

**People v Irizarry**

2017 NY Slip Op 32556(U)

June 12, 2017

County Court, Westchester County

Docket Number: 16-0161

Judge: Barbara G. Zambelli

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This opinion is uncorrected and not selected for official publication.

COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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

- against -

NATHAN IRIZARRY,

-----X  
ZAMBELLI, J.

**FILED**

JUN 14 2017

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER  
Defendant.

DECISION AFTER HEARING

Indictment No.: 16-0161

The defendant has been indicted for the crimes of Assault in the First Degree (two counts), Assault on a Police Officer (two counts), Aggravated Assault upon a Police Officer (two counts) committed on or about November 14, 2015, in the County of Westchester.

By decision and order dated August 10, 2016, the Honorable Anne E. Minihan granted defendant's motion suppress evidence solely to the extent of ordering Dunaway, Wade, Rodriguez hearings.

The hearings were held on June 5, 2017 and June 8, 2017 wherein Detective Justin Jacobsen, Sergeant Michael McGuinn, Police Officer Luke Oliveri and Detective Marco Mendoza of the Mount Pleasant Police Department testified as well as Police Officer Marc Kavy and Detective Joseph DelMonico of the 43<sup>rd</sup> Precinct, New York Police Department.

**FINDINGS OF FACT**

The credible testimony adduced at the hearing on this case established that on November 14, 2015 at approximately 12:15 a.m. a call came into Mount Pleasant headquarters of drag racing on Rte 117. Route 117 is a four lane highway with two lanes running east and two lanes running west. Sergeant McGuinn and Police Officer Oliveri

responded to the location. While heading westbound toward the location on 117 in the direction toward Phelps Memorial Hospital, the officers, in separate marked vehicles, saw vehicles traveling east bound. The officers turned around by driving across the median. All lights were activated on their vehicles. Approaching their location was a dark vehicle with a loud exhaust and a front headlight that was out. The officers exited their vehicles and with their flashlights, the officers motioned to the vehicle to slow down, pull over, and stop. The area was well lit. Sergeant McGuinn's vehicle was in the left lane. Police Officer Oliveri's vehicle was in the right lane. Sergeant McGuinn was at the driver's side door and observed the face of the driver. Police Officer Oliveri observed the driver through the passenger side of the vehicle. The vehicle had pulled over to the right behind the police unit but did not stop, pulled back around, and took off eastbound at a high rate of speed. Each officer had seen the driver's face for several seconds. The driver was described as a male white or light skinned Hispanic, mid-late 20's, close cropped hair or shaved head, chin strapped facial hair, heavy set, 250-300 pounds, glasses, wearing a blue t shirt. The vehicle was described as a dark or black 1990's Honda Civic, faded paint job, modified tow hitch, with a metallic bumper with holes, distinctive door handle, plate number GSW and either 9227 or 9277. Police Officer Oliveri remained at the location and radio'd into headquarters the license plate numbers and the description of the vehicle. Sergeant McGuinn drove after the vehicle but lost sight of it. The Sergeant received a transmission from Police Officer Baccardi of two vehicles stopped westbound on 117, ½ mile east of Rte 9 in the westbound lane. He went to that location as did Police Officer Oliveri. Two vehicles were stopped in the right lane and shoulder. One was in disrepair (gray vehicle) and the other (red vehicle) had pulled over to help. Police Officer Baccardi, Sergeant

McGuinn and Police Officer Oliveri all had their lights activated on their vehicles. The right lane was not passable. The left lane was open. Police Officer Oliveri was writing a summons for obstructed view while seated in his vehicle. Two vehicles one dark and one white were approaching. One vehicle was a small dark car with one headlight out. The Sergeant observed that the driver was the same driver he had tried to stop at the earlier location. He was a male white with glasses, 300 pounds, closed cropped hair. The same license plate. The car pulled over to the shoulder. Police Officer Oliveri was 100% sure it was the same vehicle and driver that he had seen earlier. Sergeant McGuinn reached in and turned off the car but did not take the keys. He opened the door and told the driver, defendant, to get out of the car. Defendant twice asked why he had to get out of the car and the Sergeant yelled at him to get the F\*\*\* out of the car. He put his hand on defendant's shoulder. Defendant backed up at a high rate of speed while the car door was still open, hitting the Sergeant's legs and dragging him up the road. Police Officer Oliveri had appeared to help the Sergeant while he was struggling to get defendant out of the car and was hit by the vehicle and lost consciousness. The vehicle went speeding off eastbound on 117. The description of the distinctive rear bumper was that it was chrome with diamond cutouts, a tow hook. A drawing of the rear bumper was placed in evidence. (Exh 78b). Each officer saw the driver's face for several seconds. They saw him very well.

Detective Jacobsen did a computer search using the software Lawman in the EJustice system. He searched in Westchester County after inputting the description of a 1994 Honda Civic black , plate GSW and variations on the numbers . The description of the vehicles had been given by Sergeant McGuinn and Police Officer Oliveri while they

were in the hospital. He also did a search in the five boroughs and a DMV registration search. The registered owner was Nathan Irizarry, 448 Commonwealth Avenue, Bronx, New York. A check of the license plate readers showed images of the vehicle on Jackson Avenue at the Sprain Parkway and the Saw Mill River Parkway at the Marble Avenue entrance. It was also learned that there was an outstanding bench warrant for him.

On November 16, 2015, Sergeant McGuinn went to the Mount Pleasant Police Department to view a photo array. He could not identify anyone in the array which included the defendant's picture. Separately but on the same day, Police Officer Oliveri was shown a photo array by Lieutenant Miliambro. He was asked if he recognized any individuals in the array and if so to point them out. Police Officer Oliveri looked at the array for 30-45 seconds and picked photo 4, defendant's photo and said he was 90-95% sure it was the operator. He also said #1 looked familiar to him as well but was 90-95% sure on #4. (Photo Array Exh 61). On November 17, 2015, Police Officer Oliveri went into headquarters to correct something on his report. Sergeant Romaine said that perhaps looking at the photo array on a different medium would be helpful. The same photo array was then shown to Police Officer Oliveri on a lap top. His answer was still the same he was 90% sure.

On November 17, 2015, Detective Marco Mendoza went to defendant's home on Commonwealth Avenue and spoke to defendant's father. Defendant was not home. Detective Mendoza left his business card with his cell phone number for defendant to call him. An hour later, at 2:40 p.m. Javier Solano, an attorney called and told Detective Mendoza that he was defendant's attorney and said that if defendant was going to be arrested he would make him available but the Detective was not to talk to his client.

Detective Mendoza told him he wanted to talk to him about a hit and run. The attorney did not respond. Detective Mendoza also told him his client had a bench warrant and he should contact Police Officer Kady at the 43<sup>rd</sup> Precinct about it.

Police Officer Kavy of the New York Police Department, 43<sup>rd</sup> Precinct met with the Detectives to help in the investigation of the vehicle involved in the accident. He had located the address and owner of the vehicle in the NYC data base. In December of 2015 or January of 2016, he ran defendant's information in their data base. In February, 2016, he came up with several vehicles registered to defendant including a BMW. He also came up with his driving history. As of February 17, 2016 defendant's license was suspended. Police Officer Kavy drove down Commonwealth Avenue looking for the Honda Civic. He located a street parked BMW without plates or registration. He checked the VIN which was a match for the vin of the BMW registered to defendant. Police Officer Kavy had the vehicle towed to the Zereiga Avenue pound. That same day, Police Officer Kavy surveilled the Zereiga Avenue yard and observed the defendant driving the BMW out of the yard still without a registration. He had observed defendant place one license plate on the rear of the vehicle. He conducted a traffic stop. Defendant was placed under arrest and brought into the 43<sup>rd</sup> Precinct. He was not booked or processed. Police Officer Kavy called Detective Mendoza to let him know defendant was in custody for a suspended license. Detective Mendoza advised Chief Oliva and the Assistant District Attorney was contacted. Detective Mendoza called Police Officer Kavy to tell him they would do a line up. It was arranged that the line up would occur at Bronx homicide. Detective Mendoza called attorney Solano's Law Office and told the woman that defendant would be in a line up at Bronx homicide. She said she would get word to Solano. Arrangements were made for

Sergeant McGuinn and Police Officer Oliveri to report to headquarters in Mount Pleasant to be transported to the Bronx for a line up. At approximately 5:50 p.m. Detective Mendoza told Sergeant McGuinn that Nathan Irizarry was arrested and they were in the process of scheduling a line up. Sergeant Romaine told Sergeant McGuinn to come into headquarters.

Detective Brown, Chief Oliva, Sergeant McGuinn, Police Officer Oliveri, Detective Detective Mendoza and Detective Jacobsen drove in several cars down to the Bronx. There was no discussion concerning the line up. They all went to a room in the Bronx homicide building. At approximately 8:02 p.m., Solano returned Detective Mendoza's call while Detective Mendoza was in the homicide room. Detective Mendoza stepped out and told Solano that defendant had been arrested by the New York Police Department and would be in a line up. Solano said he was on trial and would not be making the line up. He asked what would happen if defendant was identified. Solano did not ask for a postponement or different time or date. He was told defendant would be arrested and brought to the Mount Pleasant Police Department. Detective DelMonico arranged the line up. He was the line up administrator who gathers the fillers, ensures no contact among the parties and sets up the line up. He explained he picks fillers for uniformity based on a picture or description of the suspect. The fillers were all police officers. They sat in adjustable seats behind a black garbage bag so as to hide clothing and adjust for height. Police Officer Kavy brought defendant over to the building. He arrived before the witnesses. Detective DelMonico read the instructions on Exhs 59 and 60 to Sergeant McGuinn and Police Officer Oliveri. They each signed the forms. They were brought separately into the viewing room. Chief Oliva was present. Each witness was asked by

DeIMonico the three questions on the instruction sheet. Each witness identified number three, the defendant, as the operator of the vehicle the night of the incident. They left. There was no improper contact before, during or after the identification. Defendant was placed under arrest by the Mount Pleasant police department. Defendant was issued a desk appearance ticket by the New York Police Department for driving with a suspended license.

### CONCLUSIONS OF LAW

#### Wade Hearing

The defense stipulated that the identifications set forth in the CPL 710.30 notices 5-17 were confirmatory and therefore withdrew their request for a Wade/Rodriguez hearing.

With regard to the photo array shown to Police Officer Oliveri, there is no requirement that all participants in a photo array be identical in appearance, rather, all that is required is that all participants resemble each other sufficiently so as not to create a substantial likelihood that the defendant will be singled out for identification (see, People v. Velez, 222 A.D.2d 625; lv. denied 88 N.Y.2d 887).

In the case at bar, the photo array was not unduly suggestive. Additionally, the police did not engage in improper conduct when displaying the array to a witness (see, People v. Edwards, 199 A.D.2d 574).

#### With regard to the composition of the line-up

"...corporeal lineups, properly conducted, generally provide a reliable pretrial identification procedure and are properly admitted unless it is shown that some undue suggestiveness attached to the procedure. While the People have the initial burden of

going forward to establish the reasonableness of the police conduct and the lack of any undue suggestiveness in a pretrial identification procedure, it is the defendant who bears the ultimate burden of proving that the procedure was unduly suggestive (People v. Berrios, 28 N.Y.2d 361, 321 N.Y.S.2d 884, 270 N.E.2d 709)." People v. Chipp, 75 N.Y.2d 327, 335.

In this case, the fillers resembled each other sufficiently so as not to create a substantial likelihood that defendant would be singled out. The witnesses were appropriately cautioned and there is no evidence of any improper suggestive conduct on the part of law enforcement.

The fact that Sergeant McGuinn had been told that Irizarry had been arrested did not render the line up unduly suggestive (see, People v. Santos, 250 A.D.2d 413); People v. Bourne, 46 A.D.3d 1101).

This was an investigatory line up and as such the police fulfilled their responsibility in advising attorney Solano of the line up. The attorney did not ask for an adjournment or a different time or date. Additionally, defendant never asked for his attorney (see, People v. Coates, 74 N.Y.2d 244).

The identification of the defendant as the operator of the vehicle on November 14, 2015 provided probable cause for defendant's arrest.

For the foregoing reasons the motion fo suppress is in all respects denied.

This decision constitutes the order of the court.

Dated: White Plains, New York  
June 12, 2017

  
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BARBARA G. ZAMBELLI  
COUNTY COURT JUDGE

Hon. Anthony Scarpino, Jr.  
District Attorney, Westchester County  
111 Dr. Martin Luther King Jr. Blvd.  
White Plains, New York 10601  
Attn: Tim Ward, Esq.  
Assistant District Attorney

Peter H. Tilem, Esq.  
Tilem & Associates, PC  
188 E. Post Road  
White Plains, New York 10601

Lakisha C. Hickson  
Chief Clerk