

People v Little

2015 NY Slip Op 32573(U)

June 25, 2015

Supreme Court, Bronx County

Docket Number: 0309/12

Judge: Denis J. Boyle

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM: PART H94
----- X

THE PEOPLE OF THE STATE OF NEW YORK

- against -

Indictment Number: 0309/12

CHARLES LITTLE,

Defendant.

FILED

JUN 28 2013

SUPREME COURT CLERK'S OFFICE
BRONX COUNTY

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Denis J. Boyle, J.:

A Huntley/Wade/Dunaway hearing has been held before me pursuant to defendant's motion to suppress statements and identification testimony.¹ Detective Anthony Russo testified for the People. Upon the conclusion of the hearing, the defendant's motions to suppress and to preclude were each denied with the instant findings of fact and conclusions of law to follow.

Findings of Fact:

In making the following findings of fact, I note preliminarily, that I credit the testimony of Detective Anthony Russo.

On the morning of September 18, 2011 Mr. Jonathan Lopez walked into the 40th Precinct of the New York City Police Department for the purpose of reporting a robbery which had been committed against him approximately nine hours before. He spoke first, to someone on the ground floor of the precinct and was then referred upstairs to the 40th Precinct Detective Squad where he was interviewed by Police Officer Anthony Russo, in his capacity as an officer assigned

¹ As will be discussed infra, the defendant also moved, during the hearing, to preclude certain statements.

to the 40th Precinct Detective Squad.² Officer Russo's interview with Mr. Lopez began at approximately 10:30 a.m. that morning. In the course of this interview, Mr. Lopez informed Officer Russo, in substance, that he had been at Sin City, a social club located within the confines of the 40th Precinct, the previous night and that after leaving, while walking to his car, he had been approached by a male who had said to him, "[G]ive me everything." (Hearing Transcript pgs. 6-7). He reported further that he had then gotten into the front seat of his car and that the perpetrator and gotten into the back seat of the car, "sitting directly behind him, [and had] pulled out a black firearm and said give me everything" at which point the complainant "was then forced to give over" his property (Hearing Transcript pg. 7). Mr. Lopez indicated that the property which had been taken from him included a ring, a cell phone, one hundred dollars in cash, his car keys and a Chase debit card. He indicated further that after the robbery the perpetrator had fled and that thereafter, he had fallen asleep inside his car (Hearing Transcript pgs. 43 and 46). Mr. Lopez also informed Officer Russo that he had found an identification card while cleaning out the back seat of his car and he provided it to Officer Russo (Hearing Transcript pgs. 8 and 58). The document, a New York State Benefit Card (People's One in evidence), contained the defendant's name, his date of birth and included, as well, a photo of defendant herein (Hearing Transcript pgs. 8-9). Mr. Lopez stated to Officer Russo that the man depicted in the photo on the benefit card was the person who had robbed him. He added that the perpetrator was a male black, 5'7 or 5'8 in height (Hearing Transcript pgs. 60 and 79).

Officer Russo then took the information from the benefits card regarding defendant's name

² The hearing record reflects that now Detective Anthony Russo has been a member of the New York City Police Department for fifteen years.

and date of birth and programmed it into the Precinct photo manager computer application, an "on-line mug shot bank" (Hearing Transcript pg. 9). By doing so, the officer was able to "pull up" a photo of the defendant from the data bank (Hearing Transcript pg. 9). Officer Russo then took the photo of the defendant and placed it in random order into an array of five other male individuals (People's Exhibit Two in evidence).³ Prior to showing the array to Mr. Lopez, Officer Russo read certain instructions to him from a checklist concerning "what [was] about to happen and what the complainant could expect" (Hearing Transcript pg. 12). The officer also read to Mr. Lopez instructions which were printed on the photo array itself. Officer Russo then showed the photo array to Jonathan Lopez. Mr. Lopez proceeded to identify the person depicted in photo number four, defendant herein, as the person who had robbed him the night before. Present also for this procedure was Detective Rodriguez. Approximately twenty minutes had passed between the time when Mr. Lopez had first shown Officer Russo the New York State benefits card and his identification of the defendant in the photo array (Hearing Transcript pgs. 57-58).

Following the positive photo array identification of the defendant, Officer Russo generated an i-card for the defendant and "sent it out to all commands" informing them that the defendant was the subject of an arrest warrant (Hearing Transcript pgs. 13-14; see, pg. 71). As part of his continuing investigation in the months that followed, Officer Russo also prepared a Wanted poster through an on-line system with the defendant's name, last known addresses and photo on it and distributed it in various locations and precincts in the vicinity (Hearing Transcript

³ Reference to People's Two, the photo array in evidence at the hearing, reveals that it consists of six black males; each individual depicted possesses substantially similar physical characteristics including skin tone, age range, build and hair style.

pgs. 42, 48-49).

On January 3, 2012 Officer Wade, assigned to the PSA 8 Housing Crime Unit observed the defendant in a corner bodega and, based upon the officer's recognition of the defendant from a Wanted poster at the 43rd Precinct Housing Command, he placed the defendant under arrest (Hearing Transcript pg. 15). Officer Ward then transported the defendant to the PSA 8 Command and notified Officer Russo. Upon being contacted by Officer Ward with this information, Officer Russo proceeded to the PSA 8 Command in the company of a detective. When Officer Russo and his colleague arrived at PSA 8, Officer Russo introduced himself to the defendant and proceeded to verify through defendant's name, date of birth and a NYSID number check that the defendant was, "in fact, the gentleman that we were looking for" (Hearing Transcript pg. 16). After Officer Russo verified the defendant's identity he informed the defendant that he was under arrest. He placed the defendant in handcuffs and then Officer Russo and the detective drove the defendant to the 40th Precinct. While en route, the defendant inquired, in substance, as to "what is going on," and Officer Russo told him they "will talk about it when we get upstairs" (Hearing Transcript pgs. 67-68).

Subsequent to their arrival at the 40th Precinct Detective Squad, the defendant was escorted to an interview room.⁴ The time was approximately 2:30 p.m. that afternoon (Hearing Transcript pgs. 31-32). In the presence of Detective Parks, Officer Russo then read to the defendant each of his Miranda rights from a Miranda card (People's Exhibit Four in evidence).

⁴ The hearing transcript reflects that the dimensions of the room are approximately twelve feet by twelve feet and that it has a bench in it as well as two or three seats (Hearing Transcript pg. 30). The record further reflects that prior to the defendant's interrogation, he was offered food, drink and the opportunity to use the bathroom (Hearing Transcript pg. 29).

The defendant responded yes verbally to each respective Miranda warning. Officer Russo then had the defendant initial each printed reply on the card. He placed his signature at the bottom of the card as well (Hearing Transcript pg 33; see, pgs. 32-35 and 68-69). The defendant appeared calm throughout this process (Hearing Transcript pg. 35). After the Miranda warnings had been read to the defendant and his waiver of those rights obtained, the defendant gave a verbal statement to Officer Russo. In substance, he told Officer Russo that on the night of September 18, 2011 "he was trying to get into the club, Sin City, but he was talking to the girls that were on the line. He was showing them money because he was trying to get one of the girls to leave with him instead of going inside. He told [Officer Russo] he was going to blow money inside, he [would] much rather take a girl and blow money on her without going in" (Hearing Transcript pg.36). At that point, Officer Russo showed the defendant the benefit card which the complainant had given to the officer, whereupon the defendant stated that " he [had] lost it and that ... it wasn't in the back seat of a car" (Hearing Transcript pg. 39). After seeing the benefits card the defendant's demeanor changed; he "became nervous, visibly disheveled" and "he didn't want to talk [to Officer Russo] anymore" (Hearing Transcript pg. 40). The interview had taken approximately ten minutes (Hearing transcript pg. 69).

Later that afternoon Officer Russo made arrangements for a lineup to be conducted at 1086 Simpson Street. He contacted Jonathan Lopez and thereafter, Detective Rabukis met Mr. Lopez and brought him to 1086 Simpson Street. Upon arrival, Mr. Lopez was placed in a room "[O]n the other side of the floor" from where the fillers were to be kept (Hearing Transcript pg. 19; see, pg. 25). Officer Russo arrived at 1086 Simpson Street with the defendant after the complainant. The officer placed the defendant in a cell and then spoke to the complainant to inquire if he

“needed a drink or a bathroom run” and assured him that “this will be over in a little bit [and that Officer Russo would] be back to get [him] when we’re ready”(Hearing Transcript pg. 66).⁵ In further preparation for the lineup, fillers for the lineup were contacted and upon their arrival at 1086 Simpson Street, they were placed in a separate room from the complainant and from the defendant (Hearing Transcript pg. 19). The defendant was then given his choice of where to sit amongst seats one through six. He chose seat number four. The fillers were then seated in their respective seats in the lineup room by the security officer, Officer Rodriguez, and when that was accomplished, the defendant was escorted into the room and he took his seat in seat number four. The participants in the lineup were then given a plastic bag which they held up to their necks so as to hide their clothing (Hearing Transcript pg. 28). Each of the lineup participants was also issued “the same black wool hat” which they placed on their heads (Hearing Transcript pg. 28). A photograph was then taken of the lineup (People’s Exhibit Three in evidence).⁶

When the lineup was ready to be viewed, Officer Russo spoke to Mr. Lopez to “explain to him what is going on” (Hearing Transcript pg. 20). In doing so, the officer read a checklist of instructions to Jonathan Lopez and, in substance, informed Mr. Lopez “that he was going to view a lineup and [the officer] wanted him to identify anybody that was familiar to him [and] if he does so, he [was] to tell [Officer Russo] where he remembers him from” (Hearing Transcript

⁵ The hearing record reflects that Officer Russo made his inquiries of the complainant as to whether he needed a drink or access to the facilities because “everybody has to be supervised with them there”(Hearing Transcript pg. 66).

⁶ A review of People’s Three, a photograph of the lineup here in issue, reveals that it consists of six black males. They are each seated and each participant has a plastic bag pulled up to their necks, covering their torsos. Each seated participant is wearing a similar black woolen cap on their head and all six lineup participants share similar physical characteristics including age range, facial hair and build.

pg. 27). Officer Russo then escorted Jonathan Lopez into the lineup viewing room. Once inside the room, Officer Russo repeated his instructions to Mr. Lopez again regarding the impending lineup procedure. Officer Russo then pulled up a screen to a two-way window revealing the seated lineup participants in the adjoining room. Upon viewing the lineup, Jonathan Lopez identified the defendant, seated in seat number four, and informed Officer Lopez that he recognized him as the person who had robbed him the night that he was leaving Sin City (Hearing Transcript pg. 27). The time was approximately 5:00 p.m.

Officer Russo then removed Mr. Lopez from the lineup viewing room and brought him back to the room he had previously been waiting in. The officer then brought the photo of the lineup to Mr. Lopez and had him circle and initial the portion of the photo depicting the defendant (Hearing Transcript pg. 28). Thereafter, the defendant was taken back to the precinct and from there, he was transported to Central Booking.

Conclusions of Law:

I will address first, that branch of defendant's motion to suppress which seeks suppression of identification testimony. In support of defendant's motion to suppress identification testimony, defendant contends, in substance, that the photographic identification in this case was suggestive given that the complainant had entered the precinct in possession of a photograph of defendant and, under the circumstance, the People did not go forward at the hearing with sufficient evidence regarding the complainant's ability to make an identification (Hearing Transcript pgs. 96-98). The defendant argues, in further support of this contention, the failure to adduce evidence regarding the complainant's mental state at the time of the incident as well as an absence of evidence at the hearing regarding the lighting conditions inside the vehicle in which

the robbery occurred and more generally, a failure in the hearing record to introduce evidence concerning the complainant's opportunity to observe the perpetrator.⁷ In consideration of defendant's arguments, I would note initially that the photographic array from which the complainant made his identification of the defendant was fairly comprised (*People v. Lee*, 96 NY2d 157; *People v. Drayton*, 70 AD3d 595 [First Dept. 2010], lv. denied 15 NY3d 749; see, *People v. Thomas*, 104 AD3d 710 [Second Dept. 2013]). In this regard, I would add that any arguable difference between defendant's age and skin tone from that of the other males in the photo array was so slight as to be "barely noticeable" and did not render the composition of the photo array suggestive (*People v. Reyes*, 60 AD3d 873 at pg. 874 [Second Dept. 2009], lv. denied 12 NY3d 920; see, *People v. Garris*, 99 AD3d 1018 [Second Dept. 2012], app. denied 21 NY3d 912; *People v. Smith*, 140 AD2d 647 [Second Dept. 1988], app. denied 72 NY2d 961). It bears adding that the image of the defendant in the photo array is a different image than that depicted in his New York State benefits identification card. Moreover, the record satisfies me that the photo array identification procedure was fairly conducted. Clearly, there was no police involvement in the viewing by Mr. Lopez of the benefits card which he found in the backseat of his vehicle (See, *People v. Marte*, 12 NY3d 583; see also, *People v. Liebert*, 71 AD3d 513 [First Dept. 2010], lv. denied 15 NY3d 752; *People v. Stevens*, 44 AD3d 882 [Second Dept. 2007]; cf. *People v. Racine*, 28 Misc3d 1223(A), Supreme Court Kings County [2010]). I find nothing in

⁷ It should be noted as well, "[W]hether or not an actual misidentification has occurred is not the issue at a Wade hearing. At a Wade hearing, the Court is not required to make such a finding; the threshold is only whether the police procedures employed in this case were so flawed that the People are unable to meet their initial burden of going forward to demonstrate the legality of the police conduct and the lack of suggestiveness in the identification procedures used (*People v. Berrios*, 28 NY2d 361 [1974])(*People v. Lewis*, 20 Misc3d 1136(A), Supreme Court Kings County [2008]).

the photo identification procedure conducted by Officer Russo to have been unduly suggestive (See, *People v. Mathis*, 94 AD3d 428 [First Dept. 2012], lv. denied 19 NY3d 975).⁸

In any event, “[B]ecause evidence of a pre-trial photographic identification, even if found not to be suggestive or not to have been tainted by prior suggestive identification procedures, is not admissible at trial (*People v. Caserta*, 19 NY2d 18,20 [1966]), the issue to be decided in this case is not whether testimony concerning the photographic identification should be ‘suppressed’ but, rather, whether testimony concerning the subsequent lineup identification and prospective in-court identification should be suppressed as a result of a finding that the [photo] identification procedure was unnecessarily suggestive ... and tainted by the prior identification procedure” (*People v. Racine*, supra). Here, the record makes clear that the passage of approximately three and a half months between the photographic identification procedure and the lineup identification by Mr. Lopez “attenuated any possible taint of suggestiveness” (*People v. Nedd*, 79 AD3d 1150 at pgs. 1150-1151 [Second Dept. 2010]; see, *People v. Mathis*, supra; *People v. Liebert*, supra; *People v. Thompson*, 17 AD3d 138 [First Dept. 2005], lv. denied 5 NY3d 795; *People v. Hamilton*, 271 AD2d 618 [Second Dept. 2000], lv. denied 95 NY2d 797).

With reference to the lineup procedure itself, the hearing record establishes that the lineup was fairly comprised. Review of *People’s Three*, the photograph of the lineup in issue, reveals that any “minor variations in height ... did not render the lineup impermissibly suggestive or conducive to mistaken identification (citations omitted)” (*People v. Cox*, 54 AD3d 684 at pg. 685

⁸ The photo array identification of the defendant by the complainant, Mr. Lopez, provided probable cause for defendant’s arrest for the robbery committed upon Mr. Lopez (*People v. Higgins*, 178 AD2d 199 [First Dept. 1991], app. denied 80 NY2d 832; *People v. Woolcock*, 7 Misc3d 203, Supreme Court Kings County [2005]).

[Second Dept. 2008], lv. denied 11 NY3d 896; *People v. Grant*, 43 AD3d 800 [First Dept. 2007], lv. denied 9 NY3d 990). Indeed, in this case, “any discrepancy in height between the defendant and the fillers was minimized by the fact that the witness[es] viewed the lineup participants while the participants were seated (citations omitted)” (*People v. Solis*, 43 AD3d 1190 at pg. 1191 [Second Dept. 2007], lv. denied 9 NY3d 1009; see, *People v. Jackson*, 61 AD3d 620 [First Dept. 2009], lv. denied 13 NY3d 745, *Habeas Corpus Denied* 2012 WL 2512015 [EDNY 2012]; *People v. Grant*, supra). Further, “all of the lineup participants appear[ed] to be roughly the same age” (*People v. Reyes*, supra). Similarly, any “variation in skin tone among the various members of the lineup was not significant” (*People v. Stephens*, 254 AD2d 105 [First Dept. 1998], lv. denied 93 NY2d 879; see, *People v. Lind*, 20 AD3d 705 [Third Dept. 2005], lv. denied 5 NY3d 830; *People v. Fewell*, 43 AD3d 1293 [Fourth Dept. 2007], lv. denied 10 NY3d 862; *People v. Villacreses*, 12 AD3d 624 [Second Dept. 2004], lv. denied 4 NY3d 768, *Habeas Corpus Denied* 485 F. Supp. 2d 239, *Affd.* 327 Fed. Appx. 303 ; *People v. Stevens*, supra). I would add that the placing of woolen caps on the head of each lineup participant and the draping of their torsos operated to further minimize potential for an unduly suggestive element in the composition of the lineup (*People v. Farrell*, 28 AD3d 244 [First Dept. 2006], lv. denied 6 NY3d 894; *People v. Brown*, 47 AD3d 826 [Second Dept. 2008], lv. denied 10 NY3d 838). In short, the lineup was fairly composed and surely not unduly suggestive (*People v. Chipp*, 75 NY2d 327 [1990], cert denied 498 US 833). The hearing record also makes clear that the lineup identification procedure in question was fairly conducted. For the foregoing reasons, I find that “the lineup was lawful since he was already in lawful custody when he was placed in the lineup (citations omitted)” and further, that the instant record presents no basis for suppression of identification testimony.

(People v. Stevens, supra at pg. 883; see foot note 8, supra). The defendant's motion to suppress identification testimony is, therefore, in all respects, denied.

I will address next, the defendant's dual motions to suppress a portion of the statement he gave to Officer Russo on January 3, 2012 and to preclude a portion of that statement which defendant contends was not properly noticed pursuant to CPL section 710.30(1)(a). I would begin this analysis by noting that the statement in issue was constitutionally obtained. The defendant was, as indicated supra, lawfully arrested and thus, legally in custody at the time he gave this statement to Officer Russo. Moreover, the hearing record establishes that while in custody he was properly issued a full set of Miranda warnings prior to his interrogation and his waiver of those rights was clearly a knowing, intelligent and voluntary one. The exculpatory thrust of his statement reinforces this conclusion (People v. Harris, 167 AD2d 220 [First Dept. 1990], app. denied 77 NY2d 878). To the extent that defendant seeks suppression of that part of the statement for which he does not seek preclusion, that motion is denied.

A determination of that branch of defendant's motion which seeks preclusion of a portion of defendant's statement to Officer Russo requires reference to the statement included in the People's 710.30(1)(a) notice and a comparison of it to the statement attributed to the defendant by Officer Russo as testified to at the hearing before me. The statement notice in this case by the People reads, "I remember being around Sin City on September 18, 2011 when I was trying to get women to come with me instead of going inside the club. I was going to blow the money inside, so I might as well blow the money outside.

I called a cab, called DAT cab to get there. I was alone. I was showing off to the girls on line. I had my I.D. with me. Yeah, that's my benefit card. Yeah, that's me. I didn't leave it in

anyone's car" (Hearing Transcript pgs. 38-39). The statement testified to at the hearing is discussed and quoted, *supra*. The defendant's motion to preclude a portion of his statement turns on the argument that the pretrial 710.30(1)(a) notice provided by the People to the defendant, unlike the statement testified to at the hearing itself, did not include reference to defendant's denial that he had left the identification card in the "backseat" of a car (See, Hearing Transcript pgs. 88-91). In support of this argument, defense counsel maintains, in substance, that the omission of a specific reference to the backseat of the car in the People's 710.30(1)(a) notice renders the statement testified to at the hearing substantially more incriminating than the statement reflected in the People's statement notice, requiring, in turn, preclusion of the more incriminating portion of defendant's statement (*People v. Greer*, 42 NY2d 170). In *People v. Greer*, *supra*, relied upon by the defendant, the unnoticed portion of defendant's statement was highly incriminating and operated to change entirely the tenor of the statement which was the subject of the CPL 710.30 notice in that case. There, the statement in its entirety manifestly changed the statement in issue from an exculpatory statement to an inculpatory one. Here, by contrast, while the statement testified to at the hearing before me varies somewhat from that set forth in the People's notice pursuant to CPL 710.30, it is a variation of minor import. As held in *People v. Coleman* (256 AD2d 473, *lv. denied* 93 NY2d 872 [Second Dept. 1998]), "[A]lthough the statement identified in the notice provided pursuant to CPL 710.30 differed somewhat from the statement provided by the police officer at the pretrial hearing, suppression of the statement was not warranted because the CPL 710.30 notice notified the defendant of the sum and substance of the statement (see, *People v. Reid*, 215 AD2d 507 ; *People v. Martinez*, 203 AD2d 212). Moreover, to the extent that the CPL 710.30 notice did not include the entire statement,

the remaining part of the statement was made to the same police officer during the same conversation, in the same location as the statement identified in the CPL 710.30 notice.

Therefore, the defendant was given sufficient notice of the statement as to enable him to timely move to suppress it (see, *People v. Martinez*, supra; see also, *People v. Rodney*, 85 NY2d 289; *People v. Lopez*, 84 NY2d 425)" (*People v. Coleman*, supra at pg. 474). Accordingly, the defendant's motion to preclude that portion of the defendant's statement which defendant claims was insufficiently noticed pursuant to CPL 710.30 is denied (*People v. Coleman*, supra; *People v. Cabrera*, 63 AD3d 1176 [Second Dept. 2009], lv. denied 13 NY3d 834; *People v. Carter*, 44 AD3d 677 [Second Dept. 2007], lv. denied 9 NY3d 1031).

For the foregoing reasons, the defendant's respective motions to suppress evidence of his statement to Officer Russo and separately, to preclude a portion of his statement to Officer Russo on the ground of insufficient CPL 710.30 notice are each, in all respects, denied.

This opinion constitutes the decision and order of the Court.

Date: *June 25, 2013*

DJB

Denis J. Boyle, A.J.S.C.