

State of New York Court of Appeals

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

No. 82 SSM 18
The People &c.,
Respondent,
v.
Vincent Carmona,
Appellant.

Submitted by Jonathan Rosenberg, for appellant.
Submitted by Solomon Neubort, for respondent.

MEMORANDUM:

The order of the Appellate Division should be modified by remitting to Supreme Court for further proceedings in accordance with this memorandum and, as so modified, affirmed.

Supreme Court erred in denying defendant's pretrial request for a hearing pursuant to *People v Rodriguez* (79 NY2d 445 [1992]), as the prosecutor here offered only bare assurances that the witness was familiar with defendant. Further, the Appellate Division erroneously relied on testimony adduced at trial to overcome the suppression court's error.

“Thus, the case should be remitted to Supreme Court for a hearing to determine whether the [photographic] identification procedure was confirmatory. If, after that hearing, the court concludes that the People have not sustained their burden, a *Wade* hearing should be held and further proceedings, including a new trial, should be had as the circumstances may warrant. If the court concludes that a *Wade* hearing is not required, the judgment[] should be amended to reflect that result” (*see Rodriguez*, 79 NY2d at 453).

Defendant's challenge to the weight of the evidence is unreviewable, and his remaining contention is unpreserved.

On review of submissions pursuant to section 500.11 of the Rules, order modified by remitting the case to Supreme Court, Kings County, for further proceedings in accordance with the memorandum herein and, as so modified, affirmed. Chief Judge DiFiore and Judges Rivera, Fahey, Garcia, Wilson, Singas and Cannataro concur.

Decided October 7, 2021