

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-TRP

PRESENT:

HON. SEYMOUR ROTKER
Justice.

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.: 3200-96

LUIS DELAROSA,

Motion: FOR A NEW OR
REOPENED WADE HEARING

Defendant.

-----X

SAMUEL A. ABADY, ESQ
For the Motion

RICHARD A BROWN, DA

BY: LAURA CAROL, ADA
For the People

Upon the foregoing papers, and due deliberation had, the motion is denied. See accompanying memorandum this date.

Kew Gardens, New York
Dated: November 14, 2002

SEYMOUR ROTKER, Acting J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K- TRP

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THE PEOPLE OF THE STATE OF NEW YORK

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MEMORANDUM DECISION

LUIS DELAROSA,

Defendant.

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The defendant was originally charged by indictment filed on October 23, 1996 with robbery in the first degree and related crimes. Routine pretrial motions were filed in connection with the indictment. A *Wade* hearing was ordered and was conducted on January 29, 1997. Following the hearing, the court issued an order dated February 10, 1997 denying suppression of the identification testimony. The matter proceeded to trial by jury and the defendant was convicted and sentenced to twelve years in prison.

Following the conviction and sentence the defendant filed a motion pursuant to CPL 440.10 seeking to vacate the conviction on the basis of ineffective assistance of counsel. The trial court denied the motion without a hearing. The defendant appealed the decision to the Appellate Division, Second Department which reversed, People v. Delarosa, 287 AD2d 735 (2nd Dept., 2001). Specifically, the appellate court found that the defendant was entitled to a hearing on the issue of whether he had been deprived of a fair trial by his counsel's failure to effectively serve a notice of alibi.

On remand, the trial court conducted a hearing on the alibi issue and by order dated February 15, 2002 vacated the conviction and granted a new trial.

By motion dated August 12, 2002 the defendant now seeks an order pursuant to CPL 710.20(6) and CPL 710.40(4) granting a new *Wade* identification hearing or, in the alternative, reopening the previous hearing¹. The defendant also seeks an order compelling the production of certain witnesses should a new or continued hearing be granted. The People have filed an affirmation in opposition dated October 3, 2002. In response to the People's affirmation the defendant has filed a reply seeking dismissal of the indictment based upon alleged "spoliation of potentially exculpatory evidence".

The defendant alleges that the failure of the People to produce certain photographs or to call certain witnesses at the original *Wade* hearing violated their obligation to produce exculpatory evidence, Brady v. Maryland, 373 US 83 (1963). The defendant further alleges that certain trial testimony by the victims of the robbery constitutes newly discovered evidence which should lead to a reopening of the hearing.

FACTUAL BACKGROUND

On May 28, 1996 two Hispanic males robbed a Queens movie theater at gunpoint. There were three witnesses to the robbery, Rudy Tejada, Angela Palomino and Rafael Polanco. Immediately following the incident Mr. Tejada and Ms. Palomino went to the 104th Police Precinct to view photographs of potential suspects². No identification resulted from this viewing.

On June 1, 1996, Mr. Tejada again visited the precinct and viewed additional photographs. Ms. Palomino was not present at this viewing having advised the investigating officers that because of the passage of time she felt that she could not identify the perpetrators. Again no identification resulted.

¹ This motion was filed with the trial court but, by order dated October 17, 2002, was referred to this Court (the hearing court) for decision.

²Mr. Palomino apparently told the responding officers that he would be unable to identify the perpetrators. He testified at trial to the fact of the robbery but did not participate in any identification procedures or make any in court identification.

On June 27, 1996 Mr. Tejada visited the 83rd Police Precinct and viewed additional photographs. In the course of this viewing Mr. Tejada picked out a polaroid photograph of the defendant and identified him as one of the robbers.

On July 17, 1996 a second investigating officer showed Mr. Tejada an array of photographs of the defendant's alleged associates in an effort to identify the second perpetrator. No identification resulted. It is significant to note that prior to this procedure this second officer had obtained a photograph of the defendant from the files at One Police Plaza.

On September 4, 1996 Mr. Tejada viewed a lineup at the 104th precinct and identified the defendant as one of the individuals who had committed the robbery.

PROCEDURAL HISTORY

The only witnesses called at the *Wade* hearing in connection with this case were the two investigating police officers. The first officer testified regarding the identification procedures conducted by him on May 28, June 1 and June 27, 1996. In the course of his testimony he was asked if any photographs of the defendant were included in the photographs viewed by the witness on May 28 and June 1, 1996. He testified that he did not know but "it was a possibility". Additionally this officer was unable to produce the photograph of the defendant which the victim allegedly picked out at the June 27, 1996 viewing. He testified that he left it at the 83rd precinct. The second officer was asked if, at any time prior to the lineup, he had shown the photograph of the defendant which he had obtained from Police Plaza to the witness. He specifically denied having done so.

A photograph of the September 4, 1996 lineup was introduced into evidence at the hearing. In the lineup photograph the defendant had a goatee type beard. This is significant because the witness had described the perpetrator as having a mustache.

At trial, Mr. Tejada was the only witness who identified the defendant as the perpetrator. He testified that the defendant was the individual who held the gun during the robbery and that he wore dark sun glasses and that his confederate was fully masked. He also testified that his original

description of the gunman as having only a mustache was incorrect. The trial testimony of another witness differed from Mr. Tejada's. Mr. Polanco maintained that it was the individual who held the gun during the robbery who was masked.

CONCLUSIONS OF LAW

The defendant argues that the people violated their obligation under Brady v. Maryland , supra, by (1) failing to produce the photographs viewed by the victim at the 104th precinct which may or may not have contained a photograph of the defendant and by (2) failing to call Mr. Polanco and Ms. Palomino as witnesses.

Under certain circumstances the failure to produce an array of photographs shown to a witness can defeat the People's burden of going forward to show that the identification procedures employed were non suggestive or can lead to an inference of suggestiveness, People v. Galetti, 239 AD 2d 598 (2nd Dept, 1997). As the hearing court found in its original decision, however, this inference can be defeated where a large number of photographs are involved, People v. Faulk, 192 AD2d 717 (2nd Dept, 1993). Courts have recognized that the viewing of a large number of photographs militates against suggestiveness and that it would be onerous for the People to have to produce a vast quantity of pictures, People v. Pavon, 234 AD2d 82 (1st Dept, 1996).

The failure of a witness to identify a photograph of the defendant when it appears in a group of photographs shown to him does constitute Brady material, People v. Robinson, 280 AD2d 687 (2nd Dept., 2001), People v. Lake, 213 AD2d 494 (2nd Dept, 1995). In this case, however, the People's witness did not testify that the defendant's photograph was actually among the photographs shown to the witness. He testified only that he did not know whether or not it was in the array and that it possibly could have been. The facts here are similar to the facts in Robinson, supra. In that case , the court speculated that failure of a witness to identify the defendant's photograph from an array would be Brady material. On the facts before it, however, the court found no violation because no witness testified that the defendant's photo actually appeared in the array.

Assuming that the defendant could prove that his photograph was viewed by the witness and not identified, that fact goes to the reliability of the identification and not to suggestibility. As the Robinson case points out this fact is clearly admissible at trial to undermine the reliability of the in court identification. It is, however, irrelevant to the issue addressed at the *Wade* hearing which, in the first instance, is limited to the question of undue suggestibility.

The defendant also claims that it was error for the People not to call two other eyewitnesses to the robbery³. The trial testimony of one of these witnesses differed from that of the identifying witness as to which defendant was masked during the robbery. While this information is clearly relevant to the reliability of the in court identification it is irrelevant to the issue of suggestibility. These witnesses had nothing to do with the identification procedures which were the subject of the *Wade* hearing and it did not constitute error not to call them.

The defendant has no absolute right to call witnesses at the *Wade* hearing. Under the holding in People v. Chipp, 75 NY2d 327 (1990), the defendant must show a fact specific need for the witness's testimony that goes beyond generic or speculative claims of relevance. No such factual showing is made here.

Finally, the defendant claims that the trial testimony of Mr. Polumbo which contradicts the identifying witness, Mr. Tejada, as to which defendant was masked and Mr Tejada's testimony that he was incorrect in his initial description of the perpetrator constitute new evidence which justify reopening of the *Wade* hearing. While this testimony is clearly relevant to the issue of reliability it has no bearing on suggestibility and does not establish a basis to revisit that issue.

In his reply affirmation the defendant seeks dismissal of the charges because the People can no longer produce the photographs viewed by the witness. The defendant's argument here is two fold. First, he alleges that there was a duty to produce the photographs at the original hearing. Second, he argues that the court should draw an adverse inference from the fact that the photographs are no longer available.

³ Defense counsel at the hearing did not seek to call these witnesses nor did he demand production of the photographs viewed or selected by the witness.

As previously explained there was, primarily because of the large number of photos involved, no “duty” to produce the photographs at the original hearing , see, People v. Pavon, supra.

It is true that the loss, destruction or inadequately explained disappearance of critical evidence may result in an adverse inference or a sanction. In this case, however, the People, who had no duty to preserve this evidence (see, People v. Faulk, supra), have adequately explained why it is no longer available. The evidence was not lost or capriciously destroyed. It was, in the regular course of business, “dismantled and used for entry into (a) computer system”. Under these circumstances there is no basis for any punitive sanction.

For all of the above reasons the motion is denied.

Kew Gardens, New York
Dated: November 14, 2002

SEYMOUR ROTKER, Acting J.S.C.