

Matter of Birch

2013 NY Slip Op 34069(U)

February 20, 2013

County Court, Westchester County

Docket Number: 683-12

Judge: Barbara G. Zambelli

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

<p>FILED AND ENTERED ON 2-20-13¹³₂₀₁₂</p> <p>WESTCHESTER COUNTY CLERK</p>

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

IN THE MATTER OF THE APPLICATION TO
COMPEL

DECISION & ORDER

AQUADIOSE BIRCH

RP

683-12

TO PARTICIPATE AND APPEAR IN A LINE-UP

FEB 20 2013

-----X

ZAMBELLI, J.

The People move by Order to Show Cause, supporting ~~affirmation~~ and memorandum of law to compel Aquadiose Birch to participate in a line-up. The defendant has submitted an affirmation in opposition thereto. Upon consideration of these papers, the motion is disposed of as follows:

The People contend that on May 10, 2012, the witness (whose name and identity they submit is known by them and the Mount Vernon Police Department) was walking on East Sidney Avenue in the City of Mount Vernon with a young child and observed two males walking in the witness' direction. The People submit that the witness heard a male state "what the fuck are you looking at" and saw the other male blow a kiss at a third male standing in front of 40 East Sidney Avenue, which third male was subsequently identified as Demitri Gordon. The People contend that the witness then observed one of the males who had been walking toward the witness point a handgun at Demitri Gordon and begin firing it.

The Mount Vernon Police Department responded to the scene and PO Wuttke interviewed the witness. The witness provided a description of the two males, describing

the individual who conducted the shooting (male number 1) approximately 5'10" to 6'2", weighing about 200 pounds, wearing a dark hoodie and having braids or dreads who was armed with what appeared to be a revolver. The other male (male number 2) was described by the witness as a black male with a medium build, approximately 5'9" to 5'11" in height and who was wearing a grey sweatsuit. The People submit that PO Wuttke recognized that the description of male number 1 matched that of Aquadiose Birch and the description of male number 2 matches that of Jawwad Abdul Halim.

As part of the investigation, PO Wuttke recovered security footage from 40 East Sidney Avenue. The People submit that the footage shows Demitri Gordon arriving at the location and also shows the identifying witness and the young child. They also contend that the footage also shows two males whose faces are unclear but who both fit the witness' description and are consistent with both Birch and Halim. The People submit that the video shows the two males approach Demitri Gordon who is standing in front of 40 East Sidney Avenue. Immediately before the shooting, a police car is seen entering the area, at which time the two males turn away from Demitri Gordon and exit the frame of the camera. The People contend that the shooting occurs seconds later and the video shows that the identifying witness clearly observes male number 1 fire a handgun at Demitri Gordon, who runs from the scene as he is shot. The People advise that Gordon survived the shooting, but sustained a bullet to his leg which caused his humerus to be displaced and was also shot in the right pelvic / buttocks region.

The People contend that based upon his interview of the witness and his viewing of the surveillance video, PO Wuttke assembled a six pack photo array of six individuals including Aquadiose Birch. They submit that the witness was shown the array and pointed

to the photo of Aquadiose Birch stating that he looked like the shooter on May 10, 2012; the witness further indicated that she was 60% sure but could make a better identification if she saw the shooter in person.

Accordingly, the People seek an Order compelling Aquadiose Birch to appear in a line-up in this matter. Aquadiose Birch is currently represented by counsel (who filed papers opposing this motion) in relation to indictment 12-0683 charging him with arson in the second degree and tampering and intimidating witnesses. Given the charges regarding tampering and witness intimidation, the People request that the witness' identity remain protected at this time. The People further state that if the line-up is granted, it will be held at one of three potential locations - Bronx Homicide Squad, Yonkers Police Department, or White Plains Police Department - with the location to be provided to defendant's counsel in advance thereof.

Aquadiose Birch opposes the motion. He argues that the People failed to present probable cause in support thereof, submitting that a single witness who is only 60% sure of her identification of a person who looked like the shooter is insufficient. He also argues that the lack of probable cause is further evident by the fact that the crime occurred in May, 2012 and the People waited until now to make this application, which he submits is indicative that the People lack sufficient evidence with which to prosecute him.

The People's motion is granted. An un-indicted defendant may be placed in a line-up provided that there is probable cause to arrest defendant for the alleged crime (see People v. Carrouthers, 131 A.D.2d 770, 771 (2d Dept. 1987), lv. denied, 70 N.Y.2d 798 (1987)). The People's allegations are sufficient to meet this standard. Moreover, given his representation in the unrelated matter, defendant's counsel will be present at any line-up

held. The date and time when said the line-up shall occur will be scheduled at the mutual convenience of all parties concerned.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
February 20, 2013



BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

Hon. Janet DiFiore
District Attorney, Westchester County
111 Dr. Martin Luther King Jr. Blvd.
White Plains, New York 10601
Attn: John O'Rourke, Esq.
Assistant District Attorney

Richard Ferrante, Esq.
Attorney for Aquadirose Birch
399 Knollwood Road - Suite 111
White Plains, New York 10603

Nancy Barry, Esq.
Chief Clerk