

People v Fitzgerald

2006 NY Slip Op 30153(U)

April 6, 2006

County Court, Suffolk County

Docket Number: 0001958/2005

Judge: James F.X. Doyle

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

COUNTY COURT OF SUFFOLK COUNTY
TRIAL TERM, PART 2 SUFFOLK COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,	:	HEARING DECISION
	:	
VS	:	J.F.X. DOYLE, J.C.C.
	:	
RONALD FITZGERALD,	:	DATE: April 6, 2006
	:	
Defendant.	:	COURT CASE NO.: 1958-05
	:	
	:	
THOMAS J. SPOTA, ESQ.	:	ROBERT C. MITCHELL, ESQ.
By: ANDREW HEFFERNAN, ESQ.	:	By: MICHAEL A. AHERN, ESQ.
Criminal Courts Building	:	Legal Aid Society
Center Drive South	:	300 Center Drive
Riverhead, New York 11901	:	Riverhead, New York 11901

The defendant is charged with Criminal Sale of a Controlled Substance in the Third Degree (two counts) in violation of Penal Law §220.39, a class "B" felony, and Criminal Possession of a Controlled Substance in the Third Degree (two counts) in violation of Penal Law § 220.16, a class "B" felony. Pursuant to a written decision of this court dated April 4, 2006 [J.F.X. Doyle, J.C.C.] the court conducted a *Rodriguez* hearing on April 5, 2006 to determine whether a police-arranged confirmatory identification procedure was improperly suggestive.

Findings of Facts

In the matter at hand, the following credible evidence was presented at the hearing on April 5, 2006. The People called two witnesses, Detective B. and Detective D. The defense called no witnesses.

Det. B. has been an employee of the Suffolk County Police Department for the past 14 years Department and has been an undercover narcotics detective for the eighteen months. Prior to his promotion to detective, Det. B. was assigned to the First Precinct where he worked for nine years. During his tenure there, the detective was assigned to a COPE unit and Gang unit. The detective further indicated that at that time he worked both as a uniformed and plain clothes officer in the Wyandanch area.

On July 19, 2005, Det. B. was working a 9:00 a.m. to 5:00 p.m. tour of duty as a undercover narcotics detective. At approximately 3:00 p.m. and 4:00 p.m. he encountered the defendant, Ronald Fitzgerald, from whom he allegedly purchased quantities of crack cocaine. The detective testified that on

both occasions the lighting conditions were both light and clear.

He further testified that at the above date and times, the defendant appeared in a wheelchair, had a damaged left eye, had a scar on his throat, wore a bandana around his head, was unshaven, wore tan work boots and appeared to have motor skill problems. The description of the subject was broadcast to the back up team. The undercover indicated that while involved in the two transactions with the defendant he was approximately one to six feet away, his face was not covered and their encounters lasted approximately two to three minutes each. The detective testified that he had seen the defendant in the Wyandanch area while working in the First Precinct prior to July 19, 2005, the date of the alleged narcotics transactions.

On July 19, 2005, the witness testified that he gave a detailed description of the subject to Suffolk County Police Officer Reller and asked him if he knew his name. Officer Reller answered in the affirmative providing the undercover with the name Ronald Fitzgerald. On July 20, 2005 Detective B's attempts to obtain a "mug-shot" photo of the defendant through Suffolk County and E-Justice were unsuccessful. On July 22, 2005, the detective received photos of the defendant from the New York State Department of Corrections, viewed them and was satisfied that Ronald Fitzgerald was the same individual who sold him crack cocaine in the two hand-to-hand drug transactions on July 19, 2005. As a result of this identification, the defendant was subsequently arrested on August 19, 2005 and the viewing in the precinct on that date was merely to confirm that the arresting police officer apprehended the correct individual. Det. B. testified that any delay in the arrest of the defendant was due to continuing undercover buys within the Wyandanch area.

The People called as their next witness Det. D. The detective testified that he has been employed by the Suffolk County Police Department for nineteen years and is in his thirteenth year as a undercover narcotics detective. He indicated that he has made several thousand drug deals and that his training as a undercover narcotics detective focused on safety, possible threats, possible weapons and making an accurate physical description of the subject for the purposes of making a case and arrest.

On July 19, 2005, at approximately 3:00 p.m. and 4:00 p.m. he encountered the defendant, Ronald Fitzgerald from whom the witness and Det. B. allegedly purchased quantities of crack cocaine. The detective testified that on both occasions the lighting conditions were sunny and well lit. He described the subject in the two transactions as being a thin black male, in a wheelchair, damaged left eye, bushy hair, yellow bandana with white trim and a scar on his neck. He indicated that although he was the driver of the vehicle, for a majority of the time he had

an unobstructed view, that the subject never wore anything over his face, and each transaction took a few minutes.

Detective D testified that on July 22, 2005, he was shown a photo obtained from the New York State Department of Corrections of Ronald Fitzgerald and was satisfied that the person depicted in the photograph was the person who he had sold crack cocaine to on the two occasions. Upon the defendant's arrest, the witness testified that he viewed the subject to make sure that it was the same person who had sold him crack cocaine on July 19, 2005. He testified that he was sure that it was the same person as he had the same face and same physical attributes. On April 5, 2005, during the hearing on this matter, the detective identified the defendant in open court, stating that the defendant's appearance had changed, specifically: Mr. Fitzgerald's hair had been cut off, he wore different clothing, he had a patch over his left eye, his beard was neatly trimmed and looked healthier now.

Conclusions of Law

A *Rodriguez* hearing is held to determine whether the identification of a defendant is confirmatory in nature, that is, whether the witness had sufficient familiarity with the defendant to eliminate the issue of suggestiveness in the identification process. If the court determines that the identification was not confirmatory, then a *Wade* hearing must be held (see, *People v. Rodriguez*, 79 NY2d 445, 583 NYS2d 814 [1992]). The Court of Appeals in *Rodriguez* delineated the following factors to examine the relationship: the number of times the witness saw the defendant prior to the crime, the duration and nature of those encounters, time periods and setting of the viewings, time between the last viewing and the crime, and whether the two individuals had any conversations.

It is apparent from the evidence adduced at this hearing that the police-arranged identification procedure was merely confirmatory in nature and a *Wade* hearing is not necessary. Here, both trained undercover narcotics detectives testified in a credible, forthright manner. On July 19, 2005 the detectives had two encounters with the defendant for the purpose of purchasing narcotic drugs. The defendant's physical characteristics were distinctive, as he presented in a wheelchair, had a damaged left eye, had a scar on his neck and appeared to have motor skill issues. Both detectives were in close proximity to the subject during the hand-to-hand sales of narcotic drugs which occurred on a sunny well-lit day. Detective B. testified that prior to July 19, 2005, he had occasion to view the subject and attempted to have a conversation with him.

Having provided a detailed description of the subject to police officer Rella, Detective B. obtained the name of the

defendant. A photograph of the defendant, subsequently obtained from the New York State Department of Corrections on July 22, 2005 (People's "1" in evidence), satisfied both detectives that Ronald Fitzgerald was the same individual that the detectives purchased crack cocaine from on July 19, 2005. That the subsequent arrest of the defendant on August 19, 2005 and viewing of him at the precinct on that date was merely to confirm that the apprehended individual was the person known to the detectives as Ronald Fitzgerald.

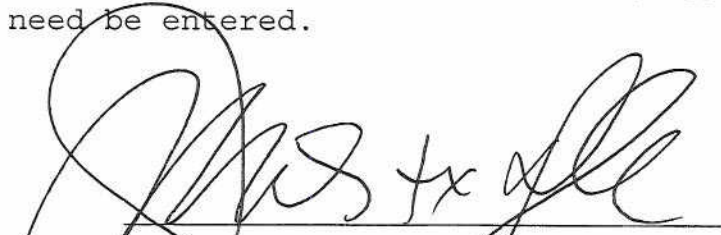
Based upon the foregoing, specifically: the unique physical characteristics of the subject; the close proximity of the transactions; the clear, daylight conditions and previous encounters with the defendant, it is clear that the identification of the defendant by the detectives could not be mistaken or the product of undue suggestiveness (*People v. Wharton*, 74 NY2d 921, 550 NYS2d 260 [1989]; *People v. Rodriguez*, 79 NY2d 445, 583 NYS2d 814 [1992]). Likewise, the face-to-face confirmatory viewing of the defendant at the station house on the date of arrest, was merely a confirmation of the undercover officer's prior identification in order to assure that the wrong individual had not been mistakenly arrested (*People v. Morales*, 37 NY2d 262, 372 NYS2d 25 [1975]).

Since the court agrees with the People's characterization of the identification that took place in this case, it accordingly finds that the defendant was not entitled to notice of this procedure as it falls outside of those contemplated by CPL§710.30 (see, *People v. Tas*, 51 NY2d 915, 434 NYS2d 978 [1980]).

For all of the above reasons, the defendant's motion to preclude the identification testimony of Detective B. And Detective D. As unduly suggestive and for lack of timely notice is denied in all respects.

The foregoing shall constitute the decision and order to the court, no further order need be entered.

ENTER



JAMES F. X. DOYLE - J.C.C.