People v Holmes
2015 NY Slip Op 32895(U)
December 8, 2015
Supreme Court, Kings County
Docket Number: 8968-2013
Judge: Vincent M. Del Giudice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS - CRIMINAL TERM - PART 25

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PEOPLE OF THE STATE OF NEW YORK

IND. NO. 8968-2013

vs.

DECISION and

TREMAINE HOLMES ORDER

Defendant.

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The defendant is charged with Murder in the Second Degree and Attempted Murder in the Second Degree, *et al.* A *Huntley/Wade* hearing was conducted before this court on November 24, 2015. The defendant seeks to suppress statements he made after he was apprehended by Brooklyn detectives while in Binghamton, New York, and lineups conducted thereafter at the 60th Precinct, in Brooklyn.

The People called one witness at the hearing: Detective Michael DeOrio. I find his testimony to be credible, reliable and worthy of belief.

Findings of Fact

On August 16, 2013, Detective Michael DeOrio was assigned to investigate a shooting that had occurred earlier that morning. Perice Brown and another individual were shot in the vicinity of 30 Avenue V, in Brooklyn's Marlboro Projects.

Early in the investigation, the defendant was named as a suspect. Detective DeOrio then compiled a photo array with a photograph of the defendant appearing in position number one.[1]

At 5:30 AM, the photo array was shown to People's witness number

[1] The photo array was introduced into evidence as People's exhibit number one.

one.[2] Detective DeOrio read a series of instructions to the witness prior to showing the witness the photo array.[3] Witness one then made a positive identification of the defendant as being the shooter. After the identification, Detective DeOrio made a wanted card for the defendant's apprehension.

On September 9, 2013, Detective DeOrio displayed a photo array to a second witness.[4] Prior to revealing the photo array to this witness, Detective DeOrio read the witness a series of instructions that were designed to be read before photographic identification procedures.[5] After being so instructed, witness two then reviewed the photo array and identified the defendant, who was in position five, as the shooter.

On October 16, 2013, the defendant was located in Binghamton, New York. The defendant was apprehended by Detective DeOrio in the rear of 272 Main Street, in Binghamton, while seated in a parked vehicle along with Jessica DelValle.

While being transported to the local Binghamton police precinct, the defendant volunteered that Ms. DelValle had nothing to do with the incident for which the defendant was accused of and that he forced her to accompany him.

At the precinct, Detective DeOrio orally read the defendant his *Miranda* rights.[6] Unlike the instructions that were read before the photo identifications, Detective DeOrio recited the *Miranda* warnings from memory and did not require the defendant to sign, nor memorialize, the waiver of the rights he was waiving. Detective testified as follows:

> I advised him he has the right to remain silent and refuse to answer any questions. I advised him that anything he says can

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[2] The name of this witness is subject to a protective order until trial commences.

[3] These instructions were introduced into evidence as People's exhibit number two.

[4] This photo array was introduced into evidence as People exhibit number three. Again, this witness's identity is currently protected by a pre-trial protective order.

[5] These instructions were introduced into evidence as People's exhibit number four.

[6] *Miranda v Arizona*, 384 US 436, 479 (1966).

> be used against him in a court of law. I advised him that he has a right to have an attorney present during any police questioning now or in the future. I advised him that if he cannot afford an attorney, one will be provided to him without cost. And I also advised him that if he didn't have an attorney available, he had the right to remain silent until he had the opportunity to consult with one. And then I asked him if he was willing to answer any questions.

(Transcript of hearing, at pages 15-16).

After being read his warnings, defendant was asked about an incident that occurred in the Marlboro Projects on August 15, 2013, at 30 Avenue V. The defendant stated that he was not in the area at the time because he was at a party in Manhattan. He denied any involvement in the shooting. He also claimed that his girlfriend, Ms. DelValle, had nothing to do with the shooting. He reiterated that he had threatened Ms. DelValle by forcing her to meet him while he was avoiding the police. He also stated that he lived at 30 Avenue V, apartment 16G, and was a Crip member. The defendant was then driven to Brooklyn but he did not make any incriminating statements during the ride.

Once the defendant and the detectives arrived at the 60th Precinct, the defendant was placed in a holding cell prior to the formulation of two lineups.

At 11:25 AM, on October 16, 2013, a lineup featuring the defendant was conducted on the first floor of the precinct. The two witnesses who earlier viewed the photo arrays returned to the precinct to view the lineups. The witnesses were separated from one another upon their arrival to the precinct and steps were taken to prevent either witness from viewing the defendant, or any of the fillers used to supplement the lineup, until the appropriate time.

At the lineup, the defendant chose to sit in position number two.[7] Prior to viewing the lineup, each of the witnesses were read a series of

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[7] Photographs of the lineups were introduced into evidence as People's exhibits

instructions from a printed form.[8] The first lineup was conducted at 11:25 AM. Witness number one viewed the lineup and identified the defendant as the person the witness saw shooting.

Witness two was then read the same series of instructions.[9] This witness then viewed the lineup and identified the defendant as the guy from the fifteenth floor he saw shooting at the men who were running.

After the lineups, the defendant was formally placed under arrest. He made no further statements.

Conclusions of Law

Huntley

In any case where the defense challenges the admission of a defendant's statement, or series of statements, the People must prove the voluntariness of any such statement beyond a reasonable doubt (*People v Huntley*, 15 NY2d 72, 78 [1965]; see also *People v Holland,* 48 NY2d 861, 862 [1979]; *People v Anderson,* 42 NY2d 35, 38-39 [1977]).

It is black letter law that the police may not interrogate a person who is in police custody without first giving that person his or her *Miranda* warnings (*Miranda v Arizona*, 384 US 436, 479 [1966]).

If it is proven that the suspect was subjected to custodial interrogation by a member of law enforcement, the prosecutor's burden includes the duty to prove, beyond a reasonable doubt, that the suspect was advised of his *Miranda* rights and that he knowingly and voluntarily waived those rights prior to making any statements sought to be introduced at trial (*Miranda*, 384 US at 471-472).

As stated earlier, *Miranda* warnings are required whenever a person is subject to custodial interrogation. Whether a person is in custody is

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six and seven.

[8] These instructions were introduced into evidence as People's exhibit number five.

[9] These instructions were introduced into evidence as People's exhibit number eight.

generally a question of fact. The standard the court must apply is what a reasonable person, innocent of any crime, would have thought had he been in the defendant's position when questioned by members of law enforcement (*People v Yukl*, 25 NY2d 585 [1969]). Factors to be considered include: (1) the amount of time the suspect spent with the police; (2) whether the suspect's freedom of action was restricted; (3) the location and atmosphere under which the questioning occurred; (4) the degree of cooperation exhibited by the suspect; (5) whether constitutional warnings were administered; and (6) whether the questioning was investigatory or accusatory in nature (*People v King*, 222 AD2d 699, 699 [2nd Dept 1995]; *People v Macklin*, 202 AD2d 445, 446 [2nd Dept 1994], *lv denied* 83 NY2d 912; *People v Arcese*, 148 AD2d 460, 460-461 [2nd Dept 1989], *lv denied* 74 NY2d 661).

"The special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation" (*Rhode Island v Innis*, 446 US 291, 300 [1980]; *People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007; *People v Tavares-Nunez*, 87 AD3d 1171, 1172 [2nd Dept 2011]). Not every statement made by a suspect in custody is subject to *Miranda*. Only those statements that are the product of custodial interrogation.

The term "interrogation" refers not only to express questioning, but also to any words or actions on the part of the police, other than those normally attendant to arrest and custody, that the police know, or should know, are reasonably likely to elicit an incriminating response (*Rhode Island v Innis*, 446 US at 301; *Ferro,* 63 NY2d at 322). The definition of interrogation can also extend to words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response (*Rhode Island v Innis*, 446 US at 301-302). Simply stated, the *Miranda* safeguards come into issue, and must be administered to a person, whenever a person in custody is subjected to either express questioning or its functional equivalent (*Rhode Island v Innis*, 446 US at 300). "The question is not what was the subjective intent of the police but rather what

words and actions, in light of their knowledge concerning the suspect, they 'should have known were reasonably likely to elicit an incriminating response'" (*Ferro*, 63 NY2d at 322-323; *Rhode Island v Innis*, 446 US at 302).

In this case, the testimony provided by Detective DeOrio was somewhat vague and inconclusive as to the facts and circumstances surrounding the initial questioning of the defendant upon his apprehension in Binghamton. Since the defendant was clearly in custody at the time Detective DeOrio apprehended him, any questioning by the detective required the defendant to first be advised of his rights under *Miranda*. It is uncontroverted that defendant was never read his *Miranda* warnings at the scene of his apprehension. The People's assertion that the defendant volunteered the statements attributed to him were not proven to this court's satisfaction, beyond a reasonable doubt. Accordingly, the initial statements the defendant made to Detective DeOrio must be suppressed.

With respect to the statements the defendant made at the local police precinct, I find that the People have also failed to meet their burden of establishing, beyond a reasonable doubt, that those statements were freely and voluntarily made.

I find it disconcerting that Detective DeOrio, who was so meticulous to read the approved warnings prior to the photographic and lineup identification procedures, failed to memorialize his reading of the defendant's *Miranda* warnings or the interrogation of the defendant.

During oral argument, the prosecutor claimed that the defendant's statements were admissible, even in the absence of *Miranda* warnings because the initial statements all fall under the pedigree exception to the *Miranda* rule.

In *People v Rodney* (85 NY2d 289 [1995]), our Court of Appeals held that pedigree information, obtained as the result of routine police questioning, is exempt from the notice requirement of CPL §710.30 because pedigree questioning is usually not designed to elicit an incriminating response when such questioning is "reasonably related to the police's administrative concerns" (*Pennsylvania v Muniz*, 496 US 582, 601-602 [1990])(see also, *People v Slade*, -----AD3d ----, 2015 NY Slip Op. 08252 [4th

Dept 2015][pedigree suppressed since question was likely to elicit an incriminating response under the circumstances]; *People v Allen*, 118 AD3d 902 [2nd Dept 2014], *lv denied* 25 NY3d 949 [asking defendant to supply his true name as part of pedigree process is not interrogation]; *People v Carrasquillo*, 50 AD3d 1547 [4th Dept 2008][defendant's date of birth is pedigree information that is not suppressible even if obtained without adequate warnings]; *People v Velazquez*, 33 AD3d 352 [1st Dept 2006], *lv denied* 7 NY3d 929][defendant's address not suppressed since defendant revealed it during the booking process]).

In the case before this court, Detective DeOrio initiated his conversation with the defendant immediately upon his apprehension of the defendant. The defendant did not reveal his address as part of the routine booking process but in response to questioning by Detective DeOrio that the prosecutor now intends to use on its direct case to show the defendant's knowledge of the location of the crime. Even if the information obtained is pedigree, the manner in which it was obtained in this case differs from that of routine questioning asked during the normal booking process. Although *Velazquez* can be argued to the contrary, this court is not prepared to hold that merely because the information was eventually revealed during the booking process it is therefore exempt from the formal notice requirement.

Accordingly, the defendant's statements to Detective DeOrio are hereby suppressed, during the People's direct case, and even the defendant's address may not be elicited as part of the defendant's pedigree.[10]

Wade

It is axiomatic that the purpose of a *Wade* hearing is to determine

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[10] During oral arguments, the defense conceded that the statements could be used at trial if the defendant elected to testify, as *Harris* material (*People v Harris*, 25 NY2d 175 [1969], *aff'd sub nom Harris v New York*, 401 US 222 [1971]). After the court gave its oral decision from the bench, but prior to openings, the defense consented to allowing Detective DeOrio testify as to the address given to him by the defendant at the time of his apprehension in Binghamton, as a tactical decision to prevent its establishment at trial by other means.

whether police conducted pre-trial identification procedures were unduly and impermissibly suggestive so as to deny a defendant due process (*Stovall v Denno*, 388 US 293 [1967]; *People v Adams,* 53 NY2d 241 [1981]). In this case, the defendant challenges the photographic arrays and the lineups.

Photo Arrays

"A photo array is unduly suggestive 'where some characteristic of one picture draws the viewer's attention to it, indicating that the police have made a particular selection'" (*People v Smiley*, 49 AD3d 1299, 1300 [4th Dept 2008], *lv denied* 10 NY3d 870, quoting *People v Diggs*, 199 AD3d 1098, 1098 [4th Dept 2005], *lv denied* 5 NY3d 787; *People v Robert*, 184 AD2d 597, 598 [2nd Dept 1992], *lv denied* 80 NY2d 929, 933)(see also, *People v Boria*, 279 AD2d 585, 586 [2nd Dept 2001], *lv denied* 96 NY2d 781; *People v Cherry*, 150 AD2d 475 [2nd Dept 19 89]; *People v Dubois*, 140 AD2d 619,622 [2nd Dept 1988], *lv denied* 72 NY2d 911).

This court has examined the computer generated photo arrays introduced into evidence as People's exhibits one and three. In exhibit one, Detective DeOrio used a black marker to conceal the necks and shoulders of each of the men in the photo array.[11]

In each array, the defendant's appearance and pose does not differ in any apparent manner from those of the other men in the photographs. All of the men appear to be close in age and have similar hairstyles, skin tones and facial characteristics (*People v Howard,* 50 AD3d 823 [2nd Dept 2008], *lv denied* 10 NY3d 935; *Robert*, 184 AD2d at 598). The men depicted in each of the photo arrays were sufficiently similar in appearance so that the identification procedure was not rendered unduly suggestive (*Howard*, 50 AD3d at 823; *People v Ragunauth*, 24 AD3d 472, 472 [2nd Dept 2005], *lv denied* 6 NY3d 779; *People v Malphurs*, 111 AD2d 266, 267-268 [2nd Dept 1985], *lv denied* 66 NY2d 616). "The composition and presentation of the photo array were such that there was no reasonable possibility that the attention of the witness would be drawn to defendant as the suspect chosen by the police" (*People v Sylvester*, 32 AD3d 1226, 1227 [4th Dept 2006], *lv denied* 7 NY3d 929; *People v Dean*, 28 AD3d 1118 [4th Dept 2006], *lv denied* 7 NY3d 787; *see generally People v Chipp*, 75 NY2d 327, 335-336 [1990], *cert denied* 498 US 833).

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[11] No such markings are apparent in exhibit three but the six men in the array all appear to be wearing similar dark crew neck t-shirts. No neck tattoos are apparent.

Accordingly, the photo arrays were not suggestive and do not give rise to an impermissible in-court identification.

Lineup

Defendant contends that evidence of his lineup identifications should be suppressed because the lineups were unduly suggestive. To meet their burden of proof, the People introduced into evidence photographs that were taken of the lineup (People's exhibits six and seven).

It is axiomatic that while participants in a lineup should share the same general physical characteristics as the suspect (*People v Kirby,* 34 AD3d 695, 695 [2nd Dept 2006], *lv denied* 8 NY3d 881; *People v Burns*, 138 AD2d 614, 615 [2nd Dept 1988], *lv denied* 71 NY2d 1024) "there is no requirement ... that a defendant in a line-up be surrounded by people nearly identical in appearance" (*Chipp*, 75 NY2d at 336; *Matter of Raymond A.,* 178 AD2d 288, 289 [1st Dept 1991])(*see also People v Hoehne*, 203 AD2d 480, 481 [2nd Dept 1994], *lv denied* 83 NY2d 967; *People v Henderson*, 170 AD2d 532, 533 [2nd Dept 1991], *lv denied* 77 NY2d 995; *People v Jackson,* 151 AD2d 694, 694 [2nd Dept 1989]). "Police stations are not theatrical casting offices" (*United States v Lewis*, 547 F2d 1030, 1035 [1976], *cert denied* 423 US 1111). In addition, "identical clothing is not required to be worn by the lineup standins where, as here, common and similar apparel is used" (*People v Buxton*, 189 AD2d 996, 997 [3rd Dept 1993], *lv denied* 81 NY2d 1011)(*internal citations omitted*).

Defendant contends that the Lineup Information Report (which was introduced into evidence as People's exhibit eight) establishes that other lineup participants were insufficiently similar to the defendant. The defendant is listed as 5 foot 11. The shortest filler was 5 foot 9. The tallest filler was an even six foot tall. Those numbers are remarkably similar. The defendant weighed 240 pounds. The lightest filler weighed 174 pounds. The heaviest filler also weighed 240 pounds. The defendant's age was listed as 31. The youngest filler was 27. The oldest filler was 49. Clearly there is some disparities in the ages of the fillers.

The People contend that despite the difference in age, the only issue to be addressed by this court is the physical appearance of the lineup participants as they appear in People' exhibit five.

As noted by our Court of Appeals, "an age discrepancy between a defendant and the fillers in a lineup, without more, is not 'sufficient to create a substantial likelihood that the defendant would be singled out for

identification'" (*People v Jackson*, 98 NY2d 555, 559 [2002], *quoting Chipp*, 75 NY2d at 336). In determining whether a lineup is fair, it is not the actual age of the participants in the lineup that matter, but how old each of the participants appears (*People v Pinckney*, 220 AD2d 539, 539 [2nd Dept 1995], *lv denied* 87 NY2d 906; *People v Glaspie*, 170 Misc2d 828, 832 [Sup Ct, Queens County 1996]). Numerous cases have held that despite the differences in the ages between a suspect and the fillers in a lineup, that fact, standing alone, does not render a lineup unduly suggestive, provided the age differences are not apparent to the viewer and provided the fillers bear a resemblance to the defendant (*People v Reyes*, 60 AD3d 873 [2nd Dept 2009], *lv denied* 2 NY3d 920; *People v Smith*, 299 AD2d 566 [2nd Dept 2002], *lv denied* 99 NY2d 632; *People v Bryan*, 228 AD2d 244 [1st Dept 1996], *lv denied* 88 NY2d 1019; *People v Cruz*, 220 AD2d 253 [1st Dept 1995], *lv denied* 87 NY2d 920; *People v Veeney*, 215 AD2d 605 [2nd Dept 1995], *lv denied* 86 NY2d 875; *People v Foster*, 200 AD2d 196 [1st Dept 1994]; *People v Rudolph*, 161 AD2d 115 [1st Dept 1990], *lv denied* 76 NY2d 795; *People v Malone*, 157 Misc2d 86 [Sup Ct, Queens County 1993]).

This Court has closely examined People's exhibits six and seven. The exhibits contain three color photographs.[12] All six men at the lineup were wearing identical blue shower caps, with black garbage bags covering their clothing from the chest down.[13] Each of the participants was holding a rectangular sheet of paper containing a number from one to six. The shower caps hid any disparities in hairstyle and the garbage bags limited and differences in weight and clothing.

Accordingly, I find that the lineup constitutes a fair and representative panel upon which a civilian witness could make a trustworthy and reliable identification. The defendant's physical characteristics were sufficiently similar to the other participants so as to negate any likelihood that the defendant would be singled out for identification based on his appearance (*Jackson*, 98 NY2d at 559; *Chipp*, 75 NY2d at 336; *People v Bacchus*, 50 AD3d 818, 819 [2nd Dept 2008], *lv denied* 11 NY3d 785; *People v Washington*, 40 AD3d 1136, 1137 [2nd Dept 2007], *lv denied* 9 NY3d 883;

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[12] Exhibit seven is a color photograph of all six men in the lineup. Exhibit six contains two separate photos. The first photo shows fillers one and three and the defendant, who is holding the number two. The second photo displays fillers four, five and six.

[13] The testimony elicited was uncontroverted that when the two witnesses viewed the lineups, the fillers were directed to lift the black garbage bags under their chins, in order to avoid any distraction caused by differences in clothing.

People v Davis, 27 AD3d 761, 761 [2nd Dept 2006], *lv denied* 7 NY3d 847; *People v Peterkin*, 27 AD3d 666, 667 [2nd Dept 2006], *lv denied* 7 NY3d 793). The People may introduce the lineups as part of their direct case at trial.

Conclusion

Accordingly, defendant's motion to suppress the statements he made to the police upon his apprehension and at the Binghamton police precinct is granted and those statements may not be introduced as part of the People's direct case.

On the other hand, defendant's motion to suppress any testimony concerning the lineup identifications is hereby denied.

This constitutes the decision, opinion and order of the court.

Vincent M Del Giudice
Judge of the Court of Claims
Acting Supreme Court Justice

Dated: December 8, 2015
Brooklyn, New York