Supreme Court, Kings County, New York.

The PEOPLE of the State of New York
v.
Anthony Ayler, Defendant.
No. 3217/2003.
Sept. 22, 2004.

James P. Sullivan, J.
The defendant is charged with attempted murder in the second degree, three counts of rape in the first degree, sodomy in the first degree and related charges stemming from three separate incidents that have been linked to defendant by DNA evidence. The first incident occurred on December 19, 1998, when a man grabbed complainant number 1 by her hair on the street, choked her and dragged her into a building located at 2741 Fulton Street in Brooklyn, where he repeatedly hit her about the face, removed her clothing and inserted his penis into her anus and vagina. The second incident occurred on November 21, 1999, when a man grabbed complainant number 2 by the throat, dragged her into the same building at 2741 Fulton Street, where he pulled her hair, removed her clothing and inserted his penis into her anus and vagina. The third incident occurred on December 21, 2001, in front of the same address at 2741 Fulton Street, at which time a man grabbed complainant number 3 by the throat, repeatedly choked her and inserted his penis in the complainant's vagina. All three complainant's were treated at Brookdale Hospital following the respective incidents and sexual assault kits were collected from each of the complainants. The DNA profile developed from semen recovered from those sexual assault kits matches the defendant's DNA profile.

By order dated September 24, 2003, the court granted the defendant's omnibus motion to the extent of ordering a *Wade* and *Huntley* hearing. The application for a *Mapp* hearing was denied based on the People's representation that no physical evidence was seized from the defendant. It was subsequently revealed that the butts of cigarettes smoked by the defendant while he was being held at the Office of the Brooklyn Special Victims Squad (BSVS) on July 13, 1999, were collected and tested for DNA. On the basis of that evidence, the hearing was expanded to include a *Mapp* issue for suppression of the cigarette butts and the DNA test results on the ground that the cigarette butts were unlawfully seized and the DNA evidence derived therefrom is the fruit of the poisonous tree.

The pre-trial suppression hearing was commenced before me on May 17, 2004, and continued on September 7, 2004. The People called Detective Edward Narvaez, who was assigned to investigate these cases, and Detective Mary Cox, who had detained defendant in connection with another case and retrieved the cigarette butts in question for DNA testing. From all of the credible evidence adduced at the hearing, I make the following findings of fact:

Detective Mary Cox of the BSVS was assigned on December 23, 1998, to investigate a sexual assault complaint involving complainant number 1. On that same date, Detective

Cox met with complainant number 1 who was in a bruised condition and suffering terrible pain. Thereafter, on January 24, 1999, Detective Cox met with this complainant again at which time complainant number 1 pointed out a two-family dwelling located at 2741 Fulton Street in Brooklyn as the place where the sexual assault on December 19, 1998, had occurred and described her assailant as a tall black male, with a dark complexion, wearing a dark blue hooded rain jacket. Detective Cox knocked on the door at that location. A man meeting the general description given by the complainant responded. Detective Cox told the man, whom she identified as the defendant Anthony Ayler, that she needed to speak with him. Detective Cox took the defendant to the office of the BSVS on Washington Street where he was placed in a lineup viewed by complainant number 1. This complainant was unable to positively identify anyone in the lineup and the defendant was released.

At that same time, Detective Cox had also been looking for a woman who had been the defendant's live-in girlfriend and had filed a criminal complaint claiming defendant had sexually assaulted her. When she was unable to locate defendant's former girlfriend, Detective Cox put out a wanted card. Defendant's girlfriend was eventually located by another precinct on July 12, 1999 and made a confirmatory identification of the defendant from a photograph shown to her by Detective Cox. The next day, July 13, 1999, Detective Cox, accompanied by other police personnel, went to the 2741 Fulton Street address where they placed defendant in custody and brought him to the BSVS office.

After taking the defendant into the interview room, Detective Cox tidied the room by emptying the waste basket and cleaning the table and ashtray. She then asked the defendant if he wanted anything. In response, defendant asked for a cigarette. Detective Cox obtained a cigarette from one of her co-workers, gave it to defendant, lit it for him and handed him an ashtray. While in the interview room, defendant smoked two or three cigarettes. During the period that defendant was in the interview room, no one other than the defendant was smoking in that room. When defendant was taken to Central Booking, Detective Cox emptied the contents of the ashtray into a manila envelope which was vouchered and sent to a lab for DNA testing. Defendant's former girlfriend failed to follow up relative to the complaint and the defendant was again released.

On July 19, 2002, Detective Edward Narvaez of the BSVS was notified by the Office of the Chief Medical Examiner of the City of New York (OCME) that the defendant's DNA profile developed from one of the cigarette butts recovered from the BSVS interview room after defendant was arrested and placed there matched the DNA profiles developed from the sexual assault collection kits of the three female complainants in this case.

On April 12, 2003, Detective Narvaez showed complainant number 1 a photo array, which included a photo of the defendant. Complainant number 1 was unable to identify anyone in the array. Thereafter, on April 18, 2003, Detective Narvaez and his partner Detective Steve Litwin showed complainant number 3 a six-person photo array. Complainant number 3 identified photograph number three as depicting the person who had sexually assaulted her. Complainant number 3 initialed the array and wrote down the

number of the person she had identified. Defendant's photograph was in the number three position.

Detective Narvaez also showed complainant number 2 a photo array, again consisting of six photographs, on April 22, 2003. She identified photograph number two as the person who had sexually assaulted her and marked the photo array sheet accordingly. Defendant's photograph was in the number two position.

On May 10, 2003, at approximately 3:20 p.m., Detective Narvaez arrested the defendant as he was exiting a drop-in shelter located at 39 Bond Street in Brooklyn. No physical evidence was recovered from the defendant at the time of his arrest. At approximately 10:20 p.m. Detective Narvaez, who was in the interview room at BSVS with the defendant, advised defendant of his Miranda rights. After each of the warnings, defendant indicated that he understood the warnings by writing “yes” followed by his initials. He further indicated that he was waiving such rights and would answer questions. The Miranda warnings form was dated, the time was noted, and it was signed by defendant and Detective Narvaez.

After the Miranda warnings were given to defendant, Detective Narvaez told defendant that he had been arrested in connection with rape complaints made by three women who were identified by name. Defendant responded, in essence, that he did not recognize the names of the complainants, he met lots of women on the street, got “blow jobs” from “crackheads” in exchange for money, he never raped anyone and would not have vaginal sex with such women. Defendant contended that he would take the women he engaged for oral sex to Highland Park. Defendant's statement was reduced to writing and signed by the defendant. Detective Narvaez's interview with defendant concluded at about 10:55 p.m.

Later that evening, at approximately 11:30 p.m., defendant was placed in a lineup consisting of five so-called “fillers”. When Detective Litwin arrived with the fillers, they were immediately placed in the interview room that was on the opposite side of the building from the room where the complainant number 2, who was the only complainant to view the lineup, was brought. Defendant selected position five in the lineup. All of the lineup participants were seated to lessen any height differential. Detective Narvaez had all of the participants put on caps to cover their hair so as not to highlight the fact that defendant was the only one with braids.

Detective Narvaez told complainant number 2 that she would be viewing the lineup through a one-way mirror, that she should take her time looking at each participant's face, and that if she recognized anyone she should tell Detective Narvaez the number of the individual she recognized and from where she recognized the individual. Complainant number 2 identified participant number five and said she recognized him “from the rape”. The detective photographed the lineup.

Following the conclusion of the lineup, Detective Narvaez advised defendant that he had been identified in the lineup. Defendant was then given the opportunity to provide his

own handwritten statement. The defendant was given a piece of paper and a pen after which he proceeded to write a statement which was similar to the previous statement he had given to Detective Narvaez.

Based upon the foregoing findings of fact, I make the following conclusions of law:

The People have satisfied their burden of establishing the propriety of the police conduct and the absence of suggestiveness in the photo array or the lineup (*see, People v. Jackson*, 98 N.Y.2d 555; *People v. Chipp*, 75 N.Y.2d 327, 335, *cert. denied* 498 U.S. 833). Furthermore, the defendant has failed to establish that the procedure was unduly suggestive (*id.*). My examination of the photo arrays from which two of the three complaining witnesses identified defendant reveals no hint of inappropriate suggestiveness. This court is satisfied that the individuals depicted in the photographs were sufficiently similar in appearance to defendant so that no characteristic would influence the viewer toward choosing the defendant (*see*, *People v. Chipp, supra* at 336). There is no requirement that all of the photographs have nearly identical characteristics and features (*id.; People v. Jackson,* 282 A.D.2d 830, *lv denied* 96 N.Y.2d 902).

Similarly, the photograph taken of the lineup reflects that the fillers were sufficiently similar to defendant in physical characteristics so that there would be no substantial likelihood that defendant would be singled out for identification (*see, People v. Briggs*, 285 A.D.2d 514, *lv denied* 98 N.Y.2d 636; *People v. Cook*, 254 A.D.2d 92). Any discrepancies in height between defendant and the fillers were minimized by fact that all the participants in the lineup were seated (*see, People v. Richards*, 2 AD3d 883; *People v. Bolt*, 295 A.D.2d 357). Moreover, any differences in hair style were overcome by having the participants wear caps. “While due process requires that pretrial identification procedures be fair, there is no requirement that the defendant must be surrounded by fillers who have identical physical characteristics” (*People v. Briggs, supra; see*, *People v. Snyder*, 304 A.D.2d 776). Any minor variations in the features of the fillers and the defendant in this case did not render the lineup impermissibly suggestive. Without a showing by the defendant that the identification procedures were unduly suggestive, the People do not need to demonstrate that an independent source exists for the complaining witnesses' in-court identifications (*see, People v. Jackson*, 98 N.Y.2d 555, *supra; People v. Chipp, supra*).

Next, upon review of the oral and written statements made to Detectives Navarez after defendant received his *Miranda* warnings and agreed to waive his rights, I find that those statements were made voluntarily and not in violation of any constitutional right.

Lastly, the court does not find that suppression of the cigarette butts or the DNA evidence derived therefrom is warranted. In order to invoke the exclusionary rule, the defendant has the burden of establishing standing by showing a legitimate expectation of privacy in the premises or object searched (*see, People v. Ramirez-Portoreal*, 88 N.Y.2d 99, 108; *People v. Wesley*, 73 N.Y.2d351, 358-359). Once the defendant establishes standing, either through his or her own evidence or by relying on the evidence presented by the People (*see, People v. Gonzalez*, 68 N.Y.2d 950, 951), the People have the burden to

show that the defendant voluntarily and intentionally discarded the property searched and, therefore, waived a legitimate expectation of privacy (*People v. Ramirez-Portoreal,* 88 N.Y.2d *supra* at 108; *People v. Howard*, 50 N.Y.2d 583, 593).

There is a two-pronged test that must be met in order to challenge the validity of a search. The first prong, a subjective component, is "did *defendant* exhibit an expectation of privacy in the place or the item searched, that is, did he seek to preserve something as private" (*People v. Ramirez-Portoreal, supra*). The second prong is an objective component: "does society generally recognize defendant's expectation of privacy as *reasonable*, that is, is his expectation of privacy reasonable under the circumstances" (*id.* at 108; *see, People v. Bell,* 9 ad3d 492; *People v. Myers,* 303 A.D.2d 139, 142, *lv denied* 100 N.Y.2d 585).

Here, the court finds that the defendant had no reasonable expectation of privacy in the cigarette butts and was therefore, not deprived of his rights against unreasonable searches and seizures under the New York State Constitution. The defendant could have no reasonable expectation of privacy in the BSVS' s interview room or in any items he discarded there. It is also not reasonable to expect that garbage discarded in a police interview room would remain undisturbed out of respect for the privacy of the person who left it there (*see, People v. Myers, supra; People v. Barker*, 195 Misc.2d 92).

Assuming, *arguendo,* that the defendant had a reasonable expectation of privacy and, therefore, has standing to challenge the legality of the police seizure, the People then have the burden of showing that the defendant made a purposeful divestment of the item searched and, therefore, waived a legitimate expectation of privacy (*see, People v. Martinez,* 80 N.Y.2d 444). However, as the Court of Appeals stated in *People v. Ramirez-Portoreal,* "[e]ven where abandoned * * * if the abandonment is coerced or precipitated by unlawful police activity, then the seized property may be suppressed because it constitutes 'fruit' of the poisonous tree" (*supra* at 110). Although it is unlikely that the defendant knew when he discarded the cigarette butts that he was also discarding bodily fluids that would allow the police to obtain his DNA profile, the court does not find that Detective Cox violated fundamental principles of fairness by supplying defendant with cigarettes that defendant requested or by securing the remnants of such cigarettes after defendant had discarded them in the ashtray. Contrary to defendant's contentions, I do not find that Detective Cox acted in a purposefully covert or coercive manner when she supplied the cigarettes to defendant or that she acted with the sole intent of obtaining defendant's DNA. In sum, the defendant relinquished any expectation of privacy he had in the cigarette butts seized, as well as the DNA results obtained therefrom.

Based upon the foregoing, defendant's motion to suppress his statements, identification testimony and the DNA results is denied in its entirety.

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