People v Copeland
2018 NY Slip Op 33533(U)
April 25, 2018
County Court, Westchester County
Docket Number: 17-0552
Judge: Anne E. Minihan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

[* 1]

FILED
AND
ENTERED
ON 4-25-2018
WESTCHESTER
COUNTY CLERK

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

THE PEOPLE OF THE STATE OF NEW YORK

FILED
APR 26 2018
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

- against -

DECISION AND ORDER
Indictment No. 17-0552

ALLEN COPELAND,

Defendant.

----------X

Minihan, J.,

The defendant, Allen Copeland, has been indicted on one count of attempted murder in the second degree (PL §§ 110/125.25[1]), one count of attempted assault in the first degree (PL §§ 110/120.10[1]), assault in the second degree (PL § 120.02[2]), and criminal possession of a weapon in the second degree (PL § 265.03[1]).

The People filed timely notice of their intent to introduce an oral statement they attribute to the defendant and allege to have been made at the Mount Vernon Police Department on May 23, 2017 at approximately 6:42 p.m. and they also filed timely notices of their intent to introduce testimony regarding observations of the defendant by the complaining witness on May 24, 2017 at approximately 11:05 a.m. and by an individual named Sincere Smith at Mount Vernon Police Headquarters on May 24, 2017 at approximately 12:40 p.m. In addition to these two noticed identifications which relate to witnesses who allegedly identified the defendant from photographic arrays, there were also timely notices filed related to an identification of the defendant from a video by the defendant's parole officer, and two "identifications" related to witnesses' viewing of a video of the incident during the grand jury presentation. By omnibus motion, the defendant sought suppression of the noticed statement and the noticed identifications.

By decision and order dated November [ ], 2017, the Honorable Helen Blackwood granted so much of those branches of defendant Copeland's motion for omnibus relief seeking suppression of the noticed statement attributed to the defendant and suppression of the noticed identifications to the extent of ordering *Dunaway*, *Huntley*, and *Wade* hearings. The court also directed that a Sandoval hearing be held prior to trial. On April 16, 2018, immediately prior to commencement of pre-trial hearings, the People withdrew the CPL 710.30 notice as to the statement attributed to the defendant and, upon their representation that they no longer intend to use this statement in their case in chief, the need for a *Huntley* hearing was obviated.

Pretrial hearings thereafter commenced and concluded on April 16, 2018 at which the following witnesses gave testimony: Detectives Dale Hughes and Dennis Mullin, both from the Yonkers Police Department. Pursuant to that hearing, I give full credence to the testimony of the People's witnesses whose testimony I found to be candid, plausible and fully credible. The People's exhibits in evidence were comprised of two sets of photographic arrays and identification statements. The defense called no witnesses and presented no evidence.

People v Allen Copeland
Indictment No. 17-0552

I make the following findings of fact and conclusions of law:

FINDINGS of FACT

On May 20, 2017, Yonkers Police Detective Dale Hughes, a 21 year veteran of the Yonkers Police Department, was designated the lead detective to investigate a shooting that occurred earlier that day at Spruce Street in the City of Yonkers. Through that investigation, the defendant was developed as a suspect. On May 24, 2017 at approximately 11:05 a.m., pursuant to that investigation, he and his partner, Detective Dennis Mullin, who has been a member of the Yonkers Police Department for 17 years, met with the alleged victim, Ricardo Sandoval in order to show Mr. Sandoval a 6 person photographic array that Detective Mullin created. The detectives both observed Mr. Sandoval to be lucid, calm, and cooperative and it appeared to them that he understood what was going on.

Prior to showing Mr. Sandoval the array, which Detective Hughes had not prepared, he looked at it and thought that it to be "fair." The detective then explained to Mr. Sandoval that he was going to show him the array but that he should bear in mind that the photograph of the suspect might or might not be in it. He told Mr. Sandoval that, in viewing the array, he should concentrate on the faces and not on the hair or other things that were subject to change over time. Mr. Sandoval indicated that he understood and then viewed the array before quickly and without hesitation identifying the defendant from his photograph in the third position, indicating that he was the person who shot him. At the direction of police, Mr. Sandoval then circled the photograph of the defendant that he had selected, signed the array, and noted the date and time. Later that day, Detectives Mullin and Oakley returned to Mr. Sandoval's home where he executed a statement of identification. During this second encounter with Mr. Sandoval, Detective Mullin found him to be "clear, concise and coherent" as he had been at their initial meeting and he noted that the witness did not appear to be intoxicated or impaired.

At approximately 12:40 p.m. on the same day, Detectives Hughes and Mullin met with Sincere Smith at the Mount Vernon Police Department headquarters after being informed that Mr. Smith, who was being detained on an unrelated matter, knew the person involved in the investigation of the Spruce Street shooting. In fact, the defendant had become a suspect in the shooting because of Mr. Smith's statements to Mount Vernon Police and the District Attorney's Office. Mr. Smith, who told the detectives that he knew the defendant personally and could identify him, was also shown an array containing the defendant's photograph. Detective Hughes recalled that Mr. Smith quickly viewed the array and selected the photograph of the defendant, which was in the fourth position. He then circled the photograph of the defendant, signed the array, and noted the date and time. Mr. Smith also wrote, below the photograph of the defendant "Allen Copeland" and "shots fired on Spruce St sat night 5/20/17."

The arrays themselves had been created on May 24, 2017 by Detective Mullin using the software system that the Yonkers Police Department used to generate photographic arrays. Photographs in the system were those of people who had been previously arrested in Westchester

County. The detective recalled that, in choosing the defendant's photograph, he had likely chosen the most recent photograph that was in the system and he testified that the system selected photographs of other men who were of similar age (within five to ten years), height and weight (within twenty pounds), complexion and hair style and then he chose the filler photographs from among those which the system generated. Choosing similar backgrounds for the photographs was of secondary consideration, but the detective did try to factor in the background color but testified that it was not always possible to match the backgrounds.

In printing a hard copy of the array for Mr. Sandoval, the system generated three pages. The first was the array itself, captioned with the date and time it was prepared, the name of the preparer, the label "Assault 2nd," the defendant's photograph and the five filler photographs, each of which was marked with a number from one to six.[1] The second page of the array was identical to the first, except that it also listed the names and identifying numbers associated with each photograph as well as a box for notes. The third page of the array shown to Mr. Sandoval was captioned "Statement of Identification" and is comprised of Mr. Sandoval's signed statement indicating that he had identified the defendant as the person "who shot me on 5-20-17" and "who was outside 2 Spruce St [sic] arguing with my brother. After the argument ended, he shot me." The array shown to Mr. Smith had the same photograph of the defendant and the same five filler photographs, but the positions of the photographs were shuffled. The second page was identical to the first, except that the names of the people depicted in the six photographs were listed with their identifying numbers. There was no third page with a statement of identification. In each of the identification procedures, only the first page was shown to the witness. Detective Mullin initially testified that he had prepared only the array that had been shown to Mr. Sandoval but on cross examination, when shown the array that had been prepared in connection with the Smith identification procedure, conceded that he had been mistaken, that he had in fact prepared both arrays and that he could not recall if he had done any others.

The two arrays, which were admitted into evidence, contain the photograph of the defendant, in the third position in one and in the fourth position in the other, and the photographs of five other men of similar age and appearance. The hair styles, complexions and facial features of each of the six men are alike. While the backgrounds in the photographs are not at all similar, each of them is a different shade of gray and, since the color saturation is different in all of them, the eye is not drawn particularly to one over the other as it might be if just one photograph had an obviously different background than the others.

On May 25, 2017, Detective Hughes met with the defendant's parole officer, Maria Rios, at the Yonkers Police Department headquarters. While there, he showed her a video of the incident at 2 Spruce Street. Officer Rios, who had met the defendant on a number of occasions, was asked, while viewing the video, whom she recognized and she replied, in essence, "Yup. That's Allen Copeland," and indicated that she observed from the video that it was he who fired a weapon. The video was entered into evidence and played at the hearing.

---

[1]Detective Mullin testified that the time stamp in the system was incorrect and did not reflect the actual time the array was created or printed.

CONCLUSIONS of LAW

Inasmuch as the People withdrew their CPL 710.30 notice of a statement attributed to the defendant and represented prior to the commencement of the hearings that at the hearing that they will not, on their case in chief, use that statement, that branch of the defendant's motion which seeks suppression of the statement is moot.

The determination as to whether a pretrial identification procedure was unduly suggestive is subject to the long established, "burden-shifting mechanism" whereby the People initially bear the burden of producing evidence to establish the fairness of the procedure itself, that is the reasonableness of police conduct and the lack of undue suggestiveness (*People v Holley*, 26 NY3d 514 [2014]). If the People bear their burden, the burden then shifts to the defendant to sustain the ultimate burden to prove that the identification procedure was unduly suggestive (*People v Chipp*, 75 NY2d 327, 335 [1990]; *see also People v Jones*, 2 NY3d 235, 244 [2004]; *People v Coleman*, 73 AD3d 1200, 1203 [2d Dept 2010]).

Here, the People satisfactorily demonstrated that the identification procedure itself was not unduly suggestive nor was the manner in which the array was shown to Mr. Sandoval, the complaining witness, suggestive in any fashion. Mr. Sandoval was shown the array when he appeared to be lucid, calm, and coherent. Prior to being shown the array, Detective Hughes told him that the array that he would be asked to view might or might not contain the suspect and that, in viewing it, he was to concentrate not on the hair but on the facial features. Shortly after viewing the array, Mr. Sandoval circled the defendant's photograph quickly and without hesitation.

The same cannot be said for the identification procedure as to Mr. Smith, however and the court concludes that the People failed to sustain their initial burden. There is no record evidence that Mr. Smith was given any instruction or directions prior to viewing the array. At the hearing, Detective Hughes testified that he conducted the identification procedure during which a six person photograph array was shown to Mr. Smith and that Mr. Smith quickly identified the defendant. There is credible testimony that Mr. Smith knew the defendant's first and last names and that he circled the defendant's photograph in the array and, further, the array itself reflects Mr. Smith's handwritten annotations which include not only the defendant's first and last names but also the notation "shots fired on spruce st sat night 5/20/17." There was, however, no testimony or evidence to demonstrate that Mr. Smith was told that the defendant's picture might or might not be in the array or that he should concentrate on the faces of the individuals depicted in the photographs or any of the other instructions that Mr. Sandoval had been given prior to his viewing of the array.

While the People maintain that issues of suggestiveness are of no moment because the defendant and Mr. Smith are known to each other, there is insufficient record evidence to demonstrate that the police-arranged identification procedure was merely confirmatory as a result of the defendant having been known to the witness to such a degree so as to have been

impervious to police suggestion (*People v Rodriguez*, 79 NY2d 445, 452 [1992]). A confirmatory identification exception requires a case-by-case analysis that "rests on the length and quality of prior contacts between [the] witness and [the] defendant, but always requires a relationship which is more than 'fleeting or distant'" (*People v Waring*, 183 AD2d 271, 274 [2d Dept 1992], quoting *People v Collins*, 60 NY2d 214, 219 [1983]). Under the totality of the circumstances, I find that the People did not shoulder their burden to establish that the defendant was so well known to Mr. Smith so as to have made him impervious to police suggestion. There was conclusory testimony by the detective that Mr. Smith told police that he knew the defendant but there was no evidence demonstrating the nature, depth, or longevity of the relationship between the defendant and Mr. Smith sufficient for the court to conclude that the length and quality of the prior interactions between the two men were such that they were known to each other to such a degree so as not to be subject to police suggestion. Although Detective Hughes characterized this identification procedure in his hearing testimony as "more of a confirmatory identification" the court is unable to independently evaluate whether the nature and depth of that prior relationship rendered the identification confirmatory under law and so the defendant's motion to suppress is granted in this respect.

On this record, the People established that the array itself was not unduly suggestive. The photographs of the defendant and all five of the filler photographs depicted individuals who were all reasonably similar in appearance and there was no substantial likelihood that the defendant would be singled out for identification. There was no significant or obvious discrepancy in age, race, gender, facial features, height, weight, hair style or complexion.

The defendant argues that the light background of the defendant's photograph renders the array suggestive and maintains that the viewer's eye would necessarily be drawn to the defendant's photograph by virtue of the fact that it has the lightest background. "A photographic display is suggestive when some characteristic of one picture draws the viewer's attention to it, indicating that the police have made a particular selection" (*People v Miller*, 33 AD3d 728, 728-729 [2d Dept, 2006]; *see People v Ortiz*, 84 AD3d 839, 840 [2d Dept 2011]; *People v Ferguson*, 55 AD3d 926, 927 [2d Dept 2008]). While the background of the defendant's photograph is indeed the lightest of the six photographs, the background of every photograph in the array is a different shade of gray. In this context, the difference between the color saturation of the background of the defendant's photograph compared to the other photographs in the array is not particularly striking and, when viewed in light of the similarities of the actual individuals depicted in the photographs, the court concludes that the lighter background of the defendant's photograph did not create a substantial likelihood that the defendant would be singled out for identification by the viewer (*see People v Chipp*, 75 NY3d at 336; *People v Ortiz*, 84 AD3d at 840; *People v Ferguson*, 55 AD3d at 927).

The identifications of the defendant by Parole Officer Rios and Mr. Sandoval which took place at the grand jury and consisted of viewings of surveillance video were gratuitously noticed to the defendant. "[T]he primary purpose of the notice requirement is to implement the constitutional guarantees by alerting the defendant to the possibility that evidence identifying him

as the person who committed the crime may be constitutionally tainted and subject to a motion to suppress" (*People v Collins*, 60 NY2d 214, 219 [1983]; *see People v Gee*, 99 NY2d 158, 161-163 [2002]). Given that Parole Officer Rios had a professional relationship with the defendant before her viewing of the surveillance video, and had had occasion to meet with him regularly in the period leading up to the incident, there was no question of "suggestiveness" and no "identification" within the meaning of CPL 710.30 (*see People v Collins*, 60 NY2d at 219; *People v Gissendanner*, 48 NY2d 543, 552 [1979]). Similarly, Mr. Sandoval's viewing of the surveillance video did not result in an identification within the meaning of CPL 710.30, as it did not involve anything resembling a selection process and suggestiveness was not a concern (*see People v Gee*, 99 NY2d at 162). Based on the foregoing, the People were not required to notice the identifications by Parole Officer Rios and Mr. Sandoval.

Sandoval/Ventimiglia

Like every other witness in a civil or criminal matter, a defendant who chooses to testify on his own behalf at a criminal trial may be cross examined regarding those of his prior crimes and bad acts which bear upon his credibility, veracity or honesty (*see People v Hayes*, 97 NY2d 203, 207 [2002]; *People v Bennett*, 79 NY2d 464, 468 [1992]; *People v Sandoval,* 34 NY2d 371[1974]; *People v Marable,* 33 AD3d 723, 726 [2d Dept 2006]). Although the questioning about prior crimes and past conduct is not automatically precluded simply because the crime or conduct inquired about is similar to the crime charged (*see People v Hayes,* 97 NY2d at 208; *People v Walker,* 83 NY2d 455, 459 [1994]; *People v Pavao,* 59 NY2d 282, 292 [1983]), "cross-examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial, in view of the risk, despite the most clear and forceful limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility" (*People v Sandoval,* 34 NY2d at 377; *see People v Brothers*, 95 AD3d 1227, 1228-1229 [2d Dept 2012]). Thus, "a balance must be struck between, on the one hand, the probative worth of evidence of prior specific criminal, vicious or immoral acts on the issue of the defendant's credibility, and, on the other, the risk of unfair prejudice to the defendant, measured both by the impact of such evidence if it is admitted after his testimony and by the effect its probable introduction may have in discouraging him from taking the stand on his own behalf" (*People v Sandoval,* 34 NY2d at 375). By so doing, the defendant may make an informed decision as to whether or not to testify at his trial (*People v Sandoval*, 34 NY2d at 375).

The defendant is charged by indictment in two pending cases in Westchester County with attempted murder in the second degree (Indictment Number 17-0631) and with murder in the second degree (and other charges related to a number of robberies occurring the day before the incident for which he faces charges here) (Indictment Number 17-0561). He was arrested and charged in Bronx County with reckless endangerment in the second degree, unauthorized use of a vehicle, criminal possession of stolen property in the fifth degree, unlawful fleeing a police officer in a motor vehicle in the third degree and reckless driving in connection with a July 11, 2013 incident. The defendant was arrested and charged in June of 2013 in Bronx County with

criminal possession of a weapon in the fourth degree and thereafter was convicted upon his plea of guilty to disorderly conduct on June 29, 2013. The defendant also has two youthful offender adjudications, the first of which occurred July 4, 2012 and related to the defendant's arrest for criminal possession of stolen property in the third degree and resulted in his plea of guilty to unauthorized use of a motor vehicle in the third degree. As to this offense, the People asserted at the *Sandoval* hearing that the defendant was stopped by Mount Vernon police in a vehicle that he claimed to belong to a friend. When confronted with the falsity of this claim, the defendant allegedly continued to maintain that the vehicle was his. As to the second youthful offender adjudication, the People contend that, on August 27, 2012, while the defendant was incarcerated in the Westchester County jail on the July 4, 2012 offense, he was involved in a fight and possessed a four inch piece of sharpened plastic, which resulted in his arrest for, and subsequent plea of guilty to, promoting prison contraband.

Finally, the defendant was arrested on August 31, 2013 in the Village of Tuckahoe following an incident which occurred at approximately 1:30 a.m. The People contend that a 911 call of shots fired by an African American man in a white t-shirt and camouflage shorts let to the traffic stop and subsequent arrest of the defendant who was observed in the described clothing and the seizure of a silver revolver, which appeared to have been recently fired, next to the driver's seat. Following indictment, on May 7, 2014, the defendant was convicted upon his plea of guilty to criminal possession of a weapon in the second degree and sentenced to 3 and one-half years in state prison and 2 and one-half years of post-release supervision.

The People, proposing a *Sandoval* compromise, ask that they be permitted to inquire as to the facts surrounding the 2014 criminal possession of a weapon in the second degree conviction as well as the conviction itself. They also seek to use the youthful offender adjudications as well as their underlying facts. In so doing, they maintain that each of these demonstrate the defendant's truthfulness and willingness to place his own interests above those of society and that they bear upon the defendant's testimonial credibility and that they would represent a fair compromise in light of the defendant's overall criminal history and prior interactions with the criminal justice system.

The defendant opposes use of his prior conviction, pointing out that the instant charges are also gun-related and thus would cause the jury to view this as propensity evidence and thus that prejudice would outweigh probative value. As to the youthful offender adjudications, the defendant maintains that the purpose of youthful offender treatment is to shield individuals from the stigma of prior criminal conduct and to prevent the later use of these events to the detriment of those granted youthful offender adjudication and as such, the People should not be permitted to use these against him on cross examination at this trial. Furthermore, the defendant particularly protests the use of his youthful adjudication for promoting prison contraband on the grounds that it would necessarily prejudice him unfairly in the eyes of the jurors who would then know that he had been, at that time, an incarcerated person and, as such, would be viewed as tending to demonstrate propensity toward criminal conduct.

In order to properly balance the probative value of the defendant's prior convictions against any potential for undue prejudice, and to permit the defendant the opportunity to make an informed and meaningful decision as to whether he should testify at the trial, the court directs the following *Sandoval* compromise. Pursuant to this compromise, the People will not be permitted to inquire at all about either youthful offender adjudication. In my view neither bears sufficiently upon the defendant's credibility, honesty or veracity so as to permit inquiry at the risk of unduly deterring the defendant from testifying on his own behalf and subjecting him to prejudice in the eyes of the jurors should he choose to testify. While each certainly does evince the defendant's willingness to place his own interests above those of society, the fact is that neither adjudication is particularly recent and that the relative probative value is outweighed by the real and significant danger of these events being perceived by the jury as propensity, despite whatever curative instruction it was given.

Turning to the defendant's May 2014 conviction for criminal possession of a weapon in the second degree, the defense correctly points out that both that matter and the instant one involved firearms, however, the incident itself and the subsequent conviction are not particularly factually similar to the alleged events giving rise to this incident. Further, this conviction is not only more recent, but it is demonstrative of the defendant's willingness to place his own interests above those of society and thus is germane to the defendant's testimonial veracity and integrity. Accordingly, should the defendant testify on his own behalf, the People will be permitted to inquire as to this conviction insofar as they may cross examine the defendant regarding the fact that he was convicted of criminal possession of a weapon in the second degree, the date, the jurisdiction and the fact that he had been in possession of a loaded silver revolver in the Village of Tuckahoe. By limiting impeachment questioning in this way, any undue prejudice which could result from the fact that these offenses, like those charged here, involved firearms, is ameliorated.

The defendant may not use the *Sandoval* ruling as both a sword and a shield (*see People v Marable*, 33 AD3d 723, 725 [2d Dept 2006]). If the defendant chooses to testify and then deny or equivocate as to having been convicted, or should he claim to have never possessed a firearm or that he was unfamiliar with firearms, or should he contend that in that prior case that he pleaded guilty because he was in fact guilty, and that he did not plead guilty here because he is not guilty, he will have opened the door to cross examination exploring his true motivation for the prior guilty plea and the People will, upon their application to the court, be permitted to impeach his credibility with questions about all of the underlying facts of his prior criminal conviction (*People v Fardan*, 82 NY2d 638, 646 [1993]; *People v Thomas*, 47 AD3d 850 [2d Dept 2008]; *People v Mirable*, 33 AD2d at 725). If the defendant testifies and opens the door, the People may make their application, outside the presence of the jury, and the court will make a determination at that time.

The defendant is thus cautioned not to misuse the protection afforded him under this ruling. If the People believe that the defense has opened the door, and seek either a curative instruction or for leave to use his prior conviction or youthful offender adjudications that were

limited by this decision and order they shall raise the issue outside the presence of the jury and the matter will be addressed at that time.

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

Dated: White Plains, New York
April 25, 2018

Hon Anne E. Minihan, A.J.S.C.

TO:

HON. ANTHONY A. SCARPINO
District Attorney, Westchester County
111 Dr. Martin Luther King, Jr. Boulevard
White Plains, NY 10601
By: ADA Brian Bendish and ADA Lauren Abinanti

JOSEPH GOUBEAUD, Jr.,
Counsel to Defendant Allen Copeland
22 West First Street, Suite 502
Mount Vernon, NY 10550