

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D17947
G/kmg

_____AD3d_____

Submitted - January 15, 2008

DAVID S. RITTER, J.P.
FRED T. SANTUCCI
JOSEPH COVELLO
EDWARD D. CARNI, JJ.

2005-11058

DECISION & ORDER

The People, etc., respondent,
v LaJay Sumpter, appellant.

(Ind. No. 6660/03)

Leighton M. Jackson, New York, N.Y., for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Seth M. Lieberman, and Maria Park of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Reichbach, J.), rendered November 7, 2005, convicting him of criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Starkey, J.), of that branch of the defendant's omnibus motion which was to suppress lineup identification testimony.

ORDERED that the judgment is reversed, on the law, that branch of the defendant's omnibus motion which was to suppress lineup identification testimony is granted, and a new trial is ordered.

The defendant's contention that the evidence was legally insufficient is unpreserved for appellate review as it was not raised before the trial court (*see* CPL 470.05[2]; *People v Gray*, 86 NY2d 10, 19). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), we find that it was legally sufficient. Resolution of issues of credibility is primarily a matter to be determined by the jury, which saw and heard the witnesses, and its determination should be accorded great deference on appeal (*see People v Romero*, 7 NY3d 633, 644-645; *People v Mateo*, 2 NY3d 383, 410, *cert denied* 542 US 946). Upon the exercise of our

February 13, 2008

Page 1.

PEOPLE v SUMPTER, LaJAY

factual review power (*see* CPL 470.15[5]), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d at 644-645).

However, the hearing court erred in denying that branch of the defendant's omnibus motion which was to suppress lineup identification testimony. The defendant's right to counsel was violated when police officers conducted a lineup without first apprising the defendant's attorney and affording her a reasonable opportunity to participate (*see People v LaClere*, 76 NY2d 670). Further, because the evidence of the defendant's guilt without the erroneously admitted testimony was not overwhelming, the error cannot be deemed harmless, and a new trial is required (*see People v Crimmins*, 36 NY2d 230). However, contrary to the defendant's contention, dismissal of the indictment is not warranted (*see People v Wolters*, 41 AD3d 518; *but see People v Hargroves*, 296 AD2d 581).

The defendant's remaining contentions need not be addressed in light of the foregoing determination.

RITTER, J.P., SANTUCCI, COVELLO and CARNI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court