

**People v Wade**

2012 NY Slip Op 31778(U)

July 9, 2012

County Court, Wayne County

Docket Number: 11-135

Judge: Daniel G. Barrett

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At a term of the County Court held in and for the County of Wayne at the Hall of Justice in Lyons, New York on the 27<sup>th</sup> day of June, 2012.

Present: Honorable Daniel G. Barrett  
STATE OF NEW YORK  
COUNTY COURT COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

DECISION  
Ind. No. 11-135

MICHAEL J. WADE  
Defendant

Appearances - People- Christopher Bokelman, Esq.  
Defendant - Andrew Correia, Esq.

A hearing was held on the above date and testimony was taken. Preliminary and closing comments were put on the record by both attorneys.

The first issue is multiplicity regarding Counts 1 and 2. Defense argues that the counts essentially are the same, that in fact they allege the same crime. The prosecution argues that the issue of multiplicity was not raised in the motion papers and therefore it is not appropriate for the hearing and secondly said issue would be dealt with at the time of trial.

With regard to the issue of multiplicity in fact the issue was not raised in motion papers and therefore the Court will not rule on that issue now. However, it is an issue that will have to be ruled on at the time of trial.

Secondly, defense asked if the prosecution would put on the record that there was no DNA or fingerprint evidence not otherwise revealed or made available. The prosecution indicated that was the case.

The three remaining issues dealt with a Mapp Hearing regarding the warrant for the clothing taken from the locker at the Wayne County Jail, a Wade Hearing concerning the show up identification of the Defendant at the scene at the allege victims, and lastly a Huntley Hearing regarding a statement made by the Defendant at the time of arrest to the effect "black guys were chasing me."

Sergeant Joseph Croft of the Wayne County Sheriff's Department testified that he was called to 11601 Lummisville Road, Huron, New York by dispatcher for a crime in progress. Sergeant Croft has the canine unit and his presence was requested. Said call came in approximately 8:00 P.M..

Sergeant Croft began searching the area with his dog, Nitro. There was a barn near the home that was searched. Near the barn there was a mowed path and somewhere down the mowed path was a metal fence. Sergeant Croft saw the Defendant near the fence with his shirt over his head lying on the ground and also wearing khaki pants.

He advised the Defendant he was under arrest and handcuffed him and put him in the back seat of Deputy Brook's car.

After Sergeant Croft had gotten the Defendant off the ground, prior to putting him in Deputy Brook's car the Defendant utter a statement to the effect of : "I'm running from black guys."

When the Defendant was in Deputy Brook's car being taken back to the Porter residence, Deputy Brooks testified that he did not ask any questions of the Defendant.

Back at the Porter residence Sergeant Croft parked on the road and Deputy Brooks pulled into the driveway behind Sergeant DiSanto's vehicle, which was behind the two vehicles owned by the Porters.

Sergeant Croft went to Mr. Porter who was in the garage at the time and asked him to come back to the vehicle to identify the Defendant.

Sergeant Croft shined the flashlight through the window. Defendant was in the back seat looking forward. Mr. Porter identified the Defendant saying something to the effect "he's the one" or "that's the guy." Sergeant Croft indicated he did not say anything to Mr. Porter.

Deputy Croft indicated that there was no photo array or any physical line up. He further testified that from the time that the Defendant was first spotted by the Porters until the identification was one and one-half to two hours.

Sergeant Croft did not give the Defendant Miranda warnings.

Deputy Brooks also advised that there was a Deputy Vaughn helping in the search. The search was east of the Porter residence on Old Lummisville Road. The search took them to a barn and eventually to the mowed path, to the metal fence where the Defendant was found. After Sergeant Croft found the Defendant, Deputy Brooks heard the Sergeant shout something to the effect "show me your hands." He and Deputy Vaughn ran over and saw the Defendant laying on the ground. They saw

Sergeant Croft handcuff him and lift him off the ground.

Deputy Brooks indicated he did not hear anything said by Sergeant Croft such as you are under arrest and did not hear the Defendant say anything. Nor did the Defendant say anything in the car.

Deputy Brooks took a statement from Mr. and Mrs. Porter at different times and said statements were taken outside the hearing of the other.

The Defendant was then taken from Deputy Brook's car to Sergeant DiSanto's car. Deputy Brooks had no further contact with the Defendant.

Both Deputy Brooks and Sergeant Croft identified the Defendant in open Court.

Later Michael Wade was arraigned and remanded to the Wayne County Jail. While at the jail, Investigator James A. Dallas filled out an application for a search warrant for the Defendant's locker at the Wayne County Jail, locker number 69.

Defendant was identified at the scene by the Porters wearing khaki colored pants and a dark colored shirt.

When Sergeant Croft found the Defendant next to the metal fence he testified that the Defendant was wearing khaki pants and a dark colored shirt.

Deputy Brooks testified that when the Defendant was in his vehicle he was wearing a dark shirt and khaki pants.

Attached to the application for a search warrant is a statement of the said Porters indicating their description of the alleged crime. That in fact they found things missing from their home including a wallet, a GPS and bikes and found the Defendant in the field next to their house. The Porters identified the Defendant at their home in the back seat of Deputy Brook's car.

Mr. Porter in fact confronted the Defendant at the scene in the field next to his house and the Defendant ran. Mr. and Mrs. Porter's statements were attached to the warrant application.

Taken from the locker was one pair of men's sneakers made by Starter, color gray, blue and black, one pair of gray socks, one pair of gray underwear, one black shirt and one pair of khaki colored pants.

The Court finds there was probable cause for the search warrant and the search was carried out within the confines of the warrant.

The Defendant next challenges the identification process as being unduly suggestive. In this case there was a show up. The Defendant was brought to the scene after he was arrested and the alleged victims identified the Defendant in the back of Deputy Brook's vehicle. Sergeant Croft shined his light into the vehicle and the alleged victims identified the Defendant separately.

Because only one person is displayed to the witness, the potential for suggestiveness is great. For this reason, show ups are disfavored, although permissible, if exigent circumstances require immediate identification, or if the suspect is caught near the scene, People v. Grassia, 195 A.D. 2d 607.

While many Defendants are not found in the immediate area of the crime, the Courts will look critically where the police transport the Defendant a considerable distance back to the crime scene or a police station, People v. Liano, 142 A.D. 2d 602. However, a show up within one hour and five miles from the crime scene is not unduly suggestive, in the context of a continuous, ongoing criminal investigation, People v. Hudson, 71 A.D. 3d 1046.

While show up procedures are generally disfavored they are permissible when they are employed in close spacial and temporal proximity to the commission of the crime for the purpose of securing a prompt and reliable identification, People v. Duuvon, 77 N.Y. 2d 541, People v. Love, 54 N.Y. 2d 1023, People v. Jackson, 180 A.D. 2d 756, People v. Holder, 178 A.D. 2d 436 and People v. Adams, 163 A.D. 2d 318.

No undue suggestiveness occurred where the Defendant was handcuffed or by the fact that the victim had been told that the police had a suspect in custody, People v. Gill, 21 A.D. 3d 1120, People v. Whitney, 158 A.D. 2d 734 and People v. Dennis, 125 A.D. 2d 325.

In the case at hand the Defendant was found within a couple of hours of being identified by the alleged victims and within a couple miles of the residence. Accordingly, the show up was not unduly suggestive and said identification is admissible at trial.

The last issue deals with the statement made by the Defendant at the time of arrest. It is uncontroverted that the Defendant was not served with a 710.30 Notice.

However, within a few days of arraignment in County Court the oral statement of the Defendant as set forth in paragraph A1a, Response to Pre-Trial Order, oral statement: "black guys were chasing me."

To review, Sergeant Croft found the Defendant near a barn on a mowed path off of Old Lummisville Road hiding next to a metal fence with a shirt pulled over his face. Sergeant Croft handcuffed the Defendant, got him to his feet and put him under arrest. Defendant then made his statement.

Certainly the Defendant was under custody but he was not being interrogated. Sergeant Croft said he asked no questions of the Defendant and he did not engage him in conversation.

There are exceptions of course to CPL 710.30 and that is where a statement is made spontaneously, People v. Hall, 181 A.D. 2d 1008.

In this case the statement provided by the Defendant was in fact spontaneous. It was not pursuant to any interrogation by Sergeant Croft or other police officers.


Because the contested statements were not the product of police questioning, but rather were spontaneous and voluntary, the People were not required to give notice to the Defendant of the statements pursuant to CPL 710.30, People v. DeBlase, 142 A.D. 2d 926, People v. McFadden, 126 A.D. 2d 970.

In any event the statement was set forth in the Pre-Trial Demand within a few days of arraignment.

Therefore, the Court finds said statement to be admissible.

This constitutes the Decision of the Court.

Dated: July 9, 2012  
Lyons, New York



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Daniel G. Barrett  
County Court Judge