

54 A.D.3d 621, 864 N.Y.S.2d 14, 2008 N.Y. Slip Op. 07039

Supreme Court, Appellate Division, First Department, New York.

The PEOPLE of the State of New York, Respondent,

v.

Juan COLON, also known as Rafael Juan Colon, Defendant-Appellant.

Sept. 23, 2008.

Background: Defendant was convicted in the Supreme Court, New York County, Marcy L. Kahn, J., of murder in the first degree, and he appealed.

Holding: The Supreme Court, Appellate Division, held that defendant was not in custody for Miranda purposes when he made statements to police.

Affirmed.

West Headnotes

Headnote Citing References KeyCite Citing References for this Headnote

Key110 Criminal Law

Key110XVII Evidence

Key110XVII(M) Declarations

Key110k411 Declarations by Accused

Key110k412.2 Right to Counsel; Caution

Key110k412.2(2) k. Accusatory Stage of Proceedings; Custody. Most Cited Cases

Defendant was not in custody for Miranda purposes when he made statements to police at station; defendant voluntarily accompanied police to station, where he was expressly told he was not under arrest and was free to leave, and although he remained there over an extended period of time and was questioned with increasing intensity, he was never handcuffed or otherwise restrained, he was left alone and unguarded in an unlocked interview room for significant periods of time, and he was permitted to go to the bathroom unescorted, and although the police expressed skepticism about defendant's story, it was defendant who initiated the conversation with a detective, whom he knew from the neighborhood.

*14 Steven Banks, The Legal Aid Society, New York (Susan Epstein of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

LIPPMAN, P.J., TOM, WILLIAMS, McGUIRE, FREEDMAN, JJ.

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered April 22, 2004, convicting defendant, after a jury trial, of two counts of murder in the first degree, and sentencing him to concurrent*15 terms of 25 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress statements. The People established that the statements defendant made prior to Miranda warnings were not the product of custodial interrogation, because a reasonable innocent person in defendant's position would not have thought he was in custody (see *People v. Centano*, 76 N.Y.2d 837, 560 N.Y.S.2d 121, 559 N.E.2d 1280 [1990]; *People v. Yukl*, 25 N.Y.2d 585, 307 N.Y.S.2d 857, 256 N.E.2d 172 [1969], cert. denied 400 U.S. 851, 91 S.Ct. 78, 27 L.Ed.2d 89 [1970]). Defendant voluntarily accompanied the police to the precinct, where he was expressly told he was not under arrest and was free to

leave. Although he remained there over an extended period of time and was questioned with increasing intensity, he was never handcuffed or otherwise restrained, he was left alone and unguarded in an unlocked interview room for significant periods of time, and he was permitted to go to the bathroom unescorted (see e.g. *People v. Hernandez*, 25 A.D.3d 377, 379, 806 N.Y.S.2d 589 [2006], lv. denied, 6 N.Y.3d 834, 814 N.Y.S.2d 82, 847 N.E.2d 379 [2006]). The fact that the police expressed skepticism about defendant's story did not render the questioning custodial (see *People v. Dillhunt*, 41 A.D.3d 216, 839 N.Y.S.2d 18 [2007], lv. denied 10 N.Y.3d 764, 854 N.Y.S.2d 325, 883 N.E.2d 1260 [2008]). “Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest” (*Stansbury v. California*, 511 U.S. 318, 325, 114 S.Ct. 1526, 128 L.Ed.2d 293 [1994]). Furthermore, it was defendant who initiated the conversation with a detective, whom he knew from the neighborhood, in which he first admitted having had sex with the elderly victim on the day of the murder. The detective immediately stopped the conversation and, after Miranda warnings were administered, defendant waived his rights and gave a written statement implicating himself in the murder.

Following a six-one-half hour break, and after readministration of warnings, defendant made a videotaped confession to two assistant district attorneys. The evidence also supports the hearing court's finding that the videotaped statement was sufficiently attenuated from the earlier police questioning to remove any possible taint arising from any prior constitutional violation, and render the videotape independently admissible (see *People v. Paulman*, 5 N.Y.3d 122, 130-134, 800 N.Y.S.2d 96, 833 N.E.2d 239 [2005]).

Although defendant would have been entitled to a jury charge on the issue of the voluntariness of his pre- Miranda precinct statements (see *People v. Cefaro*, 23 N.Y.2d 283, 288-89, 296 N.Y.S.2d 345, 244 N.E.2d 42 [1968]), defense counsel withdrew the request for such a charge after the court declined to give a voluntariness charge with respect to the videotaped statement. We find that, under the circumstances, the trial court correctly declined the request because the trial evidence did not raise an issue of fact for the jury as to whether the videotaped statement was voluntarily given after a clear break in questioning (see *id.*). In any event, there is no reasonable possibility that, had it been instructed on the issue of voluntariness, the jury would have found the videotaped statement, or any of defendant's other statements, to be involuntary.

N.Y.A.D. 1 Dept.,2008.

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