

MEMORANDUM

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: JHO-H**

THE PEOPLE OF THE STATE OF NEW YORK

**BY: ROBERT CHARLES KOHM,
JUSTICE**

- against -

DATE: MARCH 29, 2004

INDICT. NO: 3891/02

MAURICIO ADAMES,

Defendant.

Defendant Mauricio Adames was indicted for assault in the second and third degrees, and other related offenses. A Huntley/Wade hearing was ordered after he moved to suppress evidence. Thereafter, upon consent of the People, the order was amended to include a Dunaway hearing. The hearing began before me on February 9, 2004; based upon the evidence there adduced, as will later be discussed, I expanded the hearing to consider whether an independent source exists for the complainant's prospective in-court identification. The expanded hearing continued on February 26, March 2, and March 4, 2004.

Detective Thomas Hickey, of the Queens Robbery Squad, and Jian Chen, the complainant, testified on the People's behalf. I find them to be credible. The following are my additional findings of fact and conclusions of law:

FINDINGS OF FACT

On November 12, 2002, Detective Hickey was assigned to investigate the October 22, 2002 assault upon Mr. Chen. He began by reviewing the case file, which contained the names

and addresses of defendant and a Ramon Abreu as, in the Detective's words, "subjects who were involved in this matter." On November 19, he interviewed the complainant by telephone. The Detective testified that Mr. Chen told him that he had been playing basketball in the park when he was accosted by a group of about ten people, one of whom stabbed him three times. He also testified that Mr. Chen told him that he had seen two of the assailants "a lot" at Bryant High School; one of the previous detectives assigned to the case had also left notes in the file to the same effect.

Detective Hickey received a call from Mr. Chen the next day, November 20; the complainant told him that his assailant was present at school. Hickey notified the dean, and defendant was escorted from the school by members of its security staff. He was then arrested, at about noon.

Defendant was placed in a holding cell. Later, Detective Hickey read him his Miranda rights from a form. After each right was read to him, defendant was asked if he understood it, and replied in the affirmative; Detective Hickey then memorialized defendant's response by writing "yes" in the appropriate place on the form. After all five rights were read to him, defendant indicated his willingness to answer questions; Detective Hickey similarly memorialized defendant's response on the form. The Miranda form was admitted into evidence as People's Exhibit #2.

After waiving his rights, defendant admitted being at the scene when the assault on Mr. Chen took place, but claimed that he ran away when the fighting began. Detective Hickey reduced defendant's statement to writing on the reverse of the Miranda warnings. The statement was admitted into evidence as Peoples's Exhibit #2A.

Detective Hickey testified that defendant was 17 years old at the time of his arrest, and

that they had no difficulty communicating.

After defendant was arrested, Mr. Chen was asked to come to the precinct to make an identification. At about 3:00 P.M., he was shown a single photo of defendant; he identified him as the person who had stabbed him several times. The photo was admitted into evidence as People's Exhibit #1.

On April 1, 2003, Mr. Chen was in the District Attorney's Office with Detective Hickey in preparation for his appearance before the Grand Jury. A single photo of defendant was shown to him to clarify what the defendant had done during the crime. The photos were admitted into evidence as People's Exhibits #3 and #4. Detective Hickey testified that the complainant selected defendant's photo as the person who had stabbed him. A Chinese interpreter was present to assist the complainant. Previously, Mr. Chen and Detective Hickey had communicated in English without one.

At the conclusion of Detective Hickey's testimony at the hearing, defense counsel argued, in part, that the two above-described single photo identifications of defendant were not confirmatory, but, rather, suggestive. For the reasons which will be discussed below, the Court agreed. Accordingly, the People called the complainant to testify in order to establish both probable cause for defendant's arrest and an independent source for the complainant's prospective in-court identification which would be free from the taint of the suggestive pretrial identification procedures.

Mr Chen testified through an interpreter. He stated that while in the park with friends playing basketball, he observed a group walking towards them, blocking exits as they came. It was about 6:00 P.M., and still bright.

Defendant was constantly in front of the group, and, therefore, stood out. He observed

defendant for four to five minutes as the group approached. Defendant then stopped between 4 and 6 feet in front of him; he asked him and his friends if they were Chinese. Mr. Chen replied that he didn't know them, and asked what they wanted, whereupon the group started hitting them; he was pushed up against a wall, and defendant rushed toward him, hitting him a number of times with something in his hand. The attack itself lasted three to five minutes.

Mr. Chen testified that the person who had asked him the question about being Chinese had short hair, and was short and Hispanic. Upon cross-examination, he was unable to say how old the assailant was, how much he weighed, or what he was wearing.

Mr. Chen also contradicted part of Detective Hickey's testimony; he stated that he had never seen his assailants before the attack, and denied that he ever told the Detective that he attended school with two of them.

I believe part of the discrepancy in the testimony may be explained by language problems between the two witnesses. Mr. Chen indicated that although he did not know his assailants at the time of the assault, he subsequently learned that they attended his high school. That concept may have been miscommunicated to, or misconstrued by, the Detective.

In any event, Mr. Chen also testified that when he viewed defendant's photo on November 20, he already had defendant's face in his memory. Importantly, he also testified to having previously identified individual photos of two assailants from a group of six or seven photos shown to him by school officials. The People represented that a dean had shown photos to Mr. Chen, but that they were unable to identify the dean who had done so, or locate the photos.

CONCLUSIONS OF LAW

Defense counsel alleges that the only basis for defendant's arrest was his name in the file

that Detective Hickey inherited and, therefore, that the People did not establish probable cause; accordingly, defendant's statement must be suppressed as fruit of his illegal arrest. Counsel also argues that the People did not meet their burden of establishing an independent source for the complainant's prospective in-court identification by clear and convincing evidence.

Before addressing defense counsel's arguments, the court will discuss its reasoning with respect to finding the single-photo identifications of defendant unduly suggestive.

The People initially argued that the photo identifications were merely confirmatory because Mr. Chen know two of his attackers from school. However, Detective Hickey's testimony that Mr. Chen told him that he had seen two of his assailants "a lot" at school, even if true, did not carry the People's burden of establishing that Mr. Chen was so well-acquainted with defendant as to be impervious to a suggestive identification procedure (*see, People v Rodriguez*, 79 NY2d 445; *People v Graham*, 283 AD2d 885, *lv denied* 96 NY2d 940; *People v Thornton*, 236 AD2d 430). There was no testimony as to the meaning of "a lot", how recently or, conversely, how distant the observations were (*see, People v Collins*, 60 NY2d 214, 219), or the length of the observations (*see, People v Newball*, 76 NY2d 587-592).

Furthermore, it cannot be said that Mr. Chen's viewing of the single photo of defendant at the precinct was confirmatory of his earlier spontaneous identification of his assailant at the school, as there is no way of knowing just whom it was he recognized and called the Detective about (*cf., People v Anderson*, 260 AD2d 387, *lv denied* 93 NY2d 965).

In addition, the complainant's first viewing of the single photo of defendant took place approximately three hours after defendant's arrest. There was no reason why a lineup could not have been conducted or, at least, arranged for in that length of time. Thus, the single photo viewing was unnecessarily suggestive (*see, People v Perez*, 74 NY2d 637; *People v Adams*, 53

NY2d 241; People v Smith, 221 AD2d 485, lv denied 87 NY2d 925; People v Rowan, 199 AD2d 546, lv denied 83 NY2d 810; People v Glover, 191 AD2d 582, lv denied 81 NY2d 1073). Mr Chen's second viewing of the single photo of defendant at the District Attorney's Office only compounded the suggestiveness of the earlier viewing (*see, People v Edmunds, 166 AD2d 273, lv denied 77 NY2d 905; cf., People v Herner, 85 NY2d 877*).

However, contrary to defense counsel's contention, Mr. Chen's testimony was sufficient to carry the People's burden of establishing by clear and convincing evidence that his prospective in-court identification would have an independent source free from the taint of the suggestive pretrial identification procedures (*see, People v Adams, 53 NY2d, supra, at 251; In the Matter of Anthony W., 284 AD2d 473; People v Sims, 245 AD2d 316, lv denied 91 NY2d 1013; People v Fuentes, 240 AD2d 511*). Defendant was the focus of Mr. Chen's visual attention for approximately ten minutes, during which time the two carried on a brief conversation (*see People v Ashe, 297 AD2d 287, lv denied 99 NY2d 555; People v Radcliffe, 273 AD2d 483; People v Campbell, 200 AD2d 624, lv denied 83 NY2d 869*). Mr. Chen's view of defendant was unobstructed, and it was sufficiently bright outside that people were playing basketball (*see, People v Ashe, supra; People v Paul, 222 AD2d 706, lv denied 87 NY2d 1023*). Defense counsel's claim that the police lacked probable cause to arrest defendant is similarly without merit. Probable cause for an arrest exists when the facts and circumstances known to the arresting officer warrant a reasonable person possessing the same expertise as the officer to conclude that a crime is being, or was, committed, and the defendant is the perpetrator (*see, People v Maldonado, 86 NY2d 631; People v Carrisquillo, 54NY2d 248; People v McCray, 51 NY2d 594*). It does not require proof beyond a reasonable doubt, or even a prima facie case (*see, People v Gomcin, 265 AD2d 493, lv denied 95 NY2d 821; People v Rivera, 67 AD2d 867*);

rather, probable cause arises when, upon consideration of the totality of circumstances, it is more probable than not that the person to be arrested committed a crime (*see, People v Carrisquillo, supra, at 254; People v Surico, 265 AD2d 596; People v Steinmetz, 195 AD2d 487*). As the Court of Appeals has stated, “The legal conclusion is to be made after considering all the facts and circumstances together. Viewed singly, these may not be persuasive, yet when viewed together the puzzle may fit and probable cause found” (*People v Bigelow, 66 NY2d 417, 423*).

Here, Detective Hickey inherited a file with the names and addresses of two people “who were involved in this matter.” That conclusion came from presumptively reliable prior investigators (*see, People v Ketchum, 93 NY2d 416; People v Petralia, 62 NY2d 47, cert denied 469 US 852; People v Brown, 287 AD2d 464, lv denied 97 NY2d 679*). Furthermore, before the Detective arrested defendant, the complainant had already identified the other of the two people named in the file, thereby increasing the probability that the remaining one was similarly guilty. Finally, the complainant testified to having identified two perpetrators from a group of photos shown to him by “the school”. It is only logical to assume that the two names in the file were derived from that identification. In essence, then, when he arrested defendant, Detective Hickey was acting, in large part, at the direction of another law enforcement officer who had the requisite probable cause for the arrest (*see, People v Ramirez-Portoreal, 88 NY2d 99; 113; People v Maldonado, supra, at 635*).

Thus, defendant’s statement was not the fruit of an illegal arrest. Moreover, the People met their burden of establishing beyond a reasonable doubt that the statement was voluntary (*see, People v Witherspoon, 66 NY2d 973; People v Anderson, 42 NY2d 35; People v Huntley, 15 NY2d 72*). Defendant made the statement only after he had been fully and properly apprised of his Miranda rights and, having been so apprised, knowingly, intelligently and voluntarily

waived them (*see, People v Sirno*, 76 NY2d 967; *People v Marciano*, 260 AD2d 406, *ly denied* 93 NY2d 1022; *People v Thomas*, 223 AD2d 612).

Accordingly, defendant's motion to suppress his statement and prospective in-court identification is denied. There is no need to suppress the suggestive photo identifications, as testimony concerning pictorial identifications is prohibited (*see, People v Pleasant*, 54 NY2d 972; *People v Caserta*, 19 NY2d 18; *People v Johnson*, 224 AD2d 635, *ly denied* 88 NY2d 849).

ROBERT CHARLES KOHM, J. S. C.