

**People v Brace**

2017 NY Slip Op 33093(U)

December 13, 2017

Supreme Court, Albany County

Docket Number: 4-8463

Judge: William A. Carter

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STATE OF NEW YORK  
COUNTY OF ALBANY

COUNTY COURT

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND ORDER  
Indictment No. 4-8463

DA 625-17

CHEONNE BRACE,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR THE PEOPLE:

HON. P. DAVID SOARES, ESQ.  
Albany County District Attorney  
Albany County Judicial Center  
6 Lodge Street  
Albany, New York 12207

JOSEPH P. BRUCATO, ESQ.  
Assistant District Attorney

FOR THE DEFENDANT:

LAW OFFICES OF DANIELLE NERONI  
668 Madison Avenue  
Albany, New York 12208

ANGELA KELLEY, ESQ.

**WILLIAM A. CARTER, J.**

On August 25, 2017, the defendant was charged by indictment with two counts of menacing in the second degree, class A misdemeanors (Penal Law § 120.14 [1]), and assault in the second degree, a class D felony, (Penal Law § 120.05 [2]). By Decision and Order issued on October 30, 2017, the Court granted the defendant's motions for Wade, Dunaway and Huntley

hearings. A combined suppression hearing was held on December 1, 2017. The People called the following witnesses: Albany Police Officer Michael Delano and Albany Police Detectives Jan Mika and Robert Lawyer. The defendant did not call any witnesses. Based upon the credible evidence adduced at the hearing, the Court makes the following findings of fact and conclusions of law.

#### FINDINGS OF FACT

On June 28, 2017, Albany Police Officer Michael Delano (Delano) was dispatched to the Osborne Street Garage, located at 191 Osborne Street, in the City of Albany. Albany Police Sergeant Basile (Basile) and Albany Police Officer Seward (Seward) accompanied Delano to the location because information was received that the suspect in a church assault investigation (85 Chestnut Street) was about to pick up her car, which had been towed. Upon arrival, Delano saw a woman matching the suspect's description – a light skinned, African-American female with blonde hair standing with a male at the window. Delano, Basile and Seward all arrived at 191 Osborne Street at approximately the same time. Delano engaged the defendant in conversation while Basile spoke with the two employees who had called the police complaining about being menaced by the defendant on June 16, 2017. After speaking with the two employees, Basile instructed Delano to arrest the defendant for the June 16, 2017 menacing. Upon arresting the defendant Delano transported her to the Albany Police Department for booking. Delano only asked the defendant pedigree questions, including her date of birth. Delano interviewed the Osborne Street Garage victim employees and had them sign criminal informations.

One June 28, 2017 Albany Police Detective Jan Mika (Mika) was assigned to investigate the 85 Chestnut Street assault complaint. On July 11, 2017, after reviewing the case file and interviewing the victim by phone, Mika created a photo array. The photo array was

automatically populated and then constructed with five filler photographs chosen by Mika. Mika altered each photograph in the array by placing black dots on the right cheek of each picture and on visible earlobes to cover a facial piercing and earrings. On July 12, 2016, Albany Detective Robert Lawyer (Lawyer), who was unaware of the details surrounding the assault, administered the photo array to the alleged victim, Glenda Bennett and another church employee while at 85 Chestnut Street. Lawyer read the photo array instructions to Bennett and passed her the array face down. The array was viewed privately in a closed room off of the church vestibule. Upon questioning, Bennett said she recognized the No. 2 photograph stating, “[s]he looks like the girl who punched and attacked me on June 28, 2017 in the vestibule.” The other viewing of the photo array did not result in a positive identification.

On July 14, 2017, while at the Albany Police Department, Mika took victim/witness statements concerning the alleged assault. On July 18, 2017, Albany Police Officer Reedy called Mika informing him that the suspect’s car, which was known from being previously towed, had again been towed. In response, Mika sent two police officers to the Osborne Street Garage to arrest the defendant for felony assault. After her arrest, the defendant met with Mika and Lawyer and she invoked her right to counsel.

CONCLUSIONS OF LAW  
DUNAWAY

An eyewitness victim of a crime can provide probable cause for the arrest of their assailant, despite the fact that the victim’s reliability has not been previously established or the information corroborated (see People v Read, 74 AD3d 1245 [2 Dept 1990]; People v Gonzalez, 138 AD2d 622 [1988], lv denied 71 NY2d 1027 [1988]). Probable cause is established absent materially impeaching circumstances, where, as here, the victim of an offense communicates to arresting officers information affording a credible ground for believing the offense was

committed and identifies the accused as the perpetrator (id.). As the defendant was arrested for menacing on the strength of two identified complainants -- employees of Osborne Garage who alleged they were menaced by the defendant with a rubber mallet, probable cause for the defendant's June 28, 2017 arrest was established. Similarly, probable cause for the defendant's July 18, 2017 arrest for felony assault was sufficiently based upon identified citizen complaints, written statements all coupled with Mika's investigation of same including previous tow records of the same vehicle. Motion denied.

#### HUNTLEY

It is the People's burden to prove beyond a reasonable doubt that any statements made by a defendant were given voluntarily (see People v Huntley, 15 NY2d 72, 78 [1965]).

Voluntariness is determined by assessing the totality of the circumstances (see People v Mateo, NY3d 383, 413 [2004]). Statements are involuntary if a defendant was subjected to custodial interrogation without first being given Miranda warnings (see People v Tillery, 60 AD3d 1203, 1205 [2009], lv denied 12 NY3d 860 [2009]).

Here, after being read her Miranda warnings, the defendant invoked her right to remain silent. However, any statements made during the booking process are admissible as spontaneously volunteered (see People v Bryant, 59 NY2d 786 [1983]; People v Burnett, 228 AD2d 788 [3 Dept 1996]) or as responses to pedigree questions (see People v Rodney, 85 NY2d 289, 293 [1995]). Motion denied.

#### WADE

The defendant contends that suppression is warranted because the pretrial identification procedure used by the police was unduly suggestive. A pretrial identification that is unduly suggestive violates due process and is accordingly inadmissible at trial against the defendant (see

People v Smith, 122 AD3d 1162 [2014]). At a Wade hearing, the People have the initial burden of establishing that “the police conduct was reasonable and their procedure was not unduly suggestive” (People v Lawal, 73 AD3d 1287 [3 Dept 2010]). The defendant then has the ultimate burden “to establish that the identification was infected by impropriety or undue suggestiveness” (*id.* at 1287-88; citing People v Chatham, 55 AD3d 1045, 1046 [2008]; People v Chipp, 75 NY2d 327, 335 [1990], cert denied 498 US 833 [1990]). Upon the court finding “no undue suggestiveness, the motion to suppress is denied and the People may admit the identification at trial” (People v Marshall, 26 NY3d 495, 506 [2015]). However, “[i]f the court finds the procedure to be unduly suggestive, and the People have failed to establish by clear and convincing evidence the existence of an independent source for the identification, the motion [to suppress must] be granted” (*id.*). “A photo array is unduly suggestive if some characteristic of one picture draws the viewer's attention in such a way as to indicate that the police have made a particular selection” (People v Davis, 18 AD3d 1016, 1018 [2005], lv denied 5 NY3d 805 [2005], quoting People v Yousef, 8 AD3d 820, 821 [2004], lv denied 3 NY3d 743 [2004]).

Here, the Court finds that the photo array was unduly suggestive in that the black line beneath the defendant's photograph draws the viewer's immediate attention to that photograph (see People v Smith, *supra* at 1163). While there are several issues with the photo array that may support a cumulative effect argument, the primary and insurmountable problem with the array is the distinct thick black line that appears along the entire bottom of the defendant's photograph. The suggestiveness of this marking is apparent upon viewing it as no other picture contains a similar marking. By nature, an underlining something adds emphasis. In this case, the black underline draws the eye immediately to the defendant's photograph as if the police had selected that photograph. In addition, the defendant was described by the complainant as a light-skinned,

African-American female with blond hair. Moreover, photograph no. 3, immediately to the right of the defendant, depicts an entirely dissimilar female with dark brown hair and a different ethnic background than the defendant. While the Court acknowledges that there is no requirement that the other individuals depicted in a photo array be “nearly identical” to the defendant (People v Chipp, supra at 336), here, filler photograph no. 3 bears no similarity to the defendant. Black markings were added to the face of each photograph because filler photograph no. 3 had a facial piercing. Yet inexplicably, filler photographs nos. 4 and 5 depict visible chest tattoos that were not redacted.

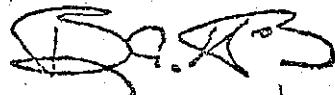
Lastly, while the People did not present any independent source evidence at the Wade hearing so that the Court could rule in the alternative (see People v Wilson, 5 NY3d 778, 780 [2005]), the Court nonetheless grants the People’s application for an independent source hearing. Such hearing will be held on **Friday, January 5, 2018 at 2:00 p.m.** The Court reserves decision on the motion pending the outcome of the hearing.

Any motions not specifically granted herein are hereby denied.

This memorandum shall constitute the decision and order of the Court.

Dated: Albany, New York  
December 13, 2017

  
WILLIAM A. CARTER, JCC

  
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