



Jeff Deskovic

The Wrongful Conviction And Exoneration Of Westchester Resident Kian Khatibi

The Crime And Arrest

On Jan. 11, 1998 Kian Khatibi went with some friends to a bar, since closed and called Lock, Stock, and Barrel, which was located on Marble Avenue in Pleasantville, New York. His brother was already inside the bar. At some point, Kian was escorted out of the bar by bouncer Nick Hobby, who testified that he did this not because Kian had been an instigator, but because he was the smallest person and the closest to him. Kian subsequently walked to a 7-11 store, and then started walking back towards the bar. Meanwhile, a guy named Duffy and another named Boyar were escorted out because they continued to harass patrons.

Khatibi noticed that four people were fighting in the front of the parking lot, on the sidewalk, and heard a voice holler towards him "Hey you, you were arguing with us inside of the bar." Fearing that they were going to come after him, he then ran to the Pleasantville Police Station to report the fight taking place. He encountered a police officer and proceeded to tell him that he should go check things out, and that he feared for his safety.

While he was at Police headquarters a call came in over the radio stating that a fight was taking place, and the cop told Khatibi that if he wished he could wait till he came back or he could leave.

The officer then ran out of the police station to break up the fight. Meanwhile, an Officer DeMaio also came to the scene, and observed that two of the combatants, William Boyar and Brian Duffy, were arguing with the other party as the group

dispersed. DeMaio did not notice any stab wounds at this time.

After canvassing the area for safety reasons, DeMaio again encountered the victims up the road and now noticed stab wounds all over their bodies. They were taken to the Westchester County Medical Center in Valhalla. The officers took note of Eric Freud who was also at the scene. Khatibi, meanwhile, left the police station and called his sister, who picked him up and took him home.

Almost a week later, on Jan. 17, 1998, Detective Sgt. Bonura and Detective Mazzei of the Pleasantville Police Department contacted Freud and asked him to come to the police station to talk about the incident. Freud agreed and met with Det. Sgt. Bonura and Det. Mazzei. Mazzei attempted to get Freud to implicate Kian Khatibi in the incident that had occurred on January 11. When Freud resisted, Mazzei physically abused him for several hours in a cell at Police Headquarters in the presence of Bonura, until he eventually signed a statement implicating Kian Khatibi as the attacker in the January 11th incident.

On Jan 28, 17 days after the incident, Boyar and Duffy identified Khatibi out of a photo array.

Neither Boyar nor Duffy ever told the same story twice. According to investigative notes by Officer Dennehy, both victims said that they were not sure what had happened. When Dennehy asked Duffy if he could describe any of the assailants, he said that he could not but that he did remember a guy with a black eye. At trial, he would change his

story to say that he knew when he was stabbed, which was right before he briefly saw Kian Khatibi. Also at trial Duffy stated that he had only three or four beers, which totally contradicted a January 11 "Trauma Admission Assessment" form by the Westchester County Medical Center Emergency Center, which stated that he said he had 14 drinks.

Additionally, Boyar did not know that he was stabbed until Dennehy told him, which contradicts a deposition taken on Jan. 28, 2008 as a basis for getting an arrest warrant. In investigative notes taken by Officer DeMaio, both victims said that Eric Freud was there but could not say if he stabbed them or was even fighting. But, at trial, Duffy said that he recalled a photo show up of Freud and then stated that there was no way that Freud had stabbed him. On an inpatient cumulative report by the Westchester County Medical Center, Boyar's blood alcohol level was in excess of .30.

On Feb. 3, 1998, Kian Khatibi received notice through a friend that Bonura and Mazzei were looking for him with a warrant for his arrest. His attorney called the police station and arranged for him to surrender the next day.

Commentary: Firstly, the police either knew or should have known that the identifications were not reliable, given that both witnesses were excessively drunk, and had many contradictions in their stories, both saying that they had only seen Kian Khatibi for a few seconds. Furthermore, the actions of Det. Mazzei in procuring the false statement from Freud, which furnished the basis for

getting the arrest warrant, was a deliberate action which suggests that the entire arrest and wrongful conviction were intentional. The actions of Det. Sgt. Bonura, in not intervening while the physical abuse was going on, makes him culpable in this case.

It is disappointing when public officials, whether law enforcement or political leaders, despite at first blush appearing to be *stand-up* people worthy of being held in high regard, have a fall from grace by means of either past or current conduct that comes to light. Bonura, the 27-year veteran police officer with an untarnished record, whose actions complaining in the media about a career criminal again being turned loose by the district attorney, himself was complicit in police brutality carried out for the purpose of obtaining a false statement, in the furtherance of what would turn out to be a wrongful conviction.

As I wrote previously regarding the wrongful conviction of Eleanor Reasonover, if the end result of citizens reporting crimes is going to be that they are themselves arrested wrongfully and charged, that will have a chilling effect on citizens reporting crimes. Police officials of all departments should take note of this and not allow things like this to go on.

The Trial

The trial prosecutor was the now deceased Eugene Clerkin, and the Judge was James Cowhey. At trial, Boyar stated that he was at the bar and was intoxicated. He said that he went to leave, but he noticed Freud and that Freud started with him. Another person was off to his left,



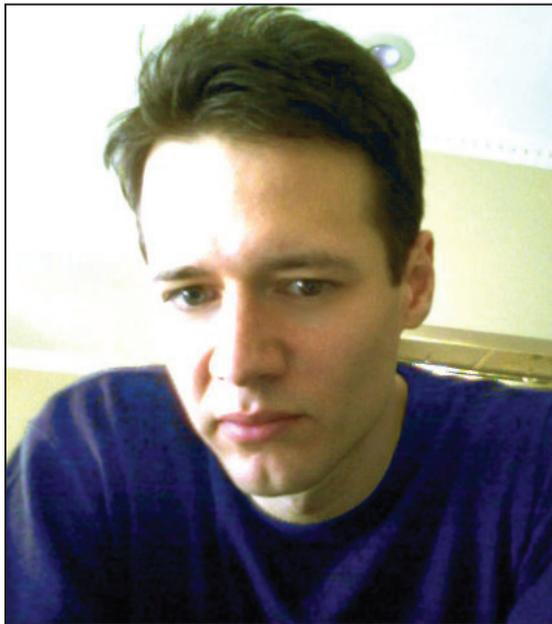
one to two feet away, but he was unable to describe him.

He said he felt a sharp jab in his right shoulder but kept looking at Freud. He turned for a split second and saw someone behind Duffy that he identified at trial as the Defendant. It wasn't until later that he realized that he had been stabbed, and that he had no idea who stabbed him. As noted above, despite the contradiction involving the deposition, Khatibi's attorney, Mr. Brian Stone, never utilized this information on cross examination.

Brian Duffy stated that he saw a bloodstain on Boyar's shirt and went outside to him. He said he argued with two people, and that while talking with Duffy he felt a pretty heavy tap to his back and side. He stated that he saw somebody for five seconds that he later identified in court as the Defendant and that this individual then ran off. As noted above, he changed his story to say that he knew when he was stabbed, but again defense attorney Stone never brought this up on cross-examination.

Eric Freud testified that the statement that he previously gave was unreliable because he gave it only after Mazzei had assaulted him for several hours, and that he had told an assistant district attorney whose name he could not recall that the statement was not reliable because it was given under duress. The police officer that Kian spoke to at the police station stated that when the call came in regarding the brawl he ran out of the police station, and that Kian ran out right after him and that they exited the police station at the same time. This testimony formed the basis of a prosecution argument to the jury that Khatibi's running out was a sign of his consciousness of guilt. Nick Hobby also testified that he had escorted Kian Khatibi out of the bar, and stated that he saw two people running around the victims.

Kayvan Khatibi, the Defendant's brother, testified that he was at the bar, had six drinks, and had an altercation with one of the victims because one of the victims came up to him and pushed him out of the way to prevent him from talking to a girl. He denied being involved in the altercation outside of the bar or stabbing the victims and stated that he left the bar alone. He further added that both he and Freud were taller than Kian. Kian testified in his own defense, confirming that he had been at the bar, was escorted out, went to the 7-11, came back, saw the altercation; that Duffy pointed at him and



Kian Khatibi

threatened him, and that fearing for his own safety, ran to the police station to report the fight. Dietris Richards testified for the Defense, stating that he saw five kids arguing and that the defendant was not one of them. He said that he saw a person lunge towards the two victims with what looked like a knife, and that he saw blood instantly.

Commentary: I believe in showing respect for the deceased, and certainly former prosecutor Clerkin died a hero's death on March 31, 2000. However, to me that doesn't mean failing to mention when people have been involved in injustices. ADA Clerkin should not have gone

forward with this case, given the inherent unreliability of the prosecution witnesses. A prosecutor should weigh the cases that are brought to him, and not simply prosecute everything. If something is not right about it, it should be handed back to the police for further investigation. If the police are unable to find any new evidence, then in the interests of justice they should not go forward.

Kian Khatibi's defense attorney's performance was certainly inept. The bare minimum that one would expect from a competent attorney would be to utilize prior inconsistent statements in order to challenge the credibility of an eyewitness.

Turning now to the Judge Cowhey; in allowing this wrongful conviction to take place, he must bare significant responsibility. How is it that he could rule that split second identifications, by two people who were excessively drunk, were reliable and thus admissible? Was it not obvious to a trained legal eye, with benefit of having seen many cases, that they were not reliable? When one thinks about how many judges are not upholding the rights of citizens charged with crimes in order to ensure that they receive a fair trial, and that wrongful convictions are not obtained, and then considers the typical conduct of many of these judges, it is downright scary.

Appeal

On his direct appeal, Khatibi's attorney argued that the verdict was against the weight of the evidence in that the Prosecution's own witness denied that the Defendant was in position to inflict the wounds, that he went to the police station for sanctuary right afterwards and that a guilty party was not likely to do that, and that the

cops did not notice any bloodstains on his face, hands, or clothing, nor scrapes or other marks indicating his participation in a fight. Additionally, the fact that the victims were highly intoxicated surely impacted upon the reliability of their split-second identifications. He also argued that the trial had been infected by prosecutorial misconduct, in that the prosecutor, in effect, acted as an unsworn witness by saying to the defendant, while cross examining him, "Well, you had a knife, you could have protected yourself", whereas Khatibi was stating that he did not have a knife and was not in an altercation. The Appellate Division ruled that the verdict was not against the weight of the evidence and the rest of his issues were either not preserved or were without merit.

Commentary: I have written about the inadequacies of appellate review in protecting the innocent. This case illustrates that circumstance well. Considering that Khatibi went to the police station and had no signs of being involved in this incident, I think that it was pretty clear that the verdict was against the weight of the evidence.

Furthermore, there is no excuse for the prosecutorial misconduct. It is well known that a prosecutor may cross-examine and challenge credibility by means of cross-examination, but they are not permitted to be an unsworn witness. The prosecutors who fought against this appeal in the office of then-District Attorney Jeanine Pirro, Lisa Colosi Floria and Richard Longworth Hecht, had to realize that these were meritorious arguments, but nonetheless fought against them. ■

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