People v Hines
2019 NY Slip Op 34387(U)
December 9, 2019
County Court, Westchester County
Docket Number: Indictment Number 19-0181
Judge: Anne E. Minihan

[* 1]

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION and ORDER
Indictment Number: 19-0181

WILLIAM HINES,

Defendant.

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Minihan, J.,

The defendant is charged by consolidated Indictment Number 19-0181 with robbery in the 2nd degree (Penal Law § 160.10[2a]), assault in the 2nd degree (Penal Law § 120.05[6]), grand larceny in the 4th degree (Penal Law § 155.30[5]), criminal possession of stolen property in the 5th degree (Penal Law § 165.40 [5]), criminal trespass in the 3rd degree (Penal Law § 140.10[c]), and robbery in the 3rd degree (Penal Law §160.05). The People allege that on February 4, 2019, at approximately 12:30 a.m. in the area of 140 Elm Street in the City of Yonkers, in the County of Westchester, in the State of New York, that the defendant, William Hines did forcibly steal property from Israel Andres Garcia and that in the course of this incident, he repeatedly punched Mr. Garcia, causing him physical injury. They allege further that on January 6, 2019, at approximately 5:30 p.m., in the area of Palisades Avenue in the City of Yonkers, that the defendant, William Hines stole money from the hand of Juan Soriano, that he possessed this stolen money with the intent to benefit himself or someone other than the owner or to impede the recovery of that money by Mr. Soriano. They further allege that after fleeing Palisade Avenue, the defendant knowingly entered and remained unlawfully at 8 Schroeder Street in Yonkers, which is property used as a public housing project, and that in so doing he violated the "No Trespassing" signs which were conspicuously posted around the property. Finally, the People allege that on February 12, 2019, at approximately 8:00 p.m., in the area of Ashburton Avenue in the City of Yonkers, that the defendant, William Hines did forcibly steal money from the person of Guardial Singh.

Defendant, claiming to be aggrieved by the improper or unlawful acquisition of evidence, has moved to suppress five noticed identifications of him made by witnesses, three by way of photographic array and two by showup identifications. The defendant has further moved to suppress three noticed statements as well as the seizure of evidence from his person. He also seeks a pre-trial *Sandoval* ruling by the court.

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By Decision and Order dated May 28, 2019, this court (Fufidio, J.,) granted so much of the defendant's omnibus motion on Indictment Number 19-0089 as sought suppression of physical evidence seized from the defendant as well as the suppression of noticed statements and identifications to the extent that *Mapp/Dunaway*, *Huntley*, and *Wade* hearings were ordered to be held prior to trial. Thereafter, the defendant filed an omnibus motion with respect to Indictment Number 19-0181. The People moved to consolidate the indictments and consented to so much of the defendant's motion for omnibus relief under Indictment Number 19-0181 as sought pre-trial hearings on suppression of physical evidence and noticed statements and identifications. By Decisions and Orders dated November 29, 2019, this court granted the People's application to consolidate and directed that combined pre-trial *Mapp/Dunaway*, *Huntley*, and *Wade* hearings be held with respect to those hearings ordered under the Decision and Order dated May 28, 2019 (Indictment Number 19-0089) as well as those ordered under the Decision and Order dated November 29, 2018 (Indictment Number 19-0181).

On December 5, 2019, these hearings were held before this court[1] at which the People called 8 witnesses from the Yonkers Police Department: Sergeant Andrew Lane, Sergeant Victoria Kusick, Detective John Viviano, Officer Joseph Parrella, Detective Adam Walencik, Detective Christopher Detz, Detective Stephen Sokolik, and Detective Sergeant Louis Venturino. Received into evidence at the hearing were two photograph array packets. The defendant neither called witnesses nor offered evidence.

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

FINDINGS of FACT

On January 6, 2019 at approximately 5:50 p.m., Sergeant Andrew Lane and his partner received a dispatch call to report to the scene of a robbery that had just occurred on or near Palisade Avenue and Walsh Road in Yonkers. The dispatcher, who was still speaking with the 911 caller while they were driving to the area, redirected them en route to 3 Schroeder Street where they encountered Juan Soriano who reported having just been robbed by a six foot tall black man wearing a camouflage jacket, blue jeans, and a red hat. Either Sergeant Lane or his partner put the description of the perpetrator on the radio before they left Mr. Soriano in the care of other officers in order to canvass the area. During the canvass, they located and detained an individual while entering the rear gate of the housing complex at 8 Schroeder Street. Although it was dark by that time, street lights illuminated the area. The defendant, the suspect who was detained, matched the physical description given by Mr. Soriano and was wearing a camouflage

[1]The People withdrew CPL 710.30 notice as to two of the defendant's statements on the ground that as they were self-serving, they would not seek to introduce them at trial.

jacket and blue jeans. Two minutes later[2], Mr. Soriano was brought to their Schroeder Street location and, after making a positive identification of the defendant as the individual who had robbed him, the defendant was placed under arrest. It was Sergeant Lane's recollection that the defendant was reasonably cooperative during this time period and that they had positioned the defendant on the sidewalk in a way that he could not leave but the sergeant could not remember whether the defendant was in handcuffs or whether there were other people around when the showup identification occurred. A search incident to the defendant's arrest yielded $14 and various personal effects.

Sergeant Victoria Kusick was working that same evening as a patrol sergeant when the robbery call came in. She responded to 3 Schroeder Street and spoke with Mr. Soriano and, while there, learned that someone matching the description given by Mr. Soriano had been detained at the rear of the Schroeder Street complex. Sergeant Kusick brought Mr. Soriano, who had told her that he believed he could identify the person who had taken his money, to the nearby area where the suspect had been detained. Once there, she found Sergeant Lane together with his partner and a detained individual. She estimated the distance between her patrol car and the area where the suspect was standing to be about fifteen feet. Sergeant Kusick testified that the officers were standing close and next to the suspect. Like Sergeant Lane, Sergeant Kusick was also unable to recall whether there were other people in the area and whether there was an officer on both sides of the suspect. Without question or prompting, Mr. Soriano said, upon seeing the defendant, "That's him."

On February 4, 2019 at approximately 12:35 a.m., Detective John Viviano, assigned to the Major Case Squad, received a call from patrol about a robbery and assault that had occurred in the area of 136 Elm Street. Officers told him that the victim, Israel Andres Garcia, had been taken to St. Joseph's Hospital and in response, Detective Viviano interviewed him but he was unable to identify the perpetrator. Detective Viviano was aware that other witnesses to this incident, Alexander Pinto and Fanny Cano, had identified the defendant as the individual who had robbed and assaulted Mr. Garcia. While he initially could not recall having been involved in the identification procedures in this case, once his recollection was refreshed, testified that on February 13, 2019, he had prepared the array that had been shown to Mr. Pinto (People's exhibit 26). Detective Viviano testified that he obtained the photographs that were used in the array by putting a description into the system which usually produced about 100 photographs to choose from. Once the array was completed, he gave the array to Detective Stephen Sokolik and it was his belief that the array was shown to Mr. Pinto that same day. He left blank the page in the array packet where the names of the individuals depicted in the filler photographs are placed and, after the array was used, he put the names on the form.

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[2]Sergeant Lane estimated that in total, ten to fifteen minutes had elapsed between the time of the call and the showup identification.

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On February 12, 2019 at approximately 8:06 p.m., Police Officer Joseph Parrella received the call reporting the robbery of an elderly man in at 109 Ashburton Avenue in Yonkers. The description of the perpetrator, which derived from the 911 caller, was a black male wearing a burgundy colored jacket who was seen fleeing the area. About a minute after receiving the call, while he and his partner were en route to the area where the robbery had been reported, he was flagged down by (Kareema) Braxton who was with the elderly victim of that robbery. He learned at about this time that someone matching the description had been detained nearby at the intersection of Palisades Avenue and Walsh Road and he asked Ms. Braxton if she thought she could identify the suspect. When Ms. Braxton indicated that she could, they went to the location where the suspect had been detained and, on the way, Officer Parrella told her that if the person she saw was the perpetrator, she should tell him and if he was not, she should tell him that too. The officer recalled that Ms. Braxton gave him the impression that she knew the suspect from Schroeder Street and that she referred to him by a nickname. Once at the location, which was about a block from where he first encountered Ms. Braxton, he observed the defendant with Sergeant Kusick and other officers and he testified that the appearance of the defendant appeared to match the description that had been given of the suspect. Officer Parrella testified that he asked Ms. Braxton whether that was the person she was talking about who had robbed the elderly man and that she had responded, "Yes." In all, he estimated that it was twelve to thirteen minutes between when he had first encountered Ms. Braxton to when the showup had occurred. Officer Parrella also could not recall whether the defendant was handcuffed or if there were other civilians in the area, but he remembered that there were more than two officers around him.

During the evening of February 12, 2019 after 8:00 p.m., Detective Adam Walencik learned that someone had been placed under arrest for the robbery occurring at 109 Ashburton Avenue. He testified that once brought back to police headquarters, the Crime Scene Unit would have taken photographs of the jacket the defendant was wearing and possibly of the defendant himself. He recalled that $7.00 was taken from the defendant at arrest as well and that the relevant evidence was collected for transport to the Property Clerk Division.

On February 12, 2019 at approximately 8:06 p.m., Detective Christopher Detz responded to the area of Palisades Avenue and Ashburton Avenue where he learned that a suspect had been detained in connection with a robbery that had just occurred. He and his partner transported the defendant to the Detective Division and then escorted him to the central booking area where he was placed in a holding cell. During the time he was in the cell, Detective Detz kept an eye on the defendant but did not speak to him at all. He recalled hearing the defendant mutter and curse and that at one point during the approximately ten minute period, the defendant said, "I don't rob niggas, I just knock them out and take what I need." On cross examination, Detective Detz acknowledged that there had probably been a video recording of the defendant in the booking area during this time but that, as far as he knew, it had not been recovered and that, in any event, the recordings did not contain any audio component.

On February 13, 2019 at approximately 11:15 p.m., in connection with investigation into the February 4, 2019 incident at 140 Elm Street, Detective Stephen Sokolik conducted a photographic array procedure with Alexander Pinto (People's exhibit 26). The detective testified that he had no other involvement in that case whatsoever. He was not involved in the investigation, he did not know the victim, he did not know the defendant and he did not create the array. When he received the array from Detective Viviano, the packet had all of the pages except the page with the names of the people depicted in each photograph.

Before showing Mr. Pinto the array, Detective Sokolik read him the printed instructions on the first page, telling him, in substance, that he was going to be shown an array containing six photographs of individuals, that he could take whatever time he needed to view the array, that the photograph of the perpetrator might or might not be among the pictures, that he should not assume that the detective knew who the perpetrator is, that he should not look to the detective for guidance during the procedure, that individuals depicted in the array might not appear as they had on the date of the incident because features such as hair styles and facial hair are subject to change, that photographs do not always depict the true complexion of the person which might be lighter or darker than that displayed in the array, that he should not pay any attention to any markings that appeared on the photographs or any differences in the type or style of the pictures, that he should not discuss with other witnesses what he saw, said or did during the procedure and that, after he had had an opportunity to view the array, he would be asked if he recognized anyone and, if so, the number of the photograph of the person he recognized and would also be asked from where he recognized that person.

Mr. Pinto acknowledged that he understood the directions and then initialed and dated the instruction form. After that, Detective Sokolik handed Mr. Pinto the manilla envelope containing the array and told him that he should open and view it when he was ready. When Mr. Pinto did, he told Detective Sokolik that he recognized the man depicted in the photograph marked number 5 as the guy who had beaten up the Hispanic victim and gone through his pockets. He said further that he and his girlfriend told him to stop and that the man depicted in photograph number 5, the defendant, had looked him in the face and said, "Mind your own fucking business." Detective Sokolik recorded Mr. Pinto's statement, read it back to him, and then obtained his signature on the form which memorialized that statement. On the array itself, Mr. Pinto circled the 5th photograph, signed it, dated it, and placed the time on it.

On February 14, 2019 at 4:40 p.m., in connection with the investigation into the February 12, 2019 incident at 180 Ashburton Avenue, Detective Sergeant Louis Venturino conducted a photographic array procedure with Fanny Cano (People's exhibit 25). Other than that, he had no other involvement in the case whatsoever. He was not involved in the investigation, he did not know the victim, he did not know the defendant and he did not create the array. When he received the array, the packet had all of the pages except the pages with the names of the people depicted in each photograph.

Before showing Ms. Cano the array, Detective Sergeant Venturino read her the printed instructions on the first page, telling her, in substance, that she was going to be shown an array containing six photographs of individuals, that she could take whatever time she needed to view the array, that the photograph of the perpetrator might or might not be among the pictures, that she should not assume that he knew who the perpetrator is, that she should not look to him for guidance during the procedure, that individuals depicted in the array might not appear as they had on the date of the incident because features such as hair styles and facial hair are subject to change, that photographs do not always depict the true complexion of the person which might be lighter or darker than that displayed in the array, that she should not pay any attention to any markings that appeared on the photographs or any differences in the type or style of the pictures, that she should not discuss with other witnesses what she saw, said or did during the procedure and that, after she had had an opportunity to view the array, she would be asked if she recognized anyone and, if so, the number of the photograph of the person she recognized and would also be asked from where she recognized that person.

Ms. Cano acknowledged that she understood the directions and then initialed and dated the instruction form. After that, Detective Sergeant Venturino showed Ms. Cano the array and told her that if she recognized anyone, she should circle the photograph of the person and put her initials on it and tell him from where she recognized the individual. Ms. Cano viewed the array, quickly identified the individual in the second position, circled it and initialed it, telling him that she recognized the person as the one who robbed the old man on Ashburton. At the bottom of the array she wrote, "I saw him rob the old man." After completion of the procedure, Ms. Cano told him that the same man had been involved in "something else" on Elm Street but he did not document that statement. On cross examination, Detective Sergeant Venturino acknowledged that afterwards he realized that he had met the defendant over the course of his career but that he did not know he was the target of the array and that when he was given the array to administer the identification procedure, he was not told who was in custody.

The following day, Detective Adam Walencik asked him to take a statement from Fanny Cano, a witness to the incident on Ashburton Avenue. Detective Sokolik was aware, at the time he took the statement from her that she had made an identification of the defendant already. While taking her statement and without asking her about any other incident, Ms. Cano told him that the guy she had picked out from the photographic array was the same guy who had attacked a Hispanic man on Elm Street.[3] Ms. Cano, who was a taxi cab driver, said that she had seen the defendant beating and robbing the man by the Mofongo Bar, that she had yelled out to the defendant to leave the man alone, and that the defendant likes to lurk on Elm Street and beat and rob people.

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[3] Because Ms. Cano volunteered that the individual she had identified as the perpetrator of the Ashburton Avenue incident had also committed a robbery and assault on Elm Street, the People noticed this as an identification. This statement, standing alone, without a separate identification procedure is not an identification within the intendment of CPL 710.30 and thus such notice was gratuitous.

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CONCLUSIONS of LAW

Mapp/Dunaway

On a motion to suppress physical evidence, the People bear the burden of establishing the legality of police conduct in the first instance (*People v Hernandez*, 40 AD3d 777, 778 [2d Dept 2007]; *People v Moses*, 32 AD3d 866 [2d Dept 2006]). In evaluating police action, the court must determine whether it was justified at its inception and whether it was reasonably related in scope to the circumstances at the time (*People v De Bour*, 40 NY2d 210 [1976]). In *De Bour*, the Court of Appeals established a graduated four tier test to evaluate the propriety of police encounters with individuals when officers act in their law enforcement capacity (*see People v Moore*, 6 NY3d 496, 498-499 [2006]). The first level permits a police officer to request information from an individual and requires only that the request be supported by an objective, credible reason not necessarily indicative of criminality (*People v Moore*, 6 NY3d at 498). The second level, the so called, common law right of inquiry, requires that there be a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion (*People v Moore*, 6 NY3d 498-499). The third level permits an officer who has a reasonable suspicion that an individual is committing, has committed, or is about to commit a crime, to forcibly stop and detain that individual (*People v Moore*, 6 NY3d 499; *People v De Bour*, 40 NY2d at 223; see also CPL 140.50[1]). The fourth level authorizes an arrest based on probable cause to believe that a person has committed a crime (*People v Moore*, 6 NY3d 499; *People v De Bour*, 40 NY2d at 223).

Sergeant Lane had reasonable suspicion to forcibly stop the defendant based on a totality of the circumstances, including a radio transmission which was relayed within moments of a robbery taking place and which provided a general description of the crime and its location and a sufficiently specific description of the defendant himself, together with the close physical and temporal proximity that he was found relative to the site of the incident and the sergeant's observation of the defendant as matching the radio-transmitted description of the suspect near the scene of the reported incident (*see People v Palmer*, 84 AD3d 1414 [2d Dept 2011]; *People v Hicks*, 78 AD3d 1075, 1075-1076 [2010]; *People v James*, 72 AD3d 844, 844-845 [2d Dept 2010]; *People v Mais*, 71 AD3d 1163 [2d Dept 2010]; *People v Hines*, 46 AD3d 912, 913 [2d Dept 2007]; *People v Bennett*, 37 AD3d 483, 484 [2d Dept]; *People v Gil*, 21 AD3d 1120, 1121 [2d Dept 2005]; *People v Green*, 10 AD3d 664 [2d Dept 2004]; *People v Holland,* 4 AD3d 375, 376 [2d Dept 2004]; *People v Private*, 259 AD2d 504 [2d Dept 1999]; *People v Johnson*, 244 AD2d 573 [2d Dept 1997]). While there were questions on cross examination as to whether or not the defendant was handcuffed during the brief period of time in which he was waiting for the identifying witness to be transported for the showup, such does not necessarily elevate a seizure based on reasonable suspicion to an arrest requiring probable cause in view of the need to protect the safety of the officers and any bystanders (*see People v Foster*, 85 NY2d 1012, 1014 [1995]; *People v Allen*, 73 NY2d 378, 379-380 [1989]; *In re Elijihn C.*, 134 AD3d 819 [2d Dept 2015]; *People v Worthy*, 308 AD2d 555 [2d Dept 2003]).

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Wade

Showup Identifications

Bearing this in mind, the defendant's challenges to the showup identification procedures do not warrant suppression. In each case, the defendant matched the description of the robber that was sufficiently specific to provide reasonable suspicion, particularly inasmuch as on both occasions the defendant was apprehended shortly after the incident and in close geographic proximity to the incident. The information provided to the detaining officers provided them with reasonable suspicion to detain the defendant to rapidly confirm or dispel the suspicion that he had committed a crime (*see People v Hicks*, 68 NY2d 234 [1986]; *People v Worthy*, 308 AD2d 555 [2d Dept 2003]).

A showup identification carries with it an inherent suggestiveness and, for that reason, is strongly disfavored (*see People v Riley*, 70 NY2d 523, 528 [1987]). The Court of Appeals has nonetheless endorsed showup identifications following the defendant's detention at or near the crime scene (*see People v Johnson*, 81 NY2d 828, 831 [1993]). They are also permitted in situations where there is an exigency such as when police have apprehended a suspect at or near the crime scene and can be viewed by the witness immediately so that police will know if they have detained the correct suspect or should continue canvassing or if the victim's injuries are such that he may not be later able to identify a suspect (*see People v Love*, 57 NY2d 1023 [1982]). Also, showup identifications have been permitted as part of an "unbroken chain of events" or ongoing investigation (*see People v Duuvon*, 77 NY2d 541 [2011]). Showup identification procedures are not improper merely on the ground that police already have probable cause to detain a suspect (*see People v Duuvon*, 77 NY2d at 545). Such procedures are, by their nature fact-specific and must be reasonable under the circumstances, not unduly suggestive, and when they are conducted in close geographic and temporal proximity to the crime (*People v Brisco*, 99 NY2d 596 [2003]; *People v Ortiz*, 90 NY2d 533, 537 [1997]; *People v Johnson*, 81 NY2d 828, 831 [1993]).

The determination whether a pre-trial identification procedure was unduly suggestive is subject to a long-established "burden-shifting mechanism" whereby the People initially bear the burden to prove the fairness of the procedure itself, that is the reasonableness of the police conduct and the lack of undue suggestiveness (*People v Holley*, 26 NY3d 514 [2014]). If the People make that required showing, the burden 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]).

The showups here were conducted as part of a continuous investigation, with constitutionally permissible range of temporal and spatial proximity to each incident (*see People v Howard*, 22 NY3d 388, 402 [2013]; *People v Brisco*, 99 NY2d 596, 597 [2003]). In addition to their promptness, the showup procedures were not suggestive under the circumstances in any way greater than that which is inherent in any showup identification (*see People v Brnja*, 50 NY2d 366 [1980]). In the first instance, Sergeant Kusick had no discussion with the identifying

witness after receiving an affirmative response to her question as to whether the witness might be able to identify the person. In the second showup, Officer Parrella asked the identifying witness essentially the same question and, in the patrol car, said only that whether or not it was the perpetrator, she should tell him. Once there, he asked whether that was the person she had been talking about. Although the better practice would have been to word that question in a more neutral fashion, it cannot be said that this question alone rendered the identification suggestive particularly in light of the credible record evidence that this identifying witness knew the defendant to some extent as she referred to him by nickname and in a manner in which from which the officer could infer that she already knew the defendant to some degree prior to the incident.

In any event, both identifications occurred essentially within minutes of the reported incident and of the defendant's detention and both showups took place within a few blocks of the incident. As there is no evidence of suggestiveness beyond that already inherent in showup identifications, neither is subject to suppression and thus the defendant's motion in this respect is denied.

Photographic Arrays

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]).

Here, the People satisfactorily demonstrated the lack of suggestiveness in the identification procedures themselves and the specific manner in which the photo arrays were shown to the identifying witnesses. In each case, before the witness was shown an array, the detective or detective sergeant gave that witness thorough, detailed instructions which each witness acknowledged hearing and understanding. Each was read the printed instructions on the first page of the array packet, telling him/her, in substance, that he/she was going to be shown an array containing six photographs of individuals, that he/she could take the necessary time needed to view the array, that the photograph of the perpetrator might or might not be among the pictures, that he/she should not assume that the officer knew who the perpetrator was and that he/she should not look to the officer for guidance during the procedure, that those depicted in the array might not appear as they had on the date of the incident because certain features are subject to change, that photographs do not always depict the true complexion of the person photographed, and that he/she should disregard any markings that appeared on the photographs. In both instances, the witnesses promptly, positively, and without hesitation identified the defendant from his photograph.

On this record, the People established that the array itself was not unduly suggestive. Each array used the same photograph of the defendant although in each array it was placed in a different position. The photographs of the defendant and the ten fillers (five for each array) all depict individuals reasonably similar in appearance to the defendant. While the defendant contends that in one array some of the filler photographs depict men substantially younger than the defendant, the court has viewed this array in light of defendant's claim in this regard

(People's exhibit 26) and does not discern a meaningful age discrepancy or any other factor, in either array, that would create a 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. In neither array was the suspect's photograph in any way highlighted or emphasized nor was either array shown to the identifying witness in a suggestive fashion (*People v Anaya*, 206 AD2d 380 [2d Dept 1994]; *People v Burris*, 171 AD2d 668 [2d Dept 1991]). Each witness was given detailed cautionary instructions prior to viewing the array and there is no record evidence that the officer who showed the arrays to either witness made any comments, suggestions or encouragement during the procedure. In fact, both officers credibly testified not knowing the victim or the defendant and neither was involved in the investigation at the point in time the procedure was administered. Neither is there any indication from the record that either witness viewed the array for more than a brief period of time before making a positive identification.

On this record, the defendant failed to demonstrate by a preponderance of the evidence that the photographic identification procedures were unduly suggestive; nor has he shown that there was any misconduct by police in the manner in which the procedures were conducted.

Accordingly, the defendant's motion to suppress these noticed identifications is denied in its entirety.

Huntley

At a hearing to suppress noticed statements made to law enforcement officials, the People bear the burden of demonstrating that the defendant's statements were voluntary beyond a reasonable doubt (*People v Anderson*, 42 NY2d 35 [1977]; *People v Huntley*, 15 NY2d 72 [1965]; *People v Loucks*, 125 AD3d 890 [2d Dept 2015]) and, if applicable, that they were made following the defendant's knowing, intelligent, and voluntary waiver of his *Miranda* rights (*Miranda v Arizona*, 384 US 436, 444 [1966]; *People v Williams*, 62 NY2d 285, 288-289 [1984]). The *Miranda* rule protects an individual's privilege against self-incrimination and, "because the privilege applies only when an accused is 'compelled' to testify, the safeguards required by *Miranda* are not triggered unless a suspect is subject to 'custodial interrogation'" (*People v Berg*, 92 NY2d 701, 704 [1999]). By definition, custodial interrogation entails both custody and interrogation (*People v Huffman*, 41 NY2d 29, 33 [1976]; *People v Valentin*, 118 AD3d 823 [2d Dept 2014]).

In this instance, the People assert that the defendant's statement was spontaneously uttered while he was in a holding cell during the booking process. The test for whether a statement is truly spontaneous is whether it was spoken by a defendant "without apparent external cause" (*People v Stoesser*, 53 NY2d 648, 650 [1981]). That is, courts look to whether a defendant spoke with true spontaneity and not as the result of "inducement, provocation, encouragement or acquiescence, no matter how subtly employed" (*People v Maerling*, 46 NY2d 289, 302-303 [1978]; *see People v Rivers*, 56 NY2d 476, 479 [1982]; *People v Lanahan*, 55 NY2d 711, 713 [1981]; *People v Stoesser*, 53 NY2d at 650).

The statement made by the defendant during the period of time that he was at the Yonkers Police Department in the holding cell were unprompted, voluntary and genuinely spontaneous (*see People v Tyrell*, 67 AD3d 827 [2d Dept 2009]). There is no record evidence that anyone asked the defendant anything, engaged him in conversation, or maintained a conversation within his hearing that would encourage or prompt his statement. Police need not silence or muzzle a talkative custodial defendant and it is clear that his statement was entirely voluntary, spontaneous, and "not the result of inducement, provocation, encouragement or acquiescence no matter how subtly employed" (*People v Maerling*, 46 NY2d 289 [1978]). The court rejects the defendant's contention that the statement is inadmissible on the ground that it represents only part of what the defendant said during this time period as the evidence adduced at the hearing is that the defendant was otherwise mumbling and cursing during this period of time and the detective credibly testified that once his attention was drawn to the fact that the defendant was speaking in the holding cell, he documented the only audible statement that the defendant made.

The People have met their burden to demonstrate, beyond a reasonable doubt, that the defendant's statement to law enforcement was both spontaneous and voluntary. Accordingly, that branch of the defendant's motion to suppress his noticed statement is denied.

With respect to the booking video recording, the failure to preserve it does not impact the suppression issue as the People have no duty to record a defendant's spontaneous statement that is clearly not the product of interrogation however, the defendant is correct that he was entitled to the production of it. While there was no audio component to the recording system, the video itself should have been turned over to the defense in compliance with the People's discovery obligations.

A trial court may, and sometimes must, instruct jurors that they may draw an inference unfavorable to the People based upon the People's failure to present, preserve or disclose certain evidence (*see People v Martinez,* 22 NY3d 551, 567 [2014]; *People v Savinon,* 100 NY2d 192, 197 [2003]). A permissive adverse inference instruction typically serves as either a penalty for the People's violation of their statutory duties, their constitutional duties or their destruction of material evidence or as an explanation of logical inferences that may be drawn regarding the People's motives for failing to present certain evidence at trial (*see generally People v Handy,* 20 NY3d 663, 667-669 [2013]; *People v Martinez,* 71 NY2d 937, 940 [1988]). Under most circumstances, the court must issue an adverse inference charge as a penalty where the State, through its agents, has destroyed existing material evidence in its possession, such as an existing video recording that has been requested by the defense (*see Handy,* 20 NY3d at 667-669). Further, where the People have violated their disclosure obligations, an adverse inference charge, and sometimes more severe penalties, are authorized (*see Martinez,* 22 NY3d at 560-565; *People v Haupt,* 71 NY2d 929, 931 [1988]).

The court concludes that, under the circumstances, an adverse inference instruction is an appropriate remedy for the People's inadvertent failure in this regard and that such will overcome any possibility of prejudice owing to the failure to provide the video recording. The parties will attempt to draft an adverse inference instruction that is mutually acceptable which the court will review and settle on an instruction to be delivered to the jury.

Sandoval

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 People, proposing a Sandoval compromise, ask that they be permitted to inquire as to defendant's prior criminal convictions to the extent that, should he choose to testify, they be permitted to cross-examine him as to his May 23, 2018 conviction for obstruction of governmental administration in the 2nd degree, his November 29, 2017 conviction for false personation, his June 13, 2017 conviction for criminal contempt in the 2nd degree, his April 25, 2017 conviction for criminal contempt in the 2nd degree, his November 16, 2016 conviction for criminal contempt in the 2nd degree, his December 8, 2015 conviction for criminal contempt in the 2nd degree, his May 27, 2014 conviction for criminal contempt in the 2nd degree, his January 6, 2014 conviction for criminal contempt in the 2nd degree, his November 18, 1998 conviction for criminal possession of a controlled substance in the 3rd degree, his December 10, 1997 conviction for criminal contempt in the 2nd degree, his December 10, 1997 conviction for assault in the 3rd degree, his June 10, 1996 conviction for assault in the 3rd degree, his January 16, 1995 conviction for assault in the 3rd degree, his December 13, 1993 conviction for petit larceny, his August 2, 1991 conviction for attempted robbery in the 2nd degree, and his June 28, 1989 conviction for petit larceny.

As to each of these, the People seek leave to inquire only as to the name of the offense for which the defendant was convicted and the date of the conviction. They maintain that these convictions demonstrate the defendant's willingness to place his interests above those of society and that, since the defendant has spent a significant period of time incarcerated as a result of these and other convictions, the court should consider tolling to pull the older convictions within a 10 year time frame.

The defendant opposes a different compromise under which the People would be permitted to inquire as to whether the defendant has a misdemeanor conviction and a felony conviction. He maintains that the People's point that the defendant has placed his interests above societal interests could be made without subjecting him to cross examination as to the sixteen convictions that the People seek to use. The defendant points out that many of the convictions that the People would use to cross examine him are decades old, that any conviction that is older than ten years is too remote to bear upon his present testimonial credibility. He asserts that allowing the People to cross examine him on so many convictions would irreparably prejudice him in the eyes of the jury.

Further to the issue of remoteness, the defendant argues that his 1998 conviction for criminal possession of a controlled substance in the 3rd degree would not, if it had been committed after enactment of the Drug Law Reform Act (which drastically changed the Rockefeller law's sentencing guidelines) have resulted in the significant sentence of incarceration that the defendant served and that simple fairness dictates that the court not factor in tolling when considering the issue of remoteness. With respect to the defendant's convictions for criminal contempt in the 2nd degree, the defendant maintains that he should be given consideration for guilty pleas that he entered for expediency's sake because his inability to post bail resulted in pleas he would not otherwise have entered but for his desire to be released from incarceration. He points out that in less than a month, when new criminal justice reform takes effect, a similarly situated individual charged with this offense will be released without monetary bail and that the People will be without leverage to obtain such dispositions by way of guilty pleas.

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 as to the nature of any the defendant's prior criminal convictions occurring prior to 2014. The most recent conviction prior to 2014 which the People seek to use is the defendant's 1998 conviction for criminal possession of a controlled substance in the 3rd degree. In addition to having occurred more than two decades ago, this conviction does not, in any event, bear 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.

With respect to the remaining convictions for obstruction of governmental administration in the 2nd degree, for false personation and criminal contempt in the 2nd degree, which are all significantly more recent and both demonstrative of the defendant's willingness to place his interest above those of the community and are entirely germane to his testimonial veracity and integrity, the People may inquire, should the defendant testify, as to whether he has been convicted of obstruction of governmental administration in the 2nd degree, false personation and criminal contempt in the 2nd degree and they may inquire as to the dates of the first two and the most recent conviction for criminal contempt in the 2nd degree. By limiting impeachment questioning in this way, any undue prejudice which could result is ameliorated.

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 he chooses to testify and then deny or equivocate as to having been convicted or should he contend that in that prior cases 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 pleas and the People will, upon their application to the court, be permitted to impeach his credibility with questions delving into, inter alia, 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 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.

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 convictions 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
December 9, 2019

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

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