

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDUARDO JOIEL HINTON,

Defendant-Appellant.

UNPUBLISHED

May 25, 2010

No. 287477

Wayne Circuit Court

LC No. 08-005022-FC

Before: METER, P.J., and BORRELLO and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent because the police used a photographic array lineup despite the fact that defendant was in custody. When a defendant is in custody, a corporeal lineup, rather than a photo lineup, must be used, *People v Kurylczyk*, 443 Mich 289, 298; 505 NW2d 528 (1993), unless (1) it is not possible to arrange a proper lineup, (2) there are an insufficient number of persons available with the defendant's physical characteristics, (3) the nature of the case requires immediate identification, (4) the witnesses are located far from the site of the in-custody accused or (5) the subject refused to participate in a lineup and by his actions would seek to destroy the value of the identification. *People v Anderson*, 389 Mich 155, 186-187 n 22; 205 NW2d 461 (1973), overruled in part on other grounds, *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004).

Despite this rule, defendant's counsel did not move to suppress the photo array lineup. In his motion for new trial, defendant argued that the photo lineup should have been suppressed and argued that trial counsel was ineffective for failing to seek its suppression. The trial court's ruling did not address this issue, instead focusing on what it saw as multiple reliable photo identifications and in-court identifications. However, a close review of the record reveals that the witnesses were all shown the photo lineup in the same room and that there is conflicting testimony whether the first persons shown the lineup were overheard by the other witnesses stating the number of the photo they had selected. In addition, the in-court identifications were not fully consistent and one of the witnesses, although stating that the photo of defendant was that of the assailant, then stated that the assailant was not in the courtroom despite the fact that defendant was sitting right in front of her.

The reason that corporeal line-ups are required is that they are far superior to photo lineups in getting an accurate identification, i.e. getting to the truth. *Anderson*, 389 Mich at 186-187.

I would remand to the trial court for a hearing to determine why a corporeal lineup was not conducted, whether the reason fell within a recognized exception and, if not, for a *Ginther*¹ hearing as to why trial counsel did not move for suppression of the photo lineup and whether defendant was denied effective assistance of counsel.

/s/ Douglas B. Shapiro

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).