SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

ISAIAH HILL,

Defendant.

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DECISION AND ORDER

Ind. No. 13-00668-01

NEARY, J.

The defendant has been indicted for the crimes of Murder in the Second Degree, Criminal Possession of a Weapon in the Second Degree and Criminal Possession of a Weapon in the Third Degree. It is alleged that on or about May 19, 2013, the defendant did illegally possess a handgun he used to intentionally cause the death of one Christopher Foe. The defendant claiming to be aggrieved by the improper or unlawful acquisition of evidence has moved to suppress statements allegedly made by him to police personnel of the Mount Vernon Police Department on May 24, and 25, 2013 on the ground that they were involuntarily made, and to exclude the identification testimony at trial of two civilian witnesses on the ground that the

identifications would not be admissible because of an improperly made prior photographic identification of the defendant by the prospective witnesses.

The People have the burden of going forward to show that the pre-trial identification procedure was not constitutionally impermissible. The defendant, however, bears the burden of establishing by a preponderance of the evidence, that the procedure was impermissible.

If the procedure is shown to be impermissible, the People have the burden of showing by clear and convincing evidence that the prospective in-court identification testimony, rather than stemming from the unfair pre-trial procedure or confrontation, has an independent source.

The People must establish the voluntariness of the statements attributed to the defendant beyond a reasonable doubt before they are admissible at trial.

Per the decision of this Court dated November 6, 2013, *Huntley* and *Sandoval/Ventimiglia* Hearings were ordered to be held prior to trial. On June 5, 2014, combined *Huntley and Wade* hearings were held by this Court. Said *Wade* hearing, though not ordered was agreed upon by the parties. At this combined hearing, the People called the following witnesses: Police Officer Jesus Garcia, Police Office Jose Centeno and Sergeant Robert Wuttke. The following exhibits were received into evidence during the hearing: two photo arrays and a handwritten transcript. The defendant called no witnesses and offered no

evidence. At the conclusion of the aforementioned hearing, the parties agreed to a *Sandoval* compromise.

The Court finds the testimony offered by the People's witnesses to be plausible, candid, and fully credible. The Court makes the following Findings of Facts and Conclusions of Law.

FINDINGS OF FACT

In the early morning hours of May 19, 2013, Christopher Foe, an alleged member of a local street gang known as GMG, was fatally shot inside the Alamo Bar in Mount Vernon, New York. Surveillance video from within the bar captured portions of a physical altercation between the deceased and the defendant moments before the shooting. The defendant can also be seen fleeing the bar. The defendant is known to the Mount Vernon Police Department to be a member of GMG's rival gang named Goonies. The two gangs have a long, confrontational and violent history.

After searching unsuccessfully over several days for the defendant and two cohorts, the Mount Vernon Police Department detectives raided an apartment in Yonkers on May 24, 2013 and placed the defendant into custody. Apparently, no *Miranda* Warnings were ever administered to the defendant who almost immediately after arrest invoked his right to counsel.

Subsequently to his arrest in Yonkers, the defendant was placed in the back seat of a police vehicle and driven to Mount Vernon Police Headquarters. Seated next to him during the ride was Police Office Jesus Garcia. Once at the police department, Officer Garcia was assigned to guard the defendant who was seated and cuffed to a chair in an interview room.

Without being prompted in any manner, the defendant stated to Police Officer Garcia in substance: Ya'll didn't have to roll up on me like that. I was working something out with my lawyer and was planning on turning myself in tomorrow or fuck it just let ya'll try and see if you can catch me.

Later that evening, the defendant was being booked by Sergeant Robert Wuttke who was under the impression the defendant had asked for an attorney and could not be questioned. During the booking process, the defendant asked the Sergeant what he was being charged with and was told the charge was Murder in the Second Degree. The defendant then asked in substance if he thought it was possible something else could have happened inside the bar. Sergeant Wuttke replied that he thought it possible and that the defendant should speak to his attorney about that. During the booking process, the defendant lifted his shirt several times exposing numerous old scars and wounds on his torso. Sergeant Wuttke inquired about the scars and was told by the defendant they resulted from prior gunshots and pointed to his jaw area indicating verbally that injury too was the result of a gunshot.

Once booked, the defendant was placed in one of several cells in the Mount Vernon Police Department holding area. Adjoining cells apparently contained some individuals

known to the defendant. Police Office Jose Centeno was assigned to an eight (8) hour shift in the cell block and tasked with the job of sitting near the defendant's cell and observing his behavior and listening to any conversation he had.

Over an approximately ninety (90) minute span between midnight and 2:00 A.M., Police Officer Centeno scrupulously jotted down, almost verbatim, conversations that the defendant had with fellow prisoners.

Police Officer Centeno's handwritten notes were entered into evidence as People's Exhibit No. 33. The defendant's comments among other things during this period include comments about how police were searching for him and ultimately located him. He also speculates that an individual may have cooperated with police and disclosed his whereabouts. The defendant also notes he is resigned to spending time in prison.

During the afternoon of May 19, 2013, Sergeant Wuttke created a photo array consisting of a picture of the defendant and five computer generated filler portraits. He showed the array (People's Exhibit No. 34D) to an Alamo Bar security employee who selected the picture of the defendant as the individual who interacted with the deceased prior to the shooting.

A similar six (6) pack photo array (People's Exhibit No. 35) was shown to one Anthony James, a bar patron, on May 28, 2013 at police headquarters by Sergeant Wuttke. He too chose the photo of the defendant, indicating he was the shooter.

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CONCLUSIONS OF LAW

Photo Arrays:

A photo array is suggestive when some characteristic of one picture draws a viewer's attention to it, indicating that the police have made a particular selection. [See *People v. Miller*, 33 AD3d 728; *People v. Wright*, 297 AD2d 391]. In this case, there is no evidence supporting the defendant's position that his picture differs significantly from those of the fillers. All men depicted appear to be the same age and complexion. Their hair styles and facial hair are similar as are their clothing and backgrounds. The record is unchallenged concerning how the witness was instructed prior to his viewing of the array.

The defendant has not shown by a preponderance of evidence that either of the photo array identification procedures was unduly suggestive; nor has he demonstrated any misconduct by the police in how the procedures were conducted. Thus, his motion to suppress both must fail. [See *People v. Adams*, 53 NY2d 241].

The Court also finds that there existed probable cause for the defendant's arrest and, thus, the use of his booking photo in the May 28, 2013 array was appropriate.

Statements:

The People apparently concede that the defendant was never Mirandized prior to making his alleged statements that are the subject of this hearing.

It appears that Police Officer Jesus Garcia never engaged the defendant in conversation from the time of his arrest until the defendant made the aforementioned statements about being "rolled up on" and trying to arrange a surrender with an attorney.

The defendant initiated the conversation with Sergeant Wuttke during the booking process by inquiring what charge he faced and by asking if the Sergeant felt something else could have occurred in the bar. The Sergeant's reply was minimal and cannot be interpreted as an interrogation. The same rationale does not hold true concerning the inquiry the Sergeant made about the scars and wounds on the defendant's torso. These questions can be viewed as the "subtle maneuvering" by police designed to elicit incriminating responses. [See *People v. Keith Rivers*, 56 NY2d 476 and *People v. Lynes*, 49 NY2d 286].

Thus, the portion of the booking conversation during which the defendant describes the origins of his wounds, scars and injuries is suppressed and may not be used on the People's direct case. The Court finds, under *Harris,* that should the defendant testify, these statements can be used for impeachment if warranted since there is no evidence of coercion on the part of the police.

Further, the Court finds that the extensive handwritten notes taken by Police Officer Centeno, while guarding the defendant in the cell block, are admissible since it is clear beyond any reasonable doubt that those statements were spontaneous and voluntary. Indeed, while the defendant was in custody, there is no evidence that he was being questioned by any

police personnel. Police are under no obligation to muzzle a defendant who elects to engage in loud conversation with other prisoners across a cell block.

Clearly, volunteered statements are admissible provided, as here, the defendant "spoke with genuine spontaneity, and not as the result of inducement, provocation, encouragement or acquiescence, not matter how subtly employed." [See *People v. Rivers*, 56 NY2d 476, 479 quoting *People v. Maerling*, 46 NY2d 289 and *People v. Tyrell*, 67 AD3d 827].

This constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
June 6, 2014

Robert A. Neary

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ACTING SUPREME COURT JUSTICE

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