

This opinion is uncorrected and subject to revision in the Official Reports. This opinion is not available for publication in any official or unofficial reports, except the New York Law Journal, without approval of the State Reporter or the Committee on Opinions (22 NYCRR 7300.1)

October 31, 2001, in Queens County, the defendant and his co-defendant, Rasheem Parrish, chased complainant Randy Newson, and that co-defendant Parrish shot the complainant in the arm, pelvis, and leg with a firearm, after being instructed to do by defendant King. At his arraignment, in addition to other notices, the People served upon the defendant CPL 710.30(1)(b) notice of an identification procedure that took place on December 6, 2001, at approximately 1:30pm, at the complaining witness' residence. This witness identified the defendant in a photograph, as one of the individuals involved in the crime. The People did not serve notice of any other identification procedure that was conducted. In his omnibus motion, dated January 27, 2002, the defendant moved to suppress the identification procedure concerning the complainant, or in the alternative for a Wade hearing.² Those applications were denied in the Court's decision dated February 8, 2002, in that the identification by the complainant was confirmatory.

On December 30, 2001, an alleged eyewitness to the incident, an individual named Raven Bolling, identified the defendant from

King is not charged with these additional crimes.

² The attorney who represented the defendant at his arraignment was subsequently relieved, and a new attorney was assigned to represent the defendant. This new attorney filed an omnibus motion, as well as the instant motion to reargue, and is currently the attorney of record.

a photo array as one of the participants in the shooting. It should be noted that this identification procedure was conducted more than 15 days after the defendant's arraignment on the instant indictment. In their affirmation, dated March 25, 2002, the People contend that they were not notified by the police of this photo array until sometime in February, 2002.³ The defendant alleges that he was informed by the People, on February 27, 2002, of this identification procedure by way of an Order to Show Cause for a lineup (see, defense counsel's affirmation, no pagination, paragraph 8, dated February 28, 2002, attached to defendant's Motion to Reargue dated March 19, 2002). A lineup concerning the defendant was conducted on February 28, 2002, at the 101st precinct. Defense counsel was present at the lineup, and the defendant was identified by Raven Bolling as the individual who ordered the shooting underlying this indictment.

On March 1, 2002, in this part of the Supreme Court, the People served the defendant with notice of the photographic identification of him that took place on December 30, 2001, and notice of the lineup that he was identified in, on February 28, 2002. The People also contended that it was not necessary for them to serve these notices because the witness Raven Bolling and

³ The People do not indicate on what date in February they were informed by the police of the photographic identification.

the defendant are known to one another, and therefore these identification procedures were purely confirmatory. See, minutes of March 1, 2002, page 8, line 15. The defendant never contested these allegations by the People. The Court again notes that both identification procedures, namely the photo array and the lineup, were conducted more than 15 days after the defendant was arraigned on the instant indictment.⁴

In response to the People serving identification notice, the defendant served upon the Court and the People a written motion to preclude, at trial, testimony and evidence regarding the identifications of the defendant by the witness Raven Bolling. The defendant submitted that he was not served notice of the identification procedures within 15 days of his arraignment, as provided for by CPL 710.30. Therefore, he argued, the evidence must be precluded pursuant to that statute.

The People responded orally in opposition to the motion arguing to the Court that since the identification procedures in question were not conducted until after 15 days after the defendant's arraignment, the People were only obligated to serve notice to the defense within a reasonable period of time after

⁴ The defendant was arraigned on the indictment on December 12, 2001. The photo array took place on December 30, 2001. The lineup took place on February 28, 2002.

learning of the procedures, which they say they did. The People further argued that since the parties were known to each other, CPL 710.30 notice was not even necessary.

After reading defense counsel's motion, and after oral argument on the matter, the Court rendered its decision from the bench finding that since the identification procedures in question took place more than 15 days after the defendant's arraignment on the indictment, the time requirement of CPL 710.30 had no application to this case. The Court found that it would be impossible for the People to serve notice within 15 days of the defendant's arraignment of an identification procedure that had not yet been conducted. The defendant subsequently filed the instant motion to reargue.

DISCUSSION

CPL 710.30 is "a notice statute intended to facilitate a defendant's opportunity to challenge before trial the [...] reliability of his identification by others" (see, People v. Lopez, 84 NY2d 425, 428 [1994]). CPL 710.30 (1)(b) states, "Whenever the people intend to offer at a trial testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such, they must serve upon the

defendant a notice of such intention, specifying the evidence intended to be offered". Furthermore, CPL 710.30(2) requires that said notice be served upon the defendant within fifteen days of his arraignment,⁵ and CPL 710.30(3) dictates that should notice not be timely served, the evidence will be precluded.⁶

However, what is to become of identification evidence that is generated more than fifteen days after a defendant's arraignment? How could the People give notice at arraignment of an identification procedure that has not yet been conducted?⁷ Should the evidence therefore be precluded?

CPL 710.30 is silent as to what course of action the Courts must follow when an identification procedure is conducted, like in the case at bar, more than fifteen days after a defendant's arraignment have passed. Common sense dictates that it is impossible for the People to serve, at arraignment, or fifteen

⁵ CPL 710.30(2) provides the People with a good cause extension for late notice.

⁶ CPL 710.30(3) provides that if a defendant moves to suppress such evidence, and that motion has been denied, and the evidence is found to be admissible, it will be admitted at trial despite the absence of, or untimeliness of, notice.

⁷ It is important to note that the People are not prevented from seeking additional evidence against a defendant simply because the defendant has been indicted. For example, CPL 240.40(2) permits, under certain conditions, a lineup to be conducted post-indictment. See also, People v. Lane, 144 Misc. 2d 90 [N.Y. Sup. 1989].

days later, notice of an identification procedure that has not yet taken place. To preclude evidence on this basis would make even less sense. The Appellate Division, Second Department, has held that the People are not obligated to comply with the fifteen day notice deadline when the evidence has not yet been generated. See, People v. Whitaker, 106 AD2d 594 [2nd Dept 1984]; People v. Boswell, 193 AD2d 690 [2nd Dept 1993]⁸. A review of case law, and of cases that discuss the legislative history of CPL 710.30, demonstrate that the notice requirement of CPL 710.30 speaks only to evidence that is in existence at the time of a defendant's arraignment. See, People v. Lane, 144 Misc2d 90 [N.Y. Sup. 1989]; People v. G., 158 Misc2d 893 [N.Y. Sup. 1993]. Furthermore, though the distinction is not applicable to this case as the identification procedures here were conducted more than fifteen days past the defendant's arraignment, one lower court went so far as to hold that "the fifteen day rule does not apply to any post-arraignment identifications", whether or not they occurred within the fifteen days after a defendant's arraignment (see, People v. G., 158 Misc2d 893, 898 [N.Y. Sup.

⁸ People v. Whitaker, 106 AD2d 594 [2nd Dept 1984] and People v. Boswell, 193 AD2d 690 [2nd Dept 1993] both discuss CPL 710.30 notice for statement evidence. Since CPL 710.30 relates to both statement and identification evidence, the holdings of Whitaker and Boswell apply to the case at bar.

1993])). Since the photographic and lineup identification evidence in this case was not in existence at the time of the defendant's arraignment, the Court gives no weight to the defendant's argument that the People erred by failing to serve CPL 710.30 notice at the defendant's arraignment. Therefore, the Court will not preclude identification evidence from being introduced at trial based on an alleged violation of the notice requirement of CPL 710.30.

Since this Court holds that the CPL 710.30 fifteen day notice requirement does not apply to the post-arraignment identification procedures that were conducted in this case, it must determine what, if any, notice requirement does exist. In other words, when the People conduct a post-arraignment identification procedure, when do they need to alert the defendant that they intend to use that evidence against him at trial? Justice Michael R. Juviler of the New York State Supreme Court, Kings County, a court of concurrent jurisdiction, discussed this issue in People v. G., 158 Misc2d 893 [N.Y. Sup. 1993]. In that case, the court had to determine whether notice of identification evidence, obtained after the defendant's arraignment, was timely served on the defendant two months after his arraignment. In making it's determination, and finding that the notification was timely, the court looked to CPL 240.60.

The Court held that the discovery rules delineated in the CPL apply to post-arraignment identifications, and it found that when a post-arraignment identification procedure is conducted, it should be disclosed to the defendant "promptly" (see, CPL 240.60). The Court also held that since the discovery rules apply to these situations, should prosecutors fail to promptly reveal the identifications to the defense, they would face sanctions under CPL 240.70[1]. This Court agrees with Justice Juviler's analysis. In the case at bar, the Court finds that the People promptly disclosed the post-arraignment identification to the defendant. The People were alerted in February, 2002, by the police that a photographic identification of the defendant took place. The defendant submitted that he learned of this procedure on February 27, 2002, when the People brought an Order to Show Cause for the defendant's participation in a lineup.⁹ The lineup was then conducted the next day, February 28, 2002, with defense counsel present. The defendant was identified in the lineup. Though the defendant was obviously aware of the lineup procedure, since he and his counsel were present, and

⁹ The Court file indicates that the matter was not on the calendar that day. My personal notes, however, indicate that both defense counsel and the People were before me, in Part K4, on February 27, 2002. The defendant's production before the Court was waived, though the People did obtain an order to produce him.

though they were previously made aware of the photographic identification procedure, the People still served formal notice on the defendant in Court on March 1, 2002 (see, minutes of March 1, 2002, page 3, line 6). The Court finds that the People met their duty to continually disclose evidence to the defendant by timely notifying him of the identification procedures.

Furthermore, though the Court finds that the discovery rules, and not CPL 710.30, guide post-arraignment identifications, this Court has not forgotten that the "purpose of the CPL 710.30 notice is to allow a defendant to avail himself of a suppression motion in situations in which the defendant may either be unaware of the People's intention to use evidence or the existence of the evidence" (see, People v. Lane, 144 Misc2d 90, 92 [N.Y. Sup. 1989], citing to People v. White, 73 N.Y.2d 468 [1989], and People v. Briggs, 38 NY2d 319[1975]). In the present case, even though CPL 710.30 does not direct the Court, the defendant was never denied the opportunity to move to suppress the identification procedures. In fact, after the People promptly notified the defendant of the photographic identification procedure, they agreed to consent to a Wade hearing should the defendant be identified in the lineup (see, minutes of March 1, 2002, page 3, line 14). Moreover, in that defense counsel was present at the lineup, in addition to having

the opportunity to move to suppress it, she also had the opportunity to challenge the lineup as it was being conducted. Therefore, under the facts of this case, though the rule of CPL 710.30 was not applicable, its spirit was certainly honored.

Lastly, because the People did serve the defendant with notice of the identification procedures conducted in this case, this decision has discussed when the People should notify the defendant of a post-arraignment identification procedure, not if they should have served the notice. This holding exempts from the CPL 710.30 fifteen day notice requirement identification procedures that have not yet occurred by the time a defendant is arraigned. It holds that the People can not serve upon the defendant notice of an identification procedure that has not yet occurred. In essence, this decision has discussed an exception to the rule of CPL 710.30. The Court, however, is mindful of another exception to the rule, a situation where the rule doesn't even apply. "In cases in which the defendant's identity is not in issue, or those in which the protagonists are known to one another, 'suggestiveness' is not a concern and, hence, the statute [CPL 710.30] does not come into play" (see, People v. Gissendanner, 48 N.Y.2d 543, 552 [1979]). The People alleged in their affirmation dated March 25, 2002, and orally on the record (see, minutes of March 1, 2002, page 8, line 15), that the

identifying witness and the defendant are known to one another. This was not disputed by the defendant. The Court finds that the identification of the defendant was confirmatory.¹⁰ It was, therefore, outside the scope of CPL 710.30. The Court notes this exception simply because it is another basis on which to find that the preclusion of identification evidence in this case, for lack of CPL 710.30 notice within fifteen days of arraignment, is not warranted.

Accordingly, the Court grants the defendant's motion to reargue to the extent that it has reviewed the defendant's application. However, based on the foregoing discussion, the motion to preclude identification testimony offered by Raven Bolling, from being introduced at trial, is denied.

Though the Court has resolved the issues raised in the defendant's motion to reargue, seeking to preclude identification testimony from being used against the defendant at trial, there is one final matter that must be determined. As stated supra, the People in this case consented to a Wade hearing should the defendant be identified in the lineup. In their affirmation dated March 25, 2002, the People consented to a Rodriguez hearing, to demonstrate the relationship between the witness and

¹⁰ The facts establishing this identification as confirmatory will be discussed infra.

the defendant, therefore establishing that CPL 710.30 notice was not necessary.¹¹ However, though the Court would hold the People to their consent to a pre-trial hearing on identification issues,¹² this Court is not bound by the People's position where there is no bona fide issue to be heard. The facts in this case do not necessitate that a pre-trial Wade or Rodriguez hearing be held. The People stated on the record on March 1, 2002 (see, minutes, page 8, line 21), and in their affirmation dated March 25, 2002 (see, affirmation, no pagination, paragraphs 5 and 6), that the witness has known the defendant since he was eight years old,¹³ that she knew the defendant's name, and that the defendant played basketball on the witness' father's team. Furthermore, the People allege in their affirmation, paragraph 6, that this information was stated at the lineup in defense counsel's presence. Though he had two opportunities to do so, on the

¹¹ The defendant did not move for a Wade or Rodriguez hearing to determine suppression. Instead, the defendant moved for preclusion.

¹² Though the case was discussing plea bargains, the United States Supreme Court in Santobello v. New York, 404 US 257 [1971], held that when a prosecutor makes a promise regarding a plea bargain, that prosecutor must honor his commitment. This Court would have extended that logic to hold the prosecutor in this case to his consent to pre-trial hearings, if a hearing were otherwise called for.

¹³ The defendant's date of birth, according to the Court file, is December 16, 1985.

record on March 1, 2002, and in his motion to reargue, the defendant never contested the facts raised by the People that the witness and defendant were well known to one another. (See, People v. Murray, 247 AD2d 292 [1st Dept 1998]). Accordingly, the Court finds that the identification procedures conducted in this case were confirmatory, and that there are no pre-trial issues as to identification that need to be resolved in this case. Therefore, it would be a waste of judicial economy to conduct a gratuitous pre-trial hearing on identification under these circumstances, where there is no genuine issue to be decided, and this Court will not do so.

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to distribute copies of this decision and order to the attorney for the defendant and to the District Attorney.

.....
WILLIAM M. ERLBAUM, A.J.S.C.