video surveillance itself that is in evidence. It is your conclusion that controls what you see shown in the video."[1] Detective McFarlane then testified about what was depicted to the grand jury.

The detective's testimony accompanying the video evidence being played to the grand jury falls into three general categories. The first relates to the detective's opinion about the identity of individuals shown on the video, and specifically defendant and Mr. McFarlane. The second relates to the lengthy testimony describing the detective's detailed, painstaking investigation to try to apprehend those involved in the homicide by

[1] The prosecutor gave a similar instruction to the grand jury when she asked them to vote the charges that are in this indictment.

securing evidence from a variety of video surveillance cameras at various fixed, geographical locations in Bronx County. The third category is the detective's opinion of what appears on the video at the time of the alleged shooting, and in particular his opinion about what the detective refers to repeatedly as a "muzzle flash."

As to the first category, the Court finds that all of the opinion evidence offered concerning defendant's identity was properly before the grand jury. An individual who is familiar with the identity of a defendant may offer opinion testimony about the identity of an individual depicted on the video, even though the person offering the opinion was not present at the time the video images were captured and had not witnessed the events depicted on the video. See People v. DeJesus, 2021 N.Y. App. Div. LEXIS 1854 at *1-*2, March 23, 2021 (1st Dept); People v. Sanchez, 95 A.D.2d 241, 249 (1st Dept. 2012), aff'd, 21 N.Y.3d 316 (2013). Lay opinion testimony about the identity of a person depicted on a video, including where the testifying witness is a police officer, is admissible "'if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the [video] than is the'" finder of fact. Sanchez, 95 A.D.3d at 249 (citing People v. Russell, 165 A.D. 2d 327, 333 (2nd Dept. 1991), aff'd, 79 N.Y.2d 1024 (1992)). Thus, a police officer who is familiar with a suspect's appearance because of interactions between the suspect and the officer, including during arrest processing, may offer opinion testimony to a grand jury that a person depicted on the video during the commission of a crime not witnessed by the officer is the same person taken into custody. See People v. McKinney, 171 A.D.3d 555, 555 – 56 (1st Dept. 2019).

Here, Detective Wiltshire candidly testified he was not the law enforcement officer who apprehended defendant shortly after the homicide when the defendant was about to board a plane to the Dominican Republic, using a one way ticket. However, Detective Wiltshire testified that he processed the defendant's arrest. He testified that in doing so he became familiar with the defendant's appearance. That would include not only gaining familiarity with defendant's face, but with other opinion-identification factors such as the defendant's height, build, his gait, and other characteristics that made the defective more familiar with defendant's overall appearance than the grand jury would ever have been, and here especially because defendant was not present in the grand jury. See Id.; see also People v. Calderon, 171 A.D.3d 422, 423 (1st Dept. 2019). The level of familiarity required for this type of opinion evidence is not the same as that which is required for a finding that a victim has "independent source" to make an identification of a perpetrator following a suggestive identification procedure, see People v. Diaz, 213 A.D.2d 353 (1st Dept. 1995), or to evaluate whether a previous out of court identification is confirmatory, pursuant to People v. Rodriguez, 79 N.Y.2d 445 (1992). After all, this is opinion, and not identification, evidence. Accordingly, Detective Wiltshire's opinion testimony that the person depicted on the video who got out of the driver's seat of a car linked to the homicide who is also shown standing, walking, and facing the camera at various times on various videos was the same person whose arrest he processed was properly admitted into evidence before this grand jury.

The detective's opinion that Mr. McFarlane was depicted on video surveillance footage appears to be based on the detective's visit to the hospital to check on the victim's condition. While there, he learned that Mr. Farlane was dead by reason of a

gunshot wound. Defendant does not challenge the sufficiency of the evidence that the video shows Mr. McFarlane being shot and running away from the car in a different direction from where the driver proceeds. Moreover, entries in the certified documents from the Office of the Chief Medical Examiner report in evidence before the grand jury state that Mr. McFarlane was the victim of a homicide caused by a bullet wound, and that the homicide occurred at the time and location captured on the video evidence shown to the grand jury; in front of 2066 Morris Avenue.

The second category of the testimony involved the videos the detective secured as he investigated backwards and forwards the movements of the car and the people in the car immediately before and after the shooting. Much of this involved "pole" or "Argus" police camera footage. There was nothing improper in the detective's testifying that a video showed a particular intersection, a particular building, or some other fixed location. The officer went to these particular locations within hours of the time the recordings were made. Thus, he had the ability to properly describe the locations depicted on each of the videos. See New York v. Patterson, 93 N.Y.2d 80, 84 (1999). Moreover, as a detective working in the same precinct where the homicide happened, he was aware of information such as the direction a street travels and the location of a specific address within that precinct. This part of the evidence took up the lion's share of the detective's testimony. The Court recognizes that certain parts of this section of the presentation did not contain proper opinion evidence and did usurp the fact-finding function of the grand jury. That testimony included mentioning that defendant is with the "same person" depicted at different moments, or that the vehicle shown in various locations is "the same car" that stopped next to the victim when the victim was shot. It

also included potentially inadmissible hearsay evidence that the detective spoke with defendant's mother who said that her son usually drives the vehicle shown on the video. Those statements likely cross the boundary into the grand jury's fact-finding function. And, unlike presenting an opinion related to identification of a particular person, the videos speak for themselves in terms of the grand jury's determination about whether it really is "the same person" who parks the car and gets out of the driver's seat, or whether it is "the same car" that sped off from the scene and ended up in a parking lot. Nonetheless, these inappropriate parts of the testimony, while regrettable, do not alone or when added together create a situation where the integrity of the entire grand jury presentation was impaired. See McKinney, 171 A.D.3d at 556.

The third and final category also falls within the realm of opinion evidence. Detective Wiltshire opined that a bright flash of light captured on the video at the time of the alleged shooting was consistent with a "muzzle flash" – the light emitted from the barrel of certain types of guns at the moment a bullet is discharged. As a New York City Police Officer, Detective Wiltshire has basic knowledge of how firearms operate. At trial, if a judge agreed to admit this type of opinion testimony from a ballistics expert, there would have to be a fact-specific limiting instruction. Cf. People v. Urena, 180 A.D.3d 581 (1st Dept 2020). However, for this case, the general instructions given about the limitations on the use of Detective Wiltshire's testimony was sufficient. The evidence was admissible as the type of lay opinion evidence to assist the grand jury factfinders to determine what was happening at the time a bright flash of light appeared on a silent video, and could also assist them in determining from what direction the purported murder weapon was fired. See Horsley v. Haviland, 2012 U.S. Dist. LEXIS 96181 at *

28-29, July 11, 2012 (E.D. Cal.); see also In Re Pers. Restraint of Daley, 2020 Wash App. LEXIS 934 at *25 – 26, April 13, 2020 (Wa. Ct. of App. Dist. One); Ovalle v. State, 2014 Tex. App. LEXIS 186 at *8, * 20-21, January 9, 2014 (Tex. Ct. App. 13th Dist.); State v. Thorne, 490 A.2d 646, 648 (Me. 1985).

Based on a reading of the decision dismissing the first indictment, it appears that the testimony before this grand jury is similar in content to the evidence presented to the first grand jury. However, the striking difference is the presence of the limiting instructions given to the grand jury in this presentation. As noted, that instruction was given before the detective testified, and when the prosecutor gave the final charging instructions to the grand jury. The prosecutor therefore made it sufficiently clear that it was up to the grand jurors to determine on their own, as a matter of fact, the identity of the people whose images were captured and shown on the various videos, what the video showed these individuals to be doing at the times shown, and whether the bright light emitted from an object in the front seat of the car was the muzzle flash captured on video at the time the fatal bullet was fired.

This Court finds that these instructions were sufficient in the context of this grand jury presentation to cure the prejudice noted by the judge who dismissed the first indictment. While it is, of course, axiomatic that a grand jury need not be instructed with the same precision as a trial jury. See e.g. People v. Calbud, Inc., 49 N.Y.2d 389, 394 (1980), this Court would prefer a more targeted instruction be given in future video-based grand jury presentations involving opinion testimony. The focus of cases that condemn the practice of having a police officer describe what is on a video seems to involve situations where the officer essentially presents a running narration of what a

defendant is doing and why when viewing a video taken during the commission of a crime the officer never witnessed. See People v. Dean, 58 Misc. 977, 981-82 (Yates County Court 2017); People v. Peralta, 2009 N.Y. Misc. LEXIS 499 at ** 7 -8, March 3, 2009 (Sup. Ct. Queens County). Telling a jury that such testimony is admitted as "narration" could be viewed as confusing. In this case, other than the officer's using the videos to illustrate his investigative steps, the identification and "muzzle flash" testimony is opinion evidence. As such, this Court recommends that prosecutors deliver a limiting instruction of the kind approved by the First Department in DeJesus. There, at the time the witness testified and identified the defendant on a surveillance video taken when the witness was not present, Justice Denis Boyle told the jury:

> [The witness's] testimony as to who she believes is depicted in the surveillance video is an opinion submitted for your consideration. You, the jury[,] are the finders of fact and the factual determination as to who's depicted in the surveillance video is for you, the jury, and you alone. You're free to accept or reject this opinion.

During the final instruction to the jury, Justice Boyle reiterated :

> [The witness's] testimony as to who she believes is depicted in the surveillance video is an opinion submitted for your consideration. You, the jury, are the finders of fact, and the factual determination as to who was depicted in the surveillance video is for you the jury and you alone. You are free to accept or reject this opinion.

(People's Brief in Response, People v. Jaime DeJesus, dated January 5, 2021 at page 40).

These instructions flag the reason the testimony is admissible, and its discretionary use, just as any other instruction about opinion evidence would advise. In this Court's opinion, this is the limiting instruction that should be given to a grand jury in these cases.

Defendant also challenges the legal sufficiency of the evidence that he was an accomplice to the homicide. Defendant concedes in his motion to dismiss that the video tape "appears to show the passenger in the vehicle, alleged by the prosecution to being operated by Matthew Torres, engage[ ] in a brief verbal altercation with the deceased . . . the passenger seems to have a few words with one of the pedestrians who is later determined to be Devon McFarlane. After the vehicle suddenly stops, within 3-5 seconds, it appears that initial words are exchanged and the passenger fires one shot at the pedestrian, Devon McFarlane, causing him to eventually collapse and suddenly die." (Affirmation in Support of Motion to Dismiss Indictment, dated March 8, 2021 at ¶ 10). Based on counsel's viewing and interpretation of this video, he argues that the People failed to establish reasonable cause that defendant, as the driver of the car, intended to cause the death of Mr. McFarlane. He claims that the video evidence does not show "any level of planning or premeditation on the part of the occupants of the vehicle, other than the shooter's own contemporaneous choice and intent to fire at the deceased." (Defense affirmation at ¶ 11).[2] Defendant further argues that the prosecutor should have provided the grand jury with a "mere presence" instruction as well as a " circumstantial evidence" charge. This Court disagrees with these arguments as well.

The evidence supporting the intent element, read in the light most favorable to the People and drawing inferences from defendant's actions in the same light, see People v. Danielson, 9 N.Y.3d 342, 349 (2007), establish reasonable cause to believe

[2] In their motion response, the People proffer that the person in the passenger seat was defendant's uncle, and proffer a potential motive for the uncle to have shot Mr. McFarlane. This argument is out of place in a motion to dismiss an indictment because of the lack of evidence before the grand jury on the issue of intent, since no such evidence was ever presented to the grand jury. Accordingly, this Court has not considered these, or any other fact arguments proffered concerning non-existing evidence.

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defendant acted in concert with the front seat passenger in this point-blank shooting homicide. First, assuming that the gun was fired by the passenger, and not the driver,[3] defendant did not happen upon a shooting scene and was merely present as an observer. He drove the passenger to this very location. While there could be a competing inference that he may have first stopped the car in mid-block because two people crossed in front of it, as defendant argues, those people were not seen blocking the car when Mr. McFarlane walked into the street and walked up to the passenger window of the vehicle the driver stopped. Defendant states that there was a verbal altercation shown on the video. The words spoken remain a mystery. Yet, whatever the content of this altercation, defendant did not drive off. He remained stopped. Moreover, there is a reasonable inference to find that the gun was in view in the car before the shooting, and at least prior to the fatal shot being fired, giving some time for defendant to drive away. It was only after the shooting, as the wounded victim ran off in one direction, that defendant sped off in a different direction.

"Accomplice liability requires, at a minimum, awareness of the proscribed conduct and some overt act in furtherance of such." People v. Hibbert, 282 A.D.2d 365, 366 (1st Dept. 2001). If the passenger were the shooter, then the evidence showed actual awareness of the unfolding homicide and an overt act of keeping the passenger safely in the car, and not driving away as the passenger prepared to and then shot Mr. McFarlane. The "after" videos allow an inference that defendant and the victim continued to show a commonality of purpose, which at that time was to avoid capture

[3] The People allege that that gun might have been fired by the driver, who is the defendant. The video shows where the victim stood. The muzzle flash came from within the car. The People charge defendant in this indictment as both principle and accomplice.

for the crime they jointly committed. Defendant sped off, driving through several intersections under the watchful eye of video cameras, apparently with the gun still in the car. He drove the passenger to what the grand jury could have reasonably inferred was believed to be a safe location, parking the car off the street. He and the front seat passenger then left the car, together. They remained together when defendant rang the bell to the building that the detective opined was the residence of the defendant's girlfriend, who was also the mother of defendant's child, based on information developed during the detective's investigative steps. The driver and passenger entered that building, together. They then left the building a short time later, still together. The video evidence supports the inference that defendant changed clothes. As part of the background investigation, Detective Wiltshire testified that defendant's girlfriend later told the detective she had not seen defendant in three days. That statement, admissible for non-hearsay reasons, provided an additional reason for the detective to focus on defendant as having been an accomplice to murder. The defendant's apprehension at the airport as he subsequently attempted to leave the country allowed an inference to show consciousness of guilt not merely as an accomplice after the fact, but as an accomplice to the murder itself.

All this evidence provides reasonable cause that defendant acted with shared intent to be considered as an accomplice to this homicide. See generally, People v. Reed, 22 N.Y.3d 530, 534-35 (2014). This is very different from People v. Cummings, 131 A.D.2d 865, 867 (2nd Dept. 1987), where the evidence that the defendant was a back seat passenger in a parked car was not liable as an accomplice to a homicide committed by another occupant of the car. Moreover, the instructions provided to the

grand jury were sufficient to convey that they could charge defendant with being an accomplice only if he "acted with the mental culpability required for the commission" of the homicide. See People v. Newton, 120 A.D. 2d 751, 751 (2nd Dept. 1986). No further instruction was needed.

For all these reasons, the motion to dismiss this indictment is denied in its entirety.

This constitutes the Decision and Order of the Court.

So ordered.

Dated: April 29, 2021

Hon. Ralph Fabrizio