

People v Mobley

2010 NY Slip Op 31153(U)

January 22, 2010

Sup Ct, Kings County

Docket Number: 4967/04

Judge: Thomas J. Carroll

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SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY, CRIMINAL TERM, PART 24

PEOPLE OF THE STATE OF NEW YORK

Indictment No.: 4967/04

against

By: Hon. Thomas J. Carroll

JAMELLE MOBLEY,

Dated: January 22, 2010

Defendant

The defendant filed a motion pursuant to CPL § 440.10 seeking to vacate the judgment of conviction or granting a hearing. In deciding this motion, the court has reviewed the defendant's motion papers, the People's Affirmation in Opposition, the defendant's Reply Affirmation and the court file.

Defendant seeks to vacate his judgment of conviction and to have the verdict set aside claiming ineffective assistance of counsel based on trial counsel's failure to move to have the line-up suppressed because the police denied the defendant his right to have counsel present at the line-up.

On October 25, 2005, the defendant was convicted, after a jury trial, of robbery in the first degree for a gunpoint theft of property from Peter Holder, a passenger on a subway. His co-defendant, William Mobley, was convicted of robbery in the second degree. Two other co-defendants, Lamar McBride and Antonio Williams, pled guilty prior to the commencement of the trial.

Background

On August 2, 2004, Peter Holder was the victim of a gunpoint robbery on a subway. Within several hours, during a show-up, Mr. Holder identified William Mobley, Antonio

Williams and Lamar McBirde as three of the four perpetrators of the robbery. They were arrested and eventually indicted together under Indictment No. 4967/04.

On August 2, 2004, Det. Douglas Chavis interviewed Peter Holder in connection with that subway robbery.

On August 2, 2004, Antonio Williams told Det. Chavis that the fourth perpetrator was Jamelle Mobley.

On August 20, 2004, Det. Chavis showed Peter Holder a photo array from which Peter Holder identified a photo of Jamelle Mobley as the fourth perpetrator who had held the gun during the robbery.

On October 7, 2004, the defendant appeared in New York County Criminal Court to be arraigned on an unrelated matter. At that time, defendant's counsel on that case, Andrea Molitteri, stated on the record that she was aware that there were two detectives present to re-arrest her client, that she gave them her card and that they were not to place him in a line-up without her being present (Defendant's motion papers, Exhibit A).

On October 12, 2004, the defendant appeared again on the same matter. Ms. Molitteri stated on the record that there were detectives in the courtroom and that she had already given them her card at the defendant's arraignment in the criminal court and that they were not to question him or put him in a line-up without counsel being present (Defendant's motion papers, Exhibit B).

On October 12, 2004, at about 3:40 P. M., Det. Chavis arrested the defendant in New York County Criminal Court and transported him to the Transit Robbery Squad Office where he was held overnight (People's Affirmation, para. 17, 18 and Det. Chavis' Affidavit).

On October 13, 2004, at about 1:55 P.M., at the Transit Robbery Squad Office, the defendant was placed in a line-up without counsel present. Mr. Holder picked out defendant as the perpetrator who had held the gun during the August 2, 2004, subway robbery (People's Affirmation, para. 20 and Det. Chavis' Affidavit).

A copy of the line-up form indicates that defense counsel was neither notified nor present and that Det. Chavis was present at the line-up (Defendant's motion papers, Exhibit E).

On November 29, 2004, the defendant was arraigned in Kings County Supreme Court on Indictment No. 6586/04. His attorney at arraignment was Leo Kimmel, Esq., who was assigned pursuant to Art. 18-B County Law. On April 15, 2005, Mr. Kimmel was relieved and Robert Nicholson, Esq., was appointed as defendant's counsel.

On October 11, 2005, Indictment No. 6586/04 was sent to this court for hearing and trial. This indictment was consolidated into Indictment No. 4967/04, nunc pro tunc to March 31, 2005, so that the defendant could be tried together with co-defendant William Mobley. The other two defendants, Antonio Williams and Lamar McBride, who had been indicted with co-defendant William Mobley had previously pled guilty in Part 30.

On October 11 and 12, 2005, a Wade hearing was conducted before this court in response to the defendant's motion to suppress identification testimony. The People called four police officers as witnesses. The complainant was not called to testify at the hearing. Following oral argument, the court rendered a decision from the bench denying the defendant's motion to suppress identification testimony. The court found that the photo array and line-up were fairly conducted.

Discussion & Claims

A defendant is generally not entitled to counsel at an investigatory line-up that occurs before the commencement of formal adversarial judicial proceedings (*People v Mitchell*, 2 NY3d 272, 274 [2004]; *People v LaClere*, 76 NY2d 670, 672 [1990]). The right to counsel, however, does attach when the police are aware that counsel has actually entered the matter under investigation or when defendant is already represented on an unrelated matter and specifically requests that his attorney attend the lineup (*People v Mitchell* at 672; *People v Brown*, 26 AD3d 392 [2d Dept. 2006]). Under such circumstances, the police are obligated to make reasonable efforts to contact counsel and afford him or her the opportunity to appear (*People v Coates*, 74 NY2d 244, 249 [1989]; *People v LaClere* at 673, 674).

In *People v Wilson*, 89 NY2d 754 [1997], defendant's attorney on an unrelated Brooklyn case informed the court and the Queens detectives waiting to arrest defendant that he did not want defendant questioned as a suspect in a new case or placed in an investigatory lineup unless he was present. Counsel repeated his admonitions to the detectives later when his client was actually arrested. Defendant was nevertheless placed in a lineup without counsel being notified. The Court of Appeals held that the attorney by effectively communicating his interest in representing defendant in the Queens case had obligated the police to notify him of the lineup (*Id.* at 759). The failure to make any effort to notify counsel required the suppression of the lineup identification (*Id.*).

In this instance, the record indicates that Det. Chavis knew, from his appearances in New York County Criminal Court, that the defendant was represented by counsel and that she had expressly requested that the defendant not be placed in a line-up or questioned without her being

present. Det. Chavis arrested the defendant on October 12, 2004, after he was released and held him overnight in the Transit Robbery Squad's office. The line-up was conducted sometime later in the afternoon on October 13, 2004. According to the line-up form attached to Det. Chavis' affidavit, no attempt was made to notify defense counsel about the line-up. There certainly was enough time to notify counsel, since the line-up was not conducted until the next afternoon. According to Defendant's Exhibits A and B, Ms. Moleterri stated her intentions not once, but twice, on the record. The People have not alleged that exigent circumstances existed that necessitated the police going forward without notifying or waiting for counsel to appear. The line-up was being held more than two months after the incident.

Here, the police were allegedly on notice that defendant was represented by counsel and no exigent circumstances prevented them from conducting the line-up within the presence of counsel.

The defendant further alleges that the October 7 and 12, 2004, transcripts were given to Mr. Nicholson prior to the commencement of the Wade hearing on October 11, 2005, and that he did not utilize that information during the Wade hearing. While defense counsel on this 440 motion, Michelle Mogal, recounts a hearsay conversation she had with Mr. Nicholson on February 18, 2009, there is no affirmation from Mr. Nicholson upon which the court can make a factual determination as to what occurred prior to the commencement of the Wade hearing on October 11, 2005.

Therefore, the court is ordering a CPL Article 440 hearing to determine the circumstances of the events of October 7 and 12, 2004, and, secondly, whether Mr. Nicholson provided effective assistance of counsel to the defendant with regard to the suppression issue and, thirdly,

related matters.

The Court will set a date for the 440 hearing.

This shall constitute the Decision and Order of the Court.


HON THOMAS J. CARROLL
J.S.C.

ENTERED
JAN 25 2010
NANCY T. SUNSHINE
COUNTY CLERK