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SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK  
CRIMINAL TERM, PART K-21, QUEENS COUNTY  
125-01 QUEENS BOULEVARD, KEW GARDENS NEW YORK 11415

PRESENT : HON. MARK H. SPIRES  
JUSTICE

-----X  
THE PEOPLE OF THE STATE OF NEW YORK IND. NO.: 3139/00

-AGAINST- HEARING: DUNAWAY-MAPP-  
HUNTLEY-WADE  
KAREEM SIMPSON  
Defendant(s)

-----X

For the motion  
Dennis Coppin, Esq.

Opposed  
Laurie Neustadt, A.D.A.

A hearing was conducted by this Court on December 11, 2001 and December 13, 2001 to determine whether there was probable cause for the defendant's arrest (Dunaway), whether the property recovered from the defendant was seized in a lawful manner (Mapp), whether a statement made by the defendant to Detective Wilkowski was elicited in a manner consistent with the defendant's constitutional rights (Huntley) and whether the identification procedure conducted of the defendant was done in a fair and non-suggestive fashion, not conducive to the defendant's misidentification (Wade).

The People called two witnesses at this hearing: Detective Mark Donato and Detective Edward Wilkowski. The defendant called one witness: Ms. Avryl Simpson. This Court fully credits the testimony of all the witnesses. As such, this Court makes the following findings of fact and conclusions of law:

## Statement of Facts

Detective Mark Donato, a fourteen year veteran of the New York City Police Department was called as a witness. In July of 2000, Detective Donato was assigned, as a detective, to the Queens South Street Crime Unit. He was assigned to work in plain clothes, street patrol. Detective Donato had been assigned in this capacity for approximately three and one half years.

Detective Donato related that earlier in the month, specifically the previous Saturday he had the occasion to be present in the 113th precinct detective squad. On that date, Detective Donato was provided with a "wanted" poster; a picture of a person who was wanted in a shooting. The detective had this poster with him on July 19, 2000.

Detective Donato was working a tour of duty that began at 5:30 a.m. on July 18, 2000 and ultimately concluded on July 19, 2000 at approximately 5:00 a.m..

On July 19, 2000, at approximately 5:00 a.m. Detective Donato was in the vicinity of Guy R Brewer Boulevard and 107th Avenue, Queens. He was seated in the rear seat of an unmarked police vehicle, dressed in plain clothes. Also seated in the vehicle were two detectives and a sergeant. At that time Detective Zackian, the driver of the vehicle, pulled the vehicle up to the intersection. Detective Donato saw an individual, the defendant, standing on the corner. The defendant looked at the detective, and appeared to be laughing. No other individuals were in the vicinity. The detective immediately recognized the defendant from the "wanted" poster that was displayed inside the vehicle, in the front visor. Detective Donato spoke to the driver; telling him to look at the wanted poster and then to look at the defendant. Detective Donato stated "that's the individual right there in the street." Detective Zackian then examined the poster and studied the defendant. The detectives and sergeant then exited the vehicle, walked up to the defendant, grabbed him by the arm, and brought him to the automobile. The defendant was placed up against the vehicle, and handcuffed. Detective Donato glanced at the

ground near the defendant and observed a plastic bag sticking half out of the defendant's right front pants leg. The detective reached down and picked up the bag. The detective noticed that the bag was a large plastic bag that contained other plastic bags of alleged crack-cocaine. The bag was approximately 8" x 8". The defendant was then placed in the vehicle, and then taken to the 103rd precinct for arrest processing. Upon arrival at the precinct the detective also recovered eighty-four dollars in United States currency from the defendant's person. During arrest processing, the detective observed two tatoos on the defendant, on his arm which matched those provided in his description. Detective Donato contacted the 113th precinct; leaving word for Detective Wilkowski that the defendant had been apprehended.

Detective Edward Wilkowski, an eleven year veteran of the New York City Police Department, was called as a witness. Detective Wilkowski has been a detective for four years, and had been assigned to the 113th precinct since July of 1996. Detective Wilkowski was working on June 25, 2000, and was engaged in a 4 p.m. to 1 a.m. tour of duty. During this tour, the detective was assigned to investigate a shooting that occurred at about 7:47 p.m. inside Rochdale Village, Queens. When the detective arrived at the scene of the shooting, he spoke with the victim: Mr. Anthony Roper. The detective investigated the area, and examined the victim's vehicle; two bullet holes were in it. Mr. Roper advised the detective that he had a discussion with a person named "Gene Polo," who he also knew as "Twin." After the discussion, Polo pointed the gun at Roper. Shots were fired at Roper by Polo and another person who was with him. After speaking with Roper, the detective located and arrested Mr. Polo.

On June 26, 2000 at approximately 12:30 a.m., in the interview room of the 113th precinct, Detective Wilkowski spoke with Gene Polo. Polo advised the detective that while he was at the location of the "Roper" shooting, he was not responsible. Polo told the detective that an individual he knew as "Omar" or "Rude Boy" shot at Anthony

Roper. The detective obtained photographs from a computer force field of individuals named "Omar." Polo viewed these photos, and identified a photograph of the defendant, Omar Simpson.

Detective Wilkowski subsequently put out a "Wanted" card on the defendant. During the weeks that followed, the detective continued to canvas the neighborhood, searching for the defendant. On July 13, 2000, the detective arranged for a "wanted" poster to be created of the defendant. This poster was distributed to different law enforcement units in the area. Several days after the poster was distributed. Detective Wilkowski was notified that Detective Donato of the Queens South Street Crime Unit had apprehended the defendant. Detective Wilkowski was advised that the defendant was in Central Booking, Queens County. By 4:30 a.m. the defendant was transported to the 113th precinct. He was placed in the interview room. The defendant was not handcuffed in the interview room.

Detective Wilkowski went to the interview room at approximately 4:30 a.m.. The detective wanted to explain to the defendant why he had been brought to this precinct. The detective told the defendant that they were investigating a shooting that had occurred in Rochdale Village, and that Gene Polo had been already arrested. Detective Wilkowski told the defendant that Gene Polo had implicated the defendant in the shooting. The detective then left the defendant a copy of Polo's written statement to read. The defendant didn't respond to the detective at this time. The detective offered the defendant food and cigarettes. The defendant indicated that he didn't want anything. The detective then left the room.

Within forty-five minutes the detective returned to the defendant. The defendant was sleeping. The detective woke the defendant up, asking the defendant if he wished to tell the detective what had happened. The defendant responded that "Gene Polo had shot at him (Roper) and that he (the defendant) was at least two hundred feet away when it

happened." [T-42]. The defendant referred to Polo as "Twin." [T-42]. The detective then asked the defendant if he wished to write this down. The defendant told the detective "No you write it for me." [T-43]. The detective replied that he'd be glad to write it for the defendant, but he wanted to first read the defendant the Miranda warnings. The detective read the defendant Miranda warnings from a pre-printed form. The defendant responded in the affirmative to the first five questions on the form. When asked questions: "Was he [the defendant] willing to answer any questions," the defendant told the detective "[he] did not wish to." At this point the detective stopped all conversation with the defendant, and left the room.

Detective Wilkowski proceeded to assemble a lineup, to include the defendant. Detective Wilkowski telephoned the victim, Anthony Roper, who was at his place of employment, in Manhattan. Detective Wilkowski told Roper that he needed him to view a lineup. Detective Wilkowski returned to the defendant and advised the defendant he was to be placed in a lineup. The detective explained the identification process to the defendant, and invited the defendant to choose his number and position in the lineup. The defendant selected number four. With the assistance of other detectives, Detective Wilkowski assembled the lineup. He matched the fillers in the lineup with physical features of the defendant. The lineup was assembled in the interview room, which was also the "viewing" room for the 113th precinct. Photographs were ultimately taken of the lineup after all the participants were in place.

In the actual lineup, the detective had all participants wear hats. The detective explained that this was to neutralize any differences in hair color or style. Several hours later, at approximately 9:05 p.m., Mr. Roper appeared at the 113th precinct to view the lineup. When Roper entered the precinct, he was immediately isolated from all other individuals in the building. Detective Wilkowski spoke with him, explaining to Roper that he would be viewing a lineup. The detective told Roper that he was to tell him if he

recognized anyone, what number he recognized, and from where he recognized that individual.

Roper viewed the lineup. Also present in the room were other police personnel and an assistant district attorney. When asked if he recognized anyone, Roper indicated "he thought it as number three or number four, he thinks four." [T-49]. At that point, each individual was asked to walk up to the window of the viewing room, individually, and speak. Each repeated the phrase "I don't know what you're talking about. I don't have nothing to do with it." [T-49]. Roper had reported to the detective that these words were spoken to him prior to the shooting. After this process, the detective asked Roper again if he recognized anyone. Roper responded that he wasn't sure. The lineup was concluded at that juncture, and Roper left the room and the precinct. Approximately ten minutes later, the detective heard a knock at his door. It was Roper, who had returned. Roper told the detective that as he "went down to the (his) car and when he thought about it, he got his thoughts clear and that he was now certain that it was number four." [T-50]. The detective told Roper he'd get back to him. Detective Wilkowski conferred with the assistant district attorney who was present at the lineup. As a result, arrest processing continued for the defendant.

Detective Wilkowski noted that in the time between the exit and return of Roper, the lineup had not been disassembled. No fillers had left the room. No one who was present in the viewing room during the lineup left the squad room between the exit and return of the witness.

Detective Wilkowski indicated that he had received information that Mr. Roper might have viewed a photo array or photographs of the defendant prior to the lineup, with his nephew. [T-86]. However, this speculative viewing was not the subject of this hearing.

Ms. Avryl Simpson, the defendant's mother, testified as a witness on the

defendant's behalf. Mrs. Simpson, a real estate broker for Century 21 indicated that on July 19, 2000, she went to the 113th precinct, arriving sometime in the late afternoon. When she arrived at the precinct, she spoke with Detective Wilkowski. The detective advised her that her son was in the precinct, upstairs. She related that she had encountered this detective before as he appeared at her home, searching for her son, the defendant. The detective told the defendant's mother that her son would be in a lineup, and that she could wait downstairs. After a short time, the detective reappeared and told her "everything would be all right, [her] son was not picked out." [T-110]. He told her to wait and he would take her to him shortly. Mrs. Simpson saw a man she guessed to be the witness (Roper) leave the precinct, and re-enter approximately fifteen to twenty minutes later. The detective then returned and told the defendant's mother that when the witness came back, he identified her son. The detective told the defendant's mother, after leaving her once again, that her son's arrest processing would now continue.

Mrs. Simpson mentioned her arrival at the 113th precinct was precipitated by a telephone call she received from the "court system." [T-113]. She was told to go to a certain location (central booking, the court house), and from there was advised that her son had been removed to the 113th precinct.

During the course of this hearing, the following items were offered and admitted into evidence: a wanted photo of the defendant (People's #1), an arrest photograph of the defendant (People's #2), a photograph of the lineup containing the defendant (People's #3), a two page handwritten statement (defendant's A), Miranda warnings (defendant's B) and a lineup form (defendant's C).

#### Arguments of Counsel

The defendant urges this court to suppress all evidence recovered in this case, and find that there was no probable cause for his arrest. The defendant argues that at the time he made the statement to police, he was clearly "in custody." Prior to making his verbal

statement to the detective, he was never advised on his Miranda warnings. In fact, the defendant argues, the police clearly intended to induce the defendant into making an involuntary statement by asking him if he wished to rebut Gene Polo's written statement, which the detective provided to the defendant to review. The actual statement was obtained only after the detective returned to the room later, waking the defendant up. The defendant also maintains that the lineup was improper. The lineup did not result in an actual identification. The hesitancy of the victim, coupled with his subsequent certainty in identification, as well as inaccurate paperwork, rendered the lineup improper. In addition, it appeared the victim viewed photographs of the defendant prior to the lineup. There was no notice of this viewing as requested by statute. The defendant did not address the Dunaway-Mapp aspect of this hearing.

The People respond that there was probable cause for the defendant's arrest. When the defendant was initially apprehended, Detective Donato matched the defendant's features to a "wanted" poster he had in his possession. The defendant was spotted in the street, in close proximity to the detective, under conditions with good visibility. As the defendant was brought to the police car, before he was searched, drugs fell out of his pants leg. This was in plain view. The contraband was visible; on the ground sticking out of the defendant's pants. Since the defendant was being sought by police from the 113th precinct, the defendant was transported there.

The People argue that Detective Wilkowski's conversation with the defendant at the 113th precinct was not interrogation. The defendant was offered food, drink and cigarettes. He was presented with Gene Polo's statement as a way to explain why the defendant was there. No pressure was exerted on the defendant to speak. The People submit the defendant's statement to the detective was a pre-Miranda statement because it was not made in response to a question. The People argue that the statement was voluntary. However, in the alternative, the People ask the Court that should the Court

find that Miranda warnings were required here and suppress the statement, the Court find that the statement was not involuntary; allowing the People to impeach the defendant with it should he choose to testify at his trial of this indictment.

The People submit that there is no impropriety in the defendant's identification. The defendant was placed in a lineup of individuals with similar physical features. The People maintain that there was no pressure placed on the victim to make an identification. In addition, there is no evidence of any suggestiveness on the part of the police, even in light of the exit and quick return of the victim. The People argue that any evidence of a "photo" viewing by the victim is purely speculative.

#### Conclusions of Law

Criminal Procedure Law §140.10 states that "... a police officer may arrest a person for ... (b) a crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise ..." see, also, Terry v. Ohio, 392 U.S. 1(1968). Such arrest is based on "reasonable suspicion." "Reasonable suspicion" has been defined as the quantum of knowledge sufficient to induce a reasonably prudent and cautious person under the circumstances to believe that criminal activity is at hand. see, e.g., People v. Martinez, 80 NY2d 444 (1992). People v. DeBour, 40 NY2d 210 (1976) generally. "Forcibly detaining someone, or keeping someone for the purpose of detaining them, results in a lesser interference with freedom than does an arrest. Consequently ... police may forcibly stop or pursue an individual if they have information which, although not yielding the probable cause necessary to justify an arrest, provide them with a reasonable suspicion that a crime has begun, is being, or is about to be committed. Martinez, supra at 447. see, also, People v. Hicks, 68 NY2d 234 (1986).

The justification of a police officer's action and the level of intrusion into an individual's privacy must be determined on a case by case basis. see, People v. Stewart,

41 NY2d 65 (1976). DeBour, supra. In hindsight, the Court must examine the quality and quantity of information available to the police together with the police officer's personal observation at the scene. see, People v. Stroller, 42 NY2d 1052 (1977). The arresting officer must articulate specific factors and conclusions which prompted the level of intrusion. see, People v. Cantor, 36 NY2d 106 (1975).

The factors present here are gleaned from the testimony of Detective Mark Donato and Detective Edward Wilkowski. Detective Wilkowski had conducted an investigation into a shooting. Interviews and photographic identification led the detective to create a "wanted" poster of the defendant. This poster, was subsequently provided to Detective Donato and his colleagues, resulted in the location and detention of the defendant.

It is well-settled that a police officer has the authority to stop a citizen, if the citizen bears a strong resemblance to a known person who is being sought in connection with a crime. see, People v. Reid, 173 AD2d 870 (2d Dept. 1991). An officer is also justified in stopping a person who bears a resemblance to a photograph of a suspect or a wanted poster. see, e.g., People v. Wright, 100 AD2d 523 (2d Dept. 1984). People v. Jacob, 202 AD2d 444 (2d Dept. 1994). People v. Bethea, 239 AD2d 510 (2d Dept. 1997).

The defendant was detained by the detectives, and lead to the patrol car. As the defendant approached the vehicle, a package containing small packets, of crack-cocaine fell out of his pants leg. This was clearly visible to the detectives, who seized the package, and placed the defendant under arrest. It is clear that the contra band was in plain view of the detectives. see, e.g., People v. Alexander, 37 NY2d 202 (1975). It is also clear that the contraband would have been recovered inevitably, when the search of the defendant was conducted incident to his lawful arrest. see, People v. Lane, 10 NY2d 347(1961). Accordingly, this Court finds that there was probable cause to detain, then arrest the defendant. see, Dunaway v. New York, 442 U.S. 200 (1979). The property

seized from the defendant was recovered in a lawful fashion. see, Chimel v. California, 395 U.S. 752 (1969). People v. DeSantis, 46 NY2d 82 (1978).

After his arrival at the precinct, the defendant was placed in a lineup, where he was viewed by the complaining witness. Prior to the arrival of the complaining witness at the precinct, the detective allowed the defendant to pick his own place in the lineup and his own number. In attempting to neutralize the differences in the fillers and defendant, the detective had all the lineup participants wear hats. see, e.g., People v. Pelow, 24 NY2d 161 (1969). As long as the fillers and defendant were not so distinctive or different, the lineup assembly was proper. see, People v. Burswell, 26 NY2d 331 (1970).

At the actual "viewing" of the lineup, the complaining witness wavered between number three (#3) and number four (#4). In the first instance, the complaining witness was undecided about either participant, even after each participant approached closer to the viewing window and spoke. The complaining witness left after not limiting his choice to one individual, and went to his car. A few minutes later, however, the complaining witness retrieved, and told the detective he perpetrator was number four (#4). While not the usual practice<sup>1</sup>, after conferring this event with supervisors, the detective continued the arrest processing of the defendant.

This Court recognizes the frustration of the defendant's mother in learning of this turn of events, however, nothing unlawful occurred here. It is well-settled law that the test of legality in identification procedures that are police arranged, are whether they impermissibly suggestive, conducive to irreparable misidentification. see, e.g., United States v. Wade, 388 U.S. 218 (1967). This Court notes that even with the testimony offered by the defendant's mother, the record is bare of any impermissive conduct by police towards this complaining witness that would render this lineup improper.

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<sup>1</sup>The detective prematurely advised the defendant's mother that the defendant had not been identified because the complaining witness had been indecisive about the participants.

Of great concern to this Court, is the method used by law enforcement to obtain the defendant's "spontaneous" statement. It is clear beyond cavil that a defendant's statement elicited before receiving Miranda warnings are spontaneous and not subject to suppression as a product of police interrogation, where there is no evidence that a police officer acted in a manner likely to induce such an incriminating statement. see, e.g., People v. Hylton, 198 AD2d 301 (2d Dept. 1993). If a police officer should have known that his action or statement would provoke an incriminating response from a defendant, without advising the defendant of his Miranda rights, said statement is subject to suppression. see, People v. Rivers, 56 NY2d 476 (1982). A police officer is not permitted to ask a defendant any questions or engage in any course of conduct subtly designed to elicit such a statement. see, People v. Harrington, 163 AD2d 327 (2d Dept. 1990).

For a defendant's statement to be considered spontaneous, the spontaneity must be genuine and not the result of inducement or provocation, encouragement or acquiescence, no matter how subtly implied. Rhode Island v. Innes, 446 U.S. 291 (1980). Spontaneity, in the context of the right to pre-interrogation warnings, turns on the question of whether a statement by a defendant was the product of "express questioning or its functional equivalent." see, Rhode Island v. Innes, supra. People v. Bryant, 59 NY2d 786 (1983). People v. Maerling, 46 NY2d 289 (1978).

"Likely to elicit a response" means an incriminating response (see, People v. Rodney, 85 NY2d 289 (1995). People v. Chambers, 184 AD2d 716 (2d Dept. 1992)) or a response relating in some way to the matter for which the suspect has been arrested. However, a question to an arrested person about pedigree, identification or employment does not require Miranda warnings, pedigree information is considered administrative. Rodney, supra. People v. Smith, 151 AD2d 792 (2d Dept. 1989). Notably, if the arrested person initiated the questioning, the detective's response is generally not considered likely

to elicit an incriminating response. see, Smith, supra. Rodney, supra.

Questions of this nature are examined carefully, on a case by case basis. As an example, in People v. Butts, 175 Misc 2d 709 (NY S. Ct. 1998). The Court held that exhibiting the defendant a picture of himself on a wanted poster, with the words printed "WANTED FOR HOMICIDE" coupled with the detective's question to Mr. Butts "this is you, right" was improper and required suppression. Such is the case here.

Detective Wilkowski's showing Polo's statement to this defendant, coupled with his repeated requests of the defendant if he wanted them to hear his side was improper. In this Court's judgement, Detective Wilkowski's intent was to elicit an incriminating statement from the defendant. After waking the defendant up, he got one.

This Court finds that the defendant's statement to the detective should be suppressed as it was obtained without Miranda, warnings and was not in fact spontaneous. However, this Court also finds said statement not to be involuntary. see, People v. Harris, 25 NY2d 175 (1969). People v. Meadows, 64 NY2d 956 (1965). People v. Carmona, 82 NY2d 603 (1993).

As such, should the defendant take the stand at his trial, the People will be entitled to utilize this statement as impeachment, under the appropriate circumstances. However, the People are prohibited from introducing this statement on their direct case.

Accordingly, the defendant's motion to suppress physical evidence and his identification is denied. The defendant's motion to suppress his statement is granted, with the appropriate limitations.

This is the decision and order of this Court.

So ordered.

Kew Gardens, New York

Dated

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MARK H. SPIRES, J.S.C.