

People v Lyde

2019 NY Slip Op 34103(U)

November 14, 2019

County Court, Westchester County

Docket Number: 18-0540

Judge: Anne E. Minihan

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

**FILED
AND
ENTERED
ON Nov. 14 2019
WESTCHESTER
COUNTY CLERK**

- against -

DECISION and ORDER
Indictment Number: 18-0540

KEVIN LYDE and
KEVIN YOUNG,

Defendants.

FILED 17
NOV 15 2019

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Minihan, J.,

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

An indictment has been filed against the defendants charging them each with grand larceny in the 2nd degree (Penal Law § 155.40[1]) (two counts) and burglary in the 3rd degree (Penal Law § 140.20) (four counts). The People allege that the defendants, together with each other and another, burglarized two buildings in Port Chester (December 11, 2017) and one in New Rochelle (February 2, 2018) and stole jewelry valued at hundreds of thousands of dollars.

Defendants, claiming to be aggrieved by the improper or unlawful acquisition of evidence, have each made suppression motions and have sought a pre-trial *Sandoval* ruling by the court. The People oppose so much of defendant Young's application as seeks the suppression of statement evidence and identification evidence but have consented to pre-trial hearings to address *Huntley* and *Wade/Rodriguez* issues. They oppose defendants' motions to suppress physical evidence and they have consented to *Sandoval* hearings.

By Decision and Order dated March 18, 2019, this court granted so much of the defendant Young's motion which was to suppress a noticed identification to the extent that a hearing was ordered to be held prior to trial to determine whether the noticed identification was, as the People allege, confirmatory (*People v Rodriguez*, 79 NY2d 445 [1992]) or, alternatively was unduly suggestive so as to taint an in-court identification of the defendant at the trial of this matter (*United States v Wade*, 388 US 218 [1967]). Additionally as to defendant Young, the court directed that a *Huntley* hearing be held as to the two statements attributed to this defendant. With respect to the defendants' motions to suppress physical evidence, the court directed that a *Mapp/Dunaway* hearing be held to determine the lawfulness of any search yielding physical evidence that was not conducted pursuant to a search warrant and, as to defendant Lyde, to address the limited issue of whether the search warrant order authorizing the search of his residence was executed outside of the authorized time period of 6:00 a.m. to 9:00 p.m.

People v Kevin Lyde and Kevin Young
Indictment No. 18-0540

On October 23, 2019 and October 24, 2019, *Wade/Rodriguez* (Young), *Huntley* (Young), and *Mapp/Dunaway* (Lyde and Young) hearings were conducted before this court. At the combined hearings, the People called five witnesses: New Rochelle Police Detective Sergeant Kevin Perri, New Rochelle Police Detectives Michael McKenniss, Vincent Marion, Michael Ciafardini and Criminal Investigator Daniel Higgins from the Westchester County District Attorney's Office. Received into evidence at the hearing, without objection by the defendants, were the following exhibits: a photograph of defendant Young, GPS records, GPS map locations related to the whereabouts of a New Rochelle Police vehicle on April 5, 2018 between 4:37 a.m. and 6:50 a.m., a *Miranda* rights form, a tactical operation plan, security video, a cell phone video, search warrant photographs, and a video of a police interview with Young. The defense called no witnesses and offered no evidence.

The court finds the testimony offered by the People's witnesses to be plausible, candid, and fully credible and makes the following findings of fact and conclusions of law.

FINDINGS of FACT

On April 5, 2018, following the investigation of, *inter alia*, the commercial burglaries of Triple J Jewelers in Port Chester and New Rochelle Coin and Jewelry in New Rochelle, various members of law enforcement from the New Rochelle Police Department, the Port Chester Police Department, the Bergen County Police Department and the Westchester County District Attorney's Office met at the New Rochelle Police Department at 4:00 a.m. to prepare for the simultaneous execution of multiple search warrants in furtherance of the investigation. New Rochelle Police Detective Sergeant Kevin Perri, assigned to the Property Theft Unit, was the operations and tactical supervisor in charge. After roll call and a briefing, the officers departed to carry out their various responsibilities relevant to the execution of the search warrants.

Detective Sergeant Perri recalled leaving the New Rochelle Police Department around 4:30 a.m. that morning to drive to Brooklyn for the execution of the search warrant on defendant Lyde's apartment. He, Detective Vincent Marion, Detective Michael Ciafardini and about ten others met at Canarsie Pier, a rotary overlooking Jamaica Bay that was both near the parkway and about a half mile or less from defendant Lyde's apartment where they waited for members of the New York Police Department and New York Fire Department to arrive to render assistance to the team executing this warrant. Shortly before 5:45 a.m., they all headed over to 2065 Rockaway Parkway. Once there at approximately 5:50 a.m. (or slightly later), the team of officers went to the 4th floor and waited until precisely 6:00 a.m. when Sergeant Perri gave the go ahead to commence execution of the search warrant. In their testimony, Sergeant Perri and Detective Vincent Marion both recalled watching their cell phones until it was exactly 6:00 a.m. before the order to begin was given. Sergeant Perri specifically recalled that waiting until 6:00 a.m. to execute all the warrants was an important part of the operation to minimize the safety concerns which could result if word were to get out that police were in the process of executing search warrants.

People v Kevin Lyde and Kevin Young
Indictment No. 18-0540

After Sergeant Perri gave the order to begin, a member of the tactical team knocked on the door of apartment 4F and it was answered by defendant Lyde who was arrested and placed in handcuffs outside his apartment. Mr. Lyde's wife and family also came out of the apartment so that it could be secured by the tactical team. Approximately five minutes after the initial knock on the door, when the apartment was confirmed to be empty, Mr. Lyde's wife went back into the apartment with Detective Marion and, when he asked her to show him where Mr. Lyde's cell phone was, she brought him into the bedroom and showed him. The detective secured the cell phone before they both left so that the apartment could be photographed and the search could begin in earnest. He recalled giving other detectives the keys to the Ford Expedition for which a search warrant had been obtained so that the vehicle could be impounded and brought back to the New Rochelle Police Department. The keys had also been found in Apartment 4F and were turned over to other officers after 6:00 a.m.

Detective Marion, whose role in the events of April 5, 2018 was to be the arresting officer, took the Lyde cell phone and Mr. Lyde back to the New Rochelle Police Department. He recalled leaving 2065 Rockway Parkway around 6:15 a.m. and driving directly back to headquarters in a police vehicle that was equipped with a GPS tracking device that monitors location, date, time, and speed (People's exhibits 6-a-2, 6-a-5, 6-a-6, 6-a-7, 6-a-8, 6-a-9, 6-a-10). The vehicle, which crossed the Whitestone Bridge both coming and going from New Rochelle, also had an EZ Pass.

Detective Michael Ciafardini, a 15 year veteran of the New Rochelle Police Department, was assigned to the property theft unit and was tasked not only with taking photographs of Apartment 4F before anything was disturbed, but also with standing by to take photographs during the search itself as evidentiary items were located and seized (People's exhibit 4-a-1). He recalled that he started photographing the apartment about eight to ten minutes after the door was opened. Among the photographs he took that day were photographs of two rooms where Optimum cable boxes were set up. These photographs were entered into evidence at the hearing. Although the data files indicated in a "date modified" column the date April 5, 2018 and times before 6:00 a.m., the detective stated that these were incorrect and that if a user were to click on "details," it would explain the time differential. Detective Ciafardini testified that although he did not cross reference the time displays on the cable boxes with his own cell phone or watch, that the time shown on the cable boxes depicted in the photographs (6:10 a.m. and 6:14 a.m.) was consistent with the actual time that the photographs were taken (People's exhibit 4-a-1).

The team working this burglary investigation executed another search warrant at 6:00 a.m. on April 5, 2018 at 1430 Bergen Street, Apartment 9H in Brooklyn. Criminal Investigator Daniel Higgins, with the Westchester County District Attorney's Office, testified that he was present with the rest of the team at New Rochelle Police headquarters at 4:00 a.m. that day before leaving the police department to meet up at a staging area until it was time to execute that warrant. Defendant Young was arrested at the apartment and brought back to the New Rochelle Police Department with Detectives Fatah and Herring. Detective Herring drove, he was the front seat passenger and defendant Young and Detective Fatah were in the back seat of the vehicle. En route, Detective Fatah advised Mr. Young of his *Miranda* rights using a *Miranda* card.

People v Kevin Lyde and Kevin Young
Indictment No. 18-0540

Defendant Young did not ask for a lawyer and did not say he did not want to speak with them. The conversation in the car was superficial although defendant Young did ask them whether this was about an incident occurring the previous day involving a woman. During the journey, Investigator Higgins did not detect the odor of an alcoholic beverage on defendant Young's breath or in the vehicle and he testified that defendant Young did not have slurred speech.

Once they arrived at the New Rochelle Police Department, defendant Young was placed in an interview room. Investigator Higgins testified that he detected no odor of an alcoholic beverage on defendant Young nor did he observe him display any indicia of intoxication. Detective Fatah and he went into the interview room and spoke with defendant Young and their conversation was recorded on video (People's exhibit 5-a-1). Prior to speaking with defendant Young, Detective Fatah advised the defendant of his *Miranda* rights for a second time, again using a Bergen County Prosecutor's Office *Miranda* form. While the form has apparently been misplaced, a copy of the same form that was used with respect to defendant Lyde was entered into evidence as illustrative of that which was used to inform defendant Young of his *Miranda* rights. In the video, Detective Fatah read defendant Young each of his rights and defendant Young acknowledged having understood them and can be seen on the video initialing and signing the form and indicating that he wished to speak to police. In the discussion that ensues, defendant Young generally denied culpability and claimed to never have been to New Rochelle, Port Chester, or New Jersey before. He also claimed to be intoxicated.

New Rochelle Police Detective Michael McKenniss, a 30 year veteran with the New Rochelle Police Department, assigned to the property theft unit, testified that a photograph of defendant Young had been pinned to the board above his cubicle for months during the investigation and testified that he saw it every day that he was working during that time period (People's exhibit 2-a-15). This photograph of defendant Young came to be pinned to the board above his cubicle as a result of information shared between his police department, the Port Chester Police Department, the New York Police Department, and criminal investigators with both the Bergen County and Westchester County District Attorneys' Offices. Detective McKenniss recalled that other agencies were investigating defendant Young – he was a suspect in seven Bergen County burglaries, two burglaries in New York City, and in Port Chester burglaries as well.

Years before, when Detective McKenniss was assigned to the narcotics unit as an undercover officer, he had often looked at such pictures as part of making identifications of people he encountered in bars, in clubs, and on the street. In the two years he had worked in narcotics, he took part in more than 100 identifications using single photographs to ensure that he had located the right suspect and he testified that he developed techniques for making identifications as a result of the work he did while assigned to this unit.

After having had many opportunities to examine the photograph of defendant Young, Detective McKenniss went back and viewed, for hours, the security video footage from 543 Main Street on February 2, 2018. This security video footage from February 2, 2018 between 2:00 a.m. and 5:00 a.m. had been taken from a camera mounted on the exterior of the business located at 543 Main Street in New Rochelle. Detective Ciafardini had been tasked with transferring the video to a thumb drive, which he secured, stored on a forensic video server, and later burned to a

People v Kevin Lyde and Kevin Young
Indictment No. 18-0540

blue ray DVD. In that video, Detective McKenniss observed a Ford Expedition as it arrived, parked, and departed the same location three times (People's exhibit 8-a-1). He further observed people climbing onto a dumpster and then onto the roof of a business and he also saw people taking duffle bags to the Ford Expedition (People's exhibit 8-a-1). Of the three people he saw on the video, he observed a man he identified as defendant Young leaving the vehicle and walking towards Division Street while talking on a cell phone (People's exhibit 8-a-1). The clothing worn by the man depicted in the video, a brown hoodie, black baseball cap with both a hologram sticker and a Mets "NY" logo, black construction boots, blue jeans, and a black or navy parka with a fur-trimmed hood and a strap and buckle on the back of the hood, was consistent with that seized in the execution of the search warrant of defendant Young's apartment on Bergan Street in the Crown Heights section of Brooklyn. Detective McKenniss testified that although he had never met defendant Young before he viewed the video, he recognized defendant Young in the video from that photograph of him he had viewed numerous times before. In his opinion, the facial characteristics of the man depicted on the video were all consistent with defendant Young's appearance in the photograph and he testified that he is one hundred percent certain that defendant Young is the man depicted in the video. His certainty derived from the facial characteristics that he observed – the full face, the salt and pepper colored facial hair, and complexion.

CONCLUSIONS of LAW

WadelRodriguez

When a defendant challenges an identification procedure as unduly suggestive, the People have the initial burden of going forward to establish the reasonableness of police conduct and the lack of undue suggestiveness (*see People v Coleman*, 73 AD3d 1200, 1203 [2d Dept 2010]). At a *Rodriguez* hearing, the People bear the burden to demonstrate that the police-arranged identification procedure was merely confirmatory as a result of the defendant being known to the witness to such a degree so as to be impervious to police suggestion (*People v Rodriguez*, 79 NY2d 445, 452 [1992]). The confirmatory identification exception requires a case-by-case analysis which "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]).

The particular issue presented here is whether a non-witness identification of the defendant, made by a highly trained and experienced police officer, may be permitted as helpful to the jury in its fact-finding function on the central issue of identity. As a general matter, the testimony of a lay witness is limited to facts within his or her personal knowledge and thus, such a witness is ordinarily not permitted to offer lay opinion evidence regarding an issue that is within the jury's exclusive province as the fact-finder (*see People v Thompson*, 111 AD3d 56 [2d Dept 2013]; *People v Graydon*, 43 AD2d 842 [2d Dept 1974]). When there is a basis to conclude that a police officer is more likely to correctly identify the defendant from a video, he may be permitted, as a lay witness, to render an opinion as to the identity of an individual portrayed in a

People v Kevin Lyde and Kevin Young
Indictment No. 18-0540

video where the defendant is known to the witness and where the testimony would aid the jury in making an independent assessment as to whether the individual depicted is indeed the defendant (*People v Russell*, 79 NY2d 1024, 1025 [1992]). It is error, however to permit an officer who was not previously familiar with the defendant to identify the defendant in surveillance video footage when there is no foundation to conclude that he is any more likely to correctly identify the defendant from the video than was the jury (*People v Reddick*, 164 AD3d 526 [2d Dept 2018; see *People v Calderon*, 171 AD3d 422 [1st Dept 2019]; *People v Myrick*, 135 AD3d 1069 [3rd Dept 2016]).

Detective McKinness testified as to his extensive experience as an undercover narcotics officer who often used still photographs to identify the sellers and buyers of narcotics whom he encountered, however, there is an inadequate basis on this record to conclude that he is more likely to correctly identify defendant Young from the video than the jury or that he could assist the jury in independently evaluating this evidence on the issue of identification. Although the detective used a still photograph of defendant Young which he had viewed innumerable times while it was pinned to a board by his office cubicle as a basis for comparison between that and the image depicted on the video, Detective McKinness did not know and had never interacted with the defendant and thus, the issue presented is essentially not a *Rodriguez* issue at all since it cannot be said to be in any respect confirmatory.

Moreover, there is no record evidence that defendant Young has changed his appearance in any significant respect since the date of the burglary and thus, the court concludes that, under the circumstances of this case, the proffered testimony would not assist the jury to make an independent evaluation as to whether the man depicted in the video is, in fact, this defendant. The People have cited no cases, and the court has found none, where a police officer, relying on relevant professional experience alone, was permitted to identify a defendant he did not personally know as the person depicted in a video recording. Since the People did not establish that defendant Young materially changed his appearance or even that the detective personally knew him previous to the identification, it would be improper to permit Detective McKinness to offer a lay opinion as to the identity of the man in the video (see *People v Jones*, 161 AD3d 1103 [2d Dept 2018; *People v Ray*, 100 AD3d 933 [2d Dept 2012]).

Huntley

At the conclusion of the hearing, defendant Young conceded the voluntariness of his statement, essentially withdrawing his motion to suppress. Notably, defendant Young's claim made during his interview with police that he was voluntarily intoxicated would not, in any event, affect the voluntariness of his statement or vitiate his concession as to its admissibility. Putting aside that the credible evidence adduced at the hearing did not support the defendant's interview comment that he was intoxicated, intoxication alone is, in any event, insufficient to render a statement involuntary unless there is evidence that defendant was intoxicated to the extent of mania or of being incapable of understanding the meaning of his statements (see *People v Martinez*, 164 AD3d 1260 [2d Dept 2018]; *People v Benjamin*, 17 AD3d 688 [2d Dept 2005]).

Mapp/Dunaway

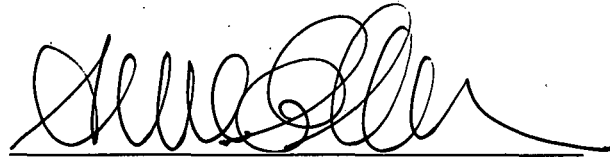
People v Kevin Lyde and Kevin Young
Indictment No. 18-0540

The court granted a *Mapp/Dunaway* hearing to determine the lawfulness of any search not conducted pursuant to a search warrant, resulting in the seizure of property, to address whether any evidence was obtained in violation of the defendant's rights under the Fourth Amendment and on the limited issue of whether the search warrants for defendant Lyde's home and vehicle were executed outside of the 6:00 a.m. to 9:00 p.m. window. As to the former, there was no evidence that there was any evidence taken from defendant Lyde's person or seized outside either warrant, both of which were adequately supported by probable cause, to be not over broad and not founded upon stale information; thus, his motion in this respect is denied. The credible record evidence demonstrates that the search warrants at issue were executed during the authorized time period and, thus, his motion is denied on this ground as well.

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

This matter is referred back to the Trial Assignment Part on Thursday, December 5, 2019, 9:30 a.m., Courtroom 303. The *Sandoval* hearing that had been previously scheduled for Monday, December 23, 2019 is cancelled. It will be rescheduled by, and thereafter held, by the trial court once this case is reassigned for trial.

Dated: White Plains, New York
November 14, 2019



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

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