

People v Walton

2014 NY Slip Op 34002(U)

February 20, 2014

Supreme Court, Kings County

Docket Number: 2459-2012

Judge: Vincent M. Del Giudice

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS - CRIMINAL TERM - PART 25

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PEOPLE OF THE STATE OF NEW YORK

vs.

IND. NO. 2459-2012

DECISION and ORDER

SAMUEL WALTON,

Defendant.

----- X
VINCENT M. DEL GIUDICE, J.

The defendant is charged with Murder in the Second Degree, *et al.* A pre-trial *Wade* hearing was conducted before this court on February 19, 2014. The People presented three witnesses at the hearing: Detective Paul Parsekian and Andrew Ottaka and Assistant District Attorney Leila Rosini. I found each of the witness' testimony to be credible and worthy of belief.

Findings of Fact

On July 4, 2009, Detective Paul Parsekian was assigned to investigate a homicide which just occurred in the vicinity of 160 Rockaway Avenue, in Brooklyn.

On December 3, 2012, the detective was ordered to conduct a double-blind lineup at the 84th Precinct. The defendant was the subject of the lineup based on information that he had been involved in the July 4, 2009 shooting. The defendant had been transported from court, where he had appeared on another matter. Detectives Parekian and Ulmer obtained lineup fillers from the Bedford Avenue Mens Shelter. Defendant's attorney was present during the setting up of the lineup. The fillers and the defendant were assigned

seats in the lineup.¹ Once all of the participants were seated, Detective Parsekian and defense counsel exited the lineup room. Detective Parsekian left the area and informed his supervisor that the lineup was ready.

Once the lineup was assembled, Assistant District Attorney Rosini walked the eyewitness from her office to the 84th Precinct. ADA Rosini testified that apart from small talk she did not speak to the eyewitness about what he was about to see and what his role would be in the procedure. Upon bringing the witness to the precinct, the assistant left the scene.

Detective Andrew Ottaka, from the 81st Precinct, was assigned to accompany the eyewitness from the precinct entrance into the lineup viewing room and to record the witness's response upon viewing the lineup. Detective Ottaka explained to the witness what a lineup was and that the witness was going to be asked if he recognized anyone in the lineup and, if so, where he recognized that individual from. Once the detective, the witness and the defense attorney entered the viewing room, the detective lifted the shade covering the glass partition and asked the witness to view the lineup. He was then asked if he recognized anybody. The witness stated he recognized the individual seated in position number four from the shooting that occurred on July 4, 2009.

Conclusions of Law

It is axiomatic that the purpose of a *Wade* hearing is to determine whether a police conducted pre-trial identification procedure was unduly and impermissibly suggestive so as to deny the defendant due process (*Stovall v Denno*, 388 US 293, 301-302 [1967]; *People v Adams*, 53 NY2d 241, 251 [1981]).

While the People have the initial burden of going forward to establish the reasonableness of the police conduct and the lack of any undue suggestiveness in a pretrial identification procedure (*People v Ortiz*, 90 NY2d 533, 537 [1997]; *People v Guitierres*, 82 AD3d 1116, 1117 [2nd Dept 2011]), the defendant bears the ultimate burden of proving that the procedure was unduly suggestive (*People v Chipp*, 75 NY2d 327, 335 [1990]; *People v Berrios*, 28 NY2d 361, 367 [1971]).

The defendant contends that evidence of the lineup identification should

¹Upon the advice of his attorney, the defendant refused to selection his seat location in the lineup and he was assigned to sit in position number four.

be suppressed because the lineup was unduly suggestive. Although counsel was present at the lineup, counsel asserted, during oral argument, that he raised no objections during the lineup because his role is strictly as an observer, not as an advocate for his client.

In addition to the testimony of the witnesses, to meet their burden the People introduced into evidence two photographs that were taken of the lineup.

It is axiomatic that while participants in a lineup should share general physical characteristics as the suspect (*People v Kirby*, 34 AD3d 695, 695 [2nd Dept 2006], *lv denied* 8 NY3d 598; *People v Burns*, 138 AD2d 614, 615 [2nd Dept 1988], *lv denied* 71 NY2d 1024) “there is no requirement ... that a defendant in a line-up be surrounded by people nearly identical in appearance” (*Chipp*, 75 NY2d at 336; *Matter of Raymond A.*, 178 AD2d 288, 289 [1st Dept 1991])(see also *People v Hoehne*, 203 AD2d 480, 481 [2nd Dept 1994], *lv denied* 83 NY2d 967; *People v Henderson*, 170 AD2d 532, 533 [2nd Dept 1991], *lv denied* 77 NY2d 995; *People v Jackson*, 151 AD2d 694, 694 [2nd Dept 1989]). “Police stations are not theatrical casting offices” (*United States v Lewis*, 547 F2d 1030, 1035 [8th Circuit 1977], *cert denied* 423 US 1111). In addition, “identical clothing is not required to be worn by the lineup standins where, as here, common and similar apparel is used” (*People v Buxton*, 189 AD2d 996, 997 [3rd Dept 1993], *lv denied* 81 NY2d 10011)(*internal citations omitted*).

During oral argument, defense counsel raised no specific objections to the physical characteristics of the lineup.

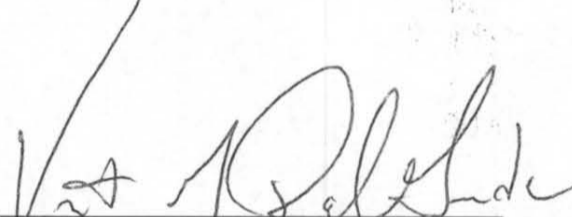
Despite certain age, weight and facial hair disparities, the fillers were sufficiently similar to the defendant in appearance so that the defendant was not singled out for identification (*People v Poey*, 260 AD2d 411, 411 [2nd Dept 1999], *lv denied* 93 NY2d 923; *People v Longshore*, 249 AD2d 565, 566 [2nd Dept 1998], *lv denied* 92 NY2d 900; *People v Lopez*, 209 AD2d 442, 442-443 [2nd Dept 1994], *lv denied* 85 NY2d 911; *People v Baptiste*, 201 AD2d 659, 660 [2nd Dept 1994]). Any significant discrepancies in height and weight were eliminated by having the participants in the lineup seated, holding a card with a number in front of them (*People v Herrera*, 219 AD2d 511, 511 [1st Dept 1995], *lv denied* 87 NY2d 847)(compare *People v Kenley*, 87 AD3d 518, 518 [1st Dept 2011], *lv denied* 18 NY3d 959 [lineup unduly suggestive when only the defendant matches a key aspect of the description of the perpetrator provided by the witness]).

This Court has closely examined People’s exhibit 1, which contained the two photographs of the lineup. I find that the lineup constituted a fair representative panel upon which a witness could make a reliable

identification. The defendant's physical characteristics were sufficiently similar to the other participants so as to negate any likelihood that the defendant was singled out for identification (*Jackson*, 98 NY2d at 559; *Chipp*, 75 NY2d at 336; *People v Bacchus*, 50 AD3d 818 [2nd Dept 2008], *lv denied* 11 NY3d 785; *People v Washington*, 40 AD3d 1136, 1137 [2nd Dept 2007], *lv denied* 9 NY3d 883; *People v Davis*, 27 AD3d 761, 761 [2nd Dept 2006], *lv denied* 7 NY3d 847; *People v Peterkin*, 27 AD3d 666, 667 [2nd Dept 2006], *lv denied* 7 NY3d 793).

Conclusion

Accordingly, defendant's motion to suppress is hereby denied. This constitutes the decision, opinion and order of the court.



Vincent M Del Giudice
Judge of the Court of Claims
Acting Supreme Court Justice

Dated: February 20, 2014
Brooklyn, New York