SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 22

THE PEOPLE OF THE STATE OF NEW YORK

*DECISION AND ORDER*

- vs -

HON. JOEL M. GOLDBERG
IND. NO. 5631/04
DATE: DECEMBER 14, 2009

ERIC STAINE,

DEFENDANT.

The defendant's motion pursuant to CPL 440.10 (i) (h), dated October 8, 2009, to vacate the judgment of March 8, 2006, convicting the defendant of Murder in the Second Degree and sentencing him as a juvenile offender to a term of fifteen years to life, upon consideration of the People's response, dated December 2, 2009, is denied.

The defendant claims he was deprived of his State and Federal constitutional rights to effective assistance of counsel based on his attorney's failure to move at the *Wade* hearing to suppress the identification testimony of two witnesses (only one of whom, Rashawn Washington, testified at the trial) on the ground that his attorney had failed to argue that the defendant's right to counsel at a pre-trial lineup had been violated.

For the reasons set forth below, this Court finds that the motion does not allege sufficient facts to warrant a hearing on the right to counsel issue, and, alternatively, assuming the lineup violated the defendant's right to counsel, that the failure of his attorney at the *Wade* hearing to argue the right to counsel issue did not deprive the defendant of his constitutional right to effective assistance of counsel.

I. The Motion Fails To Sufficiently Allege That The Defendant Was Placed In A Court-Ordered Lineup.

The motion asserts that because the defendant was incarcerated on another charge at the time of the lineup, and a "take out" order was therefore required to place the defendant

in a lineup, this circumstance, in and of itself, triggered the right to counsel at the lineup (Attorney's Affirmation, par. 7). Although a Court-ordered lineup would trigger a right to counsel (*see People v Jackson*, 74 NY2d 787, 789 [1989]; *People v Coleman,* 43 NY2d 222 [1977]), there is no evidence of such a court order being issued in this case. Instead, it appears that the defendant was in custody in Warren County, New York on a drug charge and picked up by detectives there upon the authority of a pre-existing Kings County Supreme Court bench warrant issued in a prior unrelated case (People's Memorandum of Law at 9). This scenario is supported by the defendant's own affidavit submitted in this case which states, in part, "on August 16, 2004 I was returned to the 75 Precinct on a (sic) arrest warrant for a violation of probation" (Defendant's Exhibit B).

An arrest on a bench warrant issued for a defendant at liberty who failed to appear (*see* CPL 550.10 [2] [b]) in an unrelated case does not trigger the right to counsel in a subsequent lineup. *People v Corrouthers*, 131 AD2d 770 (2d Dept. 1987).

Thus, the motion papers do not contain sworn allegations substantiating or tending to substantiate the existence of a court-ordered lineup in this case triggering the right to counsel at that lineup. CPL 440.30 (4) (b).

II. Police Awareness Of The Existence Of A Pending Unrelated Case Did Not Trigger The Defendant's Right To Counsel.

There is no Federal or State constitutional right to counsel at a lineup conducted before the filing of an accusatory instrument, even if the police know the suspect has an attorney in an unrelated pending case. *People v Hernandez*, 70 NY2d 833, 835 (1987). This is true even if the suspect is a juvenile, and the arresting officer knows the suspect has an attorney on an unrelated pending case. *Matter of Jamal C.*, 75 NY2d 893, 895 (1990).

Thus, this claim of police awareness of the existence of counsel in a pending unrelated case does not state a ground constituting a legal basis to grant the motion. CPL 440.30 (4) (a).

III. The Motion Fails To Sufficiently Allege That Either The Defendant Or His Parents Unequivocally Requested To Have An Attorney Present At The Lineup.

If either the defendant or one of his parents had made a request to the police to have the defendant's attorney on the pending case present at the lineup, the police would have been required to make a reasonable effort to notify the attorney and afford the attorney an opportunity to be present. *People v Mitchell*, 2 NY3d 272, 275-276 (2004); *People v Coates*, 74 NY2d 244, 249 (1989).

The right to counsel at an investigatory lineup will attach when a defendant in custody, already represented by counsel on an unrelated case, invokes the right by requesting his or her attorney. Once the right to counsel has been triggered, the police may not proceed with the lineup without at least apprising the defendant's lawyer of the situation and affording the lawyer a reasonable opportunity to appear. A specific request that the lineup not proceed until counsel is so notified need not be made. *People v Mitchell* at 274-275. In *Mitchell*, the Court held that a parent could invoke a juvenile's right to counsel at an investigatory lineup but that right was not triggered by telling the police only that the juvenile had a lawyer in a pending case and offering to give the police the lawyer's telephone number. To invoke the right there must be an "unequivocal" request to have a lawyer present. *People v Mitchell* at 276.

As noted in the People's Response, at 12, the affidavits of the defendant's parents each allege, "together we informed the arresting officer that Eric [the defendant] was represented by Joseph Ostrowsky, Esq. of the Legal Aid Society on another case; and we provided Mr. Ostrowsky's phone number" and were told by the police that they would contact Mr. Ostrowsky (Defendant's Exhibits C and D, par's. 3 and 4 in each Exhibit). This language did not convey an "unequivocal request" sufficient to alert the police of their desire to have Mr. Ostrowsky present at the lineup. Accordingly, these affidavits do not contain allegations substantiating or tending to substantiate an essential fact to establish the

defendant's right to counsel at the lineup. CPL 440.30 (4) (b).

The defendant's affidavit states that, "My Mother, Father, and I on separate occasions requested that my lawyer be present during the lineup" (Defendant's Exhibit B). As noted, the affidavits of the defendant's parents do not assert that the presence of a lawyer was specifically requested.

Further, the surrounding circumstances also do not support a conclusion that a specific request to the police to have Mr. Ostrowsky present at the lineup was made as opposed to a statement made to the police that Mr. Ostrowsky should be notified of the arrest.

First, the then fifteen year-old defendant would have had to have given the pending lineup some thought and then made an unequivocal request to have Mr. Ostrowsky present.

Second, if this actually happened, it would be inconsistent for the defendant not to have told Mr. Ostrowsky about having made this request and to have reminded Mr. Ostrowsky of it at the *Wade* hearing, particularly during that portion of the hearing when Mr. Ostrowsky was questioning the detective concerning the detective's awareness of the defendant having an attorney "on a pending case upstate". (*Wade* hearing at 25, Defendant's Exhibit E).

Yet, neither the defendant's affidavit nor Mr. Ostrowsky's Affirmation (Defendant's Exhibit B) assert that the defendant ever told Mr. Ostrowsky about his alleged request for counsel at the lineup. The only person who allegedly told Mr. Ostrowsky of this purported request for counsel, according to the defense motion papers *(see* Ostrowsky Affirmation, par. 3) was the defendant's mother at some unspecified time prior to the *Wade* hearing.

Further, the Ostrowsky Affirmation, at par. 3, asserts that the defendant's "mother told me that she had asked the police to contact me before putting [the defendant] in the lineup and the police said they would do so," even though the defendant's mother's Affidavit, as previously noted, does not assert that she requested that Ostrowsky be present at the lineup.

Because the only factual allegation in this motion based on personal knowledge that a request for counsel was made is contained in the defendant's Affidavit, and under the

circumstances of this case there is no reasonable possibility that such an allegation is true, the Court, in the exercise of its discretion, denies the defendant a hearing on this claim. CPL 440.30 (4) (d).

If a hearing on this claim would be outcome-determinative to a successful motion by the defendant, the Court might be more inclined to provide the defendant's parents the opportunity at a hearing to clarify what they may have said to the detective. Such a hearing would also provide Mr. Ostrowsky the opportunity to explain how he can be so sure of what the defendant's mother purportedly told him, and what the defendant may or may not have told him, and how Mr. Ostrowsky could have overlooked this issue if he was told about it, particularly in view of the fact that he himself was the lawyer whose presence was purportedly requested. However, as discussed below, under the circumstances of this case, the right to counsel question is academic, and, therefore, no useful purpose would be served by holding a hearing on that issue.

IV. Because The Defendant And The Witness Were So Well-know To Each Other That There Was No Issue Concerning An Unnecessarily Suggestive Identification Procedure, And Because The Truthfulness Not The Accuracy Of The Witness's In-Court Identification Was The Issue At The Trial, Any Error In Admitting The Lineup Identification Was Harmless Beyond A Reasonable Doubt.

The witness, Rashawn Washington, and the defendant were so well-known to each other that the accuracy of Washington's identification of the defendant was not an issue at the trial. The defendant's trial counsel argued in his summation that Washington's testimony was not credible, because Washington did not come forward as a witness until months after the shooting as a result of being pressured while in prison by detectives who threatened to charge Washington as an accomplice (Defense Summation at 516-517). Defense counsel also argued in his summation that the defendant knew Washington, but that fact alone did not mean Washington was telling the truth, because the police had to threaten Washington to

convince him to testify (Defense Summation at 520).

The jury heard testimony that Washington and the defendant had lived in the same building in a housing project and that they were friends (Washington's trial testimony at 298-299). What the jury did not hear was that not only did Washington know the defendant but also that Washington had committed an armed robbery with the defendant as an accomplice. This matter was discussed out of the presence of the jury (Proceedings of January 10, 2006 at 4; Proceedings of January 12, 2006 at 180-182). If defense counsel at trial had contested Washington's prior familiarity with the defendant, it would have opened the door to the issue of how well Washington knew the defendant, including, perhaps, the defendant's commission of this robbery with Washington.

The Court's *Wade* hearing findings at 266 that Washington had "personal familiarity with the defendant" and "that there is little risk in the danger of any prior identification procedure and or comments by the police which created a substantial likelihood of irreparable mistaken identification to taint an in-court identification" were supported by the record and not challenged by the defense.

The record clearly establishes that even if the right to counsel issue had been raised at the *Wade* hearing, and even if the Court had suppressed the lineup identification testimony, the Court would, nevertheless, have permitted Washington to make an in-court identification based on its finding that the in-court identification was not affected by what was, in fact, only a confirmatory lineup viewing. *See People v Reuben,* 215 AD2d 508, 509 (2nd Dept. 1995).

Any error in admitting at the trial the additional testimony concerning Washington's identification of the defendant at the lineup was harmless beyond a reasonable doubt, because Washington's identification testimony (which, as noted was not challenged at trial based on its being mistaken) was buttressed at trial by another witness, namely Parris Pettiford, who also previously knew the defendant and who also testified that he witnessed the defendant shoot the deceased. *People v Harris,* 80 NY2d 796 (1992); *People v Di Girolamo*, 197 AD2d 531, 532 (2nd Dept. 1993).

Because the defendant has failed to demonstrate either that his attorney's failure to raise the right to counsel issue caused him any prejudice i.e. the denial of a "fair trial, a trial whose result is reliable" (*Strickland v Washington*, 466 US 668, 687 [1994]), or deprived him of "meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]), his right to effective assistance of counsel was not violated under either the Federal or State Constitutions.

Accordingly, the defendant's motion is denied.

**SO ORDERED**

**JOEL M. GOLDBERG**
**JUDGE**