

**People v Dragani**

2016 NY Slip Op 32947(U)

August 16, 2016

Supreme Court, Westchester County

Docket Number: 16-0742

Judge: Helen M. Blackwood

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COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION  
and ORDER

LEE DRAGANI,

Ind. No.: 16-0742

FILED

Defendant.

-----X

AUG 17 2017

Blackwood, J.

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

This defendant has been charged by indictment with the crimes of robbery in the first degree (PL §160.15[4]), robbery in the second degree (PL §160.10[1]), burglary in the first degree (PL §140.30[4]), and grand larceny in the fourth degree (PL §155.30[1]). Attached to the indictment were three notices pursuant to CPL §710.30, each indicating that at trial, the People expect to introduce testimony consisting of an in-court identification of the defendant by three separate witnesses that had previously identified the defendant from either a photograph or video at the Port Chester Police Department Headquarters. One of the witnesses viewed a video on May 13, 2016, another viewed a single photograph on May 16, 2016, and a final witness viewed a video on August 22, 2016. On May 31, 2017, a Wade hearing was ordered to determine whether the identifications were so improperly suggestive and to render any in-court identification inadmissible (Zambelli, J.). On August 14, 2017, such hearing was held in this Court.

Findings of Fact

According to the testimony adduced at the hearing, on the morning of May 13, 2016, then

sixteen year-old Austin Blanco was home alone at his apartment located at 47 East Broadway, Apartment 2, in the Village of Port Chester, County of Westchester, State of New York.

Although it would have normally been a school day for Austin, he was home recovering from an asthma attack he had suffered the previous evening. At some point during the morning, Austin's best friend, Jahmeek, came to Austin's house and the two young men played video games.

Shortly before 11:00 am, Austin went into the bathroom of the apartment to take a shower and heard noises and saw shadows coming from the balcony, which is right outside of the main entrance to the apartment. Austin walked over to the door of the apartment, looked through the peephole, and saw a man in a white hoodie at the door. The man in the white hoodie walked back downstairs away from the front door, at which time a man in a black hoodie approached the door. Austin called to Jahmeek, who came to the front door and looked through the peephole, as well. It was at this point that the young men suspected that the men in the hoodies were there to rob them, so Austin handed Jahmeek a bottle and went to retrieve a hockey stick, which he could not locate. Austin picked up the phone and dialed 911, but inexplicably hung up the call before it connected. He dialed 911 again and at the same time, the man in the black hoodie entered the well-lit kitchen, ran towards Austin, and struck him, causing him to fall to his knees. During this seven to fifteen second interaction, Austin viewed the man in the black hoodie, observing part of his face from his eye to his cheek. Austin had no further opportunity to view the man in the black hoodie.

When the Port Chester Police arrived at the scene, after all suspects had fled, Austin offered the police a description of the man that struck him. Specifically, he described the man to be white or Hispanic, with a beard, and wearing all black clothing.

Eventually, Detective Valdovinos of the Port Chester Police Department responded to the

location of 47 East Broadway on a report of people entering a home and robbing the people inside. While at the location, the detective canvassed the area in order to determine whether or not there were surveillance cameras that might have captured the suspects enter or leave the home. As a part of his investigation, Detective Valdovinos located surveillance cameras at 51 East Broadway-a property that shares a driveway with number 47. Detective Valdovinos recovered footage from the surveillance camera and placed it onto a disc.

Shortly thereafter, Detective Valdovinos learned from a co-worker that the defendant had been entering the homes of local drug-dealers and burglarizing them. Detective Valdovinos was familiar with the defendant from his many years as a member of the Port Chester Police Department. During that time, he had observed the defendant more than forty times. The detective testified that it was very common for him to go the area of Oak Street in Port Chester and disperse a group of kids hanging out there with the defendant. Detective Valdovinos indicated that he had had the occasion to observe defendant in close proximity and for several minutes at a time. He also indicated that he had observed the defendant in motion, noticing things like his gait and his posture. In fact, the detective testified that at least half of his interactions with the defendant had been while the defendant was moving. Further, the detective stated that the defendant has changed aspects of his appearance over the years, particularly his facial hair. For example, the detective testified that some times the defendant is clean-shaven and sometimes he has facial hair, such as a beard or a goatee. Finally, he indicated that he has observed the defendant at all times throughout the year and in all seasons of clothing.

After securing the video surveillance taken at 51 East Broadway, Detective Valdovinos watched the footage back at the police department. Immediately, he recognized the defendant as one of the three individuals walking up the driveway of 47 East Broadway right before the

robbery. The detective testified that he was able to recognize the defendant from his gait and his face. Additionally, the detective indicated that although the defendant looks similar now to the way he appeared in the video, he has altered his appearance by changing his facial hair into a thinner beard.

Additionally, as a part of his investigation, Detective Valdovinos spoke to Austin Blanco. Detective Valdovinos transported Austin back to the Port Chester Police Department and took a statement from him. He also prepared a photographic array containing a photograph of the defendant and photographs of five other individuals. The detective used the RICCI system to find photographs of other men with similar physical characteristics of the defendant. He showed the array to Austin, telling him that the man that had robbed him may or may not be in the array. Austin was not able to identify anyone in the array.

Meanwhile, Austin Blanco's mother, Ana Rivera, commenced her own investigation of the crime on her own accord and not at the behest of law enforcement. As a part of her investigation, Ms. Rivera contacted her friends and neighbors via Facebook and Instagram and asked if any of them had an information regarding the robbery in her home. Ms. Rivera heard back from a neighbor who advised her that he heard that it was the defendant and some other men that had entered her home. The neighbor, who Ms. Rivera had known for approximately seven years, sent her a picture of the defendant via Snapchat. Ms. Rivera, in turn, sent the picture to her son and asked him if this was one of the men that robbed him. Her son, Austin, responded that yes, that was one of the men that was in their home during the robbery.

It was at this point that Austin recalled having seen the man in the photograph before. Specifically, he recalled seeing him at the bodega where Austin worked. He remembered the encounter because Austin's co-worker said that it had been a very long time since he had seen the

man since the man had been in jail. This encounter occurred approximately two weeks prior to the robbery.

On May 16, 2016, Ms. Rivera went to the Port Chester Police Department and advised Detective Vaoldovinos what she had learned through her investigation. She provided him with the picture of the defendant she had obtained from her neighbor and that she had shown to her son. However, Ms. Rivera refused to disclose the name of the neighbor to the police, nor would she testify to his identity at the hearing, except to confirm that he was not a police officer.

With this information, Detective Valdovinos created another photographic array with the defendant's photograph and once again, displayed it to Austin Blanco. As he had the first time, Austin failed to identify anyone in the array. Next, the detective showed Austin the picture of the defendant that he had obtained from Ms. Rivera. This time, Austin identified the man in the photograph as the man that had robbed him.

In furtherance of his investigation, Detective Valdovinos contacted the defendant's parole officer, Officer Antonio and asked him to come into headquarters to view the surveillance footage and see if he recognized anyone in it. Officer Antonio had been the defendant's parole officer for approximately two months and met with him on a biweekly basis. On August 22, 2016, Officer Antonio met with Detective Valdovinos at the Port Chester Police Department and viewed the surveillance footage. The officer recognized the defendant as one of the individuals in the video.

#### Conclusions of Law

Turning first to the defendant's motion to suppress the identification of the defendant by Detective Valdovinos as he viewed the video surveillance footage, the motion is denied. Given the "personal knowledge" that Detective Valdovinos has of the defendant and his appearance and

the fact that the defendant has altered his appearance since the commission of the crime, the detective's testimony may serve as an "aid to the jury in making an independent assessment" as to whether the man depicted in the surveillance footage is the defendant (People v. Russell, 79 N.Y.3d 1024, 1025, 594 N.E.2d 922 [1992]; see also People v. Jackson, 151 A.D.3d 746, 56 N.Y.S.2d 265 [2017]; People v. Ray, 100 A.D.3d 933, 954 N.Y.S.2d 199 [2012]). Furthermore, the court intends to instruct the jury that they are free to accept or reject Detective Valdovinos' testimony regarding the identify of the man depicted in the surveillance footage in order to address any possibility that the jury may give undue weight to the detective's testimony (see People v. Morgan, 214 A.D.2d 809, 625 N.Y.S.2d 673 [1995]).

Similarly, the defendant's motion to suppress the identification of the defendant made by Parole Officer Antonio after viewing the surveillance footage is denied. As does Detective Valdovinos, Officer Antonio has personal knowledge of the defendant and his appearance, having met with him bi-weekly for approximately two months. Therefore, his testimony at trial identifying the defendant as the individual in the surveillance footage will serve merely as an aide to the jury in assessing the identify of the man depicted in the footage. Once again, the court will instruct the jury that they are free to accept or reject any portion of Officer Antonio's testimony they so chose.

Turning next to Austin Blanco's identification of the defendant from the single photograph, the People argue that the motion to suppress should be denied because it was not a police arranged identification procedure and therefore, falls outside of the scope of the exclusionary rule. They rely on two cases for this proposition, namely, People v. Marte (12 N.Y.3d 583, 912 N.E.2d 37 [2009]) and People v. Williams (139 A.D.3d 885, 31 N.Y.S.2d 196[2016]). They further argue that Austin has an independent basis for identifying the

defendant and so under either application of the law, the defendant's motion to suppress should be denied.

The People's position that the noticed identification procedure falls outside of the exclusionary rule is misplaced. While the court agrees that identification procedures conducted by a private citizen are not subject to the same rules as those conducted by law enforcement, the noticed identification procedure at issue is the one in which Detective Valdovinos displayed a single photograph of the defendant to Austin, *not* when his mother showed him the same photograph. Therefore, the conclusion of the Court of Appeals in Marte (12 N.Y.3d at 587) that the rule of exclusion does not extend to cases where an identification results from a "suggestive communication by a private citizen" is inapplicable to the case at bar (*id* at 589).

Moreover, the People's reliance in Marte and Williams as it applies to the facts in those cases is misplaced. In Marte, the victim's sister showed him a picture of the person she believed to have shot him (*id* at 586). Upon viewing the picture, the victim determined that the person in the picture was his attacker (*id*). The police were notified of this investigation conducted by the victim's sister and arranged a lineup with the defendant for the victim to view (*id*). The victim picked out the defendant, who was ultimately tried for the crime (*id*). At trial, the victim identified his attacker in court (*id*). On appeal, the defendant argued that the identification should have been suppressed because of the suggestive circumstances surrounding the display of the single photograph to the victim—a procedure admittedly conducted by a civilian (*id*). In assessing the admissibility of the identification, the Court found that when the suggestiveness comes from a private citizen, there is no *per se* rule of exclusion (*id*). In Marte, that suggestive conduct came only from a private citizen; in the case at bar, the suggestive conduct came from a private citizen *and* the police.



Williams is likewise distinguishable. There, the victim was shown a photograph of the defendant by a private individual prior to a police-arranged photographic array. The victim identified the defendant in the array. The court found that there was “no evidence . . . that the witness’s earlier identification of a photograph of the defendant resulted in unconstitutional taint at the police-arranged photographic identification procedure,” (Williams, at 885).

In both of those cases, the police engaged in what the courts determined to be identifications lacking in suggestiveness (Marte, at 586; *id.*). In the case at bar, the police themselves engaged in a suggestive identification procedure by showing the victim a single photograph of an individual several days after the crime (Brathwaite v. Manson, 527 F.2d 363 [1975]). In fact, the Court of Appeals has stated that the danger of an incorrect identification “is increased when a single photograph is exhibited which tends to emphasize the person portrayed as the person sought,” (In re James H., 34 N.Y.2d 8914, 316 N.E.2d 334 [1974]). Moreover, the fact that the victim identified the defendant from the single photograph shown to him by the police after failing to identify him in photographic arrays on two separate occasions confirms the likelihood that the procedure suggested a particular outcome to the victim.

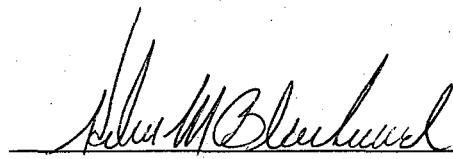
As the court finds that the procedure engaged in by the police was unduly suggestive, we now turn to the question of whether the People have established by clear and convincing evidence the existence of an independent source for the identification (People v. Marshall, 26 N.Y.3d 495, 45 N.E. 954 [2015]). After reviewing the facts adduced at the hearing, the court is of the opinion that no such independent source exists. In assessing this, the court must look to factors such as the opportunity of the witness to view the person committing the crime, the witness’ attention to the person, the accuracy of the witness description of the person, the length of time of the crime, and the witness’ level of certainty (People v. Lopez, 85 A.D.3d 1641, 924

N.Y.S.2d 871 [2011]). Here, although the confrontation took place in a well-lit kitchen, it lasted for a mere seven to fifteen seconds. Additionally, the perpetrator was wearing a “hoodie,” which partially covered his face, thereby impairing the witness’ ability to view it in its entirety, and rendering the witness unable to give a detailed description of the criminal. In fact, the witness’ initial, generalized description of his attacker lacked any specificity with regards to his attacker’s age, height, weight, and facial characteristics. For all of these reasons, the court is unconvinced that the witness has an independent source for an in court identification of the defendant and that such identification would be untainted by the improper police procedure (see, Marshall, 26 N.Y.2d at 504).

Therefore, the defendant’s motion to suppress the first two identifications notices in the indictment, as they relate to the identifications made by Detective Valdovinos and Parole Officer Antonio, is denied. The motion to suppress the final notice as it relates to the identification of the defendant by Austin Blanco, is granted.

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

Dated: White Plains, New York  
August 16, 2016

  
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HON. HELEN M. BLACKWOOD  
Westchester County Court