

**People v Alleyne**

2014 NY Slip Op 34059(U)

June 23, 2014

Supreme Court, Kings County

Docket Number: Indictment No. 883/13

Judge: Ann Donnelly

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SUPREME COURT OF THE STATE OF NEW YORK,  
COUNTY OF KINGS: CRIMINAL TERM - PART 8

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DWAYNE ALLEYNE,

Defendant.

DECISION AND ORDER  
Indictment No. 883/13

-----X  
APPEARANCES:

FOR THE PEOPLE:

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Of Counsel

ANN DONNELLY, J.:

The defendant is charged with Assault in the First Degree and related crimes. On March 11, 2014, the case was referred to this Court for Dunaway, Huntley and Wade hearings. The People called one witness, Police Officer Owen Farquharson, who testified credibly. The defense called no witnesses. Based upon the testimony adduced at the hearing and analysis of the memoranda submitted by the parties, the Court makes the following findings of fact and conclusions of law.

### Findings of Fact

On September 30, 2012, Police Officer Owen Farquharson was on bicycle patrol in Prospect Park within the confines of the 78<sup>th</sup> precinct. At about 4:20 p.m., he received a radio call of stabbing near the Boathouse. He and another officer went to investigate the call. Within about two minutes, the officers saw a group of men on the roadway approximately 2,000 feet from the Boathouse. They were carrying a man – Romain Barker -- who had been stabbed in the back; he was unconscious, and his shirt was bloody. The men were all speaking at once; they said that they had been playing soccer, and that one of the people who was playing soccer -- “Dwayne” – stabbed Mr. Barker; they described Dwayne as a black man in his thirties, dressed in a white shirt and dark pants. They pointed to a wooded area, and said that Dwayne had gone in that direction.

Officer Farquharson immediately went to the area the witnesses had indicated, following a path that led to a baseball field. Shortly thereafter, the officer saw the defendant, a black man in his thirties, wearing a white shirt, black pants, a brown baseball hat, and construction boots. There were leaves on the defendant’s pants. Officer Farquharson asked the defendant where he was coming from, and the defendant replied that he had come from the wooded area and that he had been jogging.

At that point, Officer Farquharson radioed that he had stopped a man, and asked for backup. Because officer who responded to Officer Farquharson’s call asked him the name of the person he had stopped, Officer Farquharson asked the defendant for his name; the defendant responded, “Dwayne Alleyne.” Officer Farquharson conveyed that information over the radio, and handcuffed the defendant. Other officers brought Andrew Reece, one of the witnesses who

had been with the complainant just five minutes earlier, to the wooded area. Mr. Reece pointed to the defendant, and said, "Yeah, that's him." The defendant was then put in a police car.

Mr. Reece told the officer that he had "seen the whole thing," and that the defendant stabbed the complainant after the complainant attempted to break up a fight. Mr. Reece knew the defendant's first and last name, and said that he knew him from weekly soccer games.

The next day, Officer Farquharson went to Kings County Hospital, where Mr. Barker was being treated for his injuries. The officer showed him a photograph of the defendant, and asked whether he was the person who had stabbed him; Mr. Barker said, "Yes." The officer did not attempt to interview him further, because he was "in and out of consciousness" and appeared to be "in a lot of pain." However, he spoke to Mr. Barker's brother and sister, who explained that they knew the defendant from Guyana, and that the complainant and the defendant had grown up together there. They did not understand why the defendant had stabbed their brother, whom they described as a "good guy."

### Conclusions of Law

#### The Dunaway Motion

At a suppression hearing, the People have the burden to go forward with evidence of the legality of police conduct, and the defendant has the ultimate burden of proving that the conduct was illegal. People v. Berrios, 28 NY2d 361 (1971); People v. Baldwin, 25 NY2d 66, 70 (1969). The People met their burden of going forward by calling Officer Farquharson.

Probable cause to arrest "does not require proof sufficient to warrant conviction beyond a reasonable doubt, but merely information sufficient to support a reasonable belief that an

offense...has been committed' by the person arrested." People v. Shulman, 6 NY3d 1, 25 (2005)(quoting People v. Bigelow, 66 NY2d 417, 423 (1985). See also People v. Hines, 18 AD3d 882 (2d Dep't 2005). Probable cause "is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." Maryland v. Pringle, 540 US 366 (2003). It is based on the "realities of everyday life and common sense," (People v. Wright, 8 AD3d 304 (2d Dep't 2004)), and is a synthesis of all the information that a police officer knows, including what he has seen, learned, and heard. People v. Belo, 240 AD2d 964 (3d Dep't 1997). Of course, if viewed in isolation, each piece of information might have an innocent explanation; however, viewed in their entirety, the pieces can establish probable cause. People v. Pizarro, 24 AD2d 309 (1<sup>st</sup> Dep't 2005), aff'd 7 NY3d 840 (2006); see also People v. Shulman, supra; People v. Bigelow, supra.

In this case, Officer Farquharson's detention and arrest of the defendant was entirely reasonable and proper. In a rapidly unfolding series of events – which took less than ten minutes from start to finish – the officer got the details of the attack and stopped the defendant; he learned of an assault at a specific location, met the group of men carrying the seriously injured and unconscious victim, got a description and a first name of the attacker, and learned the direction in which the attacker fled. Shortly thereafter, Officer Farquharson located the defendant, who matched the description, and had the same name given by the witnesses. Andrew Reece's identification of the defendant, which included providing the defendant's full name, completed "the totality of the chain of information" that linked the defendant to this crime. People v. Poventud, 300 AD2d 223 (1<sup>st</sup> Dep't 2003). See also People v. Shulman, supra. Under these circumstances, Officer Farquharson had probable cause to arrest the defendant.

### The Huntley Motion

The statement at issue is the defendant's answer in response to the officer's question, "Where are you coming from?" The defendant responded that he had come from the wooded area and that he had been jogging. The defendant argues that these statements "should be suppressed as the fruit of the poisonous tree" and for "failure to give Miranda warnings." The People respond that the defendant was not in custody when the officer asked a single investigatory question.

A police officer is required to administer Miranda warnings only when a suspect is both in custody and subject to interrogation. People v. Huffman, 41 NY2d 29, 33 (1976); People v. Valentin, \_\_ AD3d \_\_, 2014 Slip Op 04223 (2d Dep't 2014); People v. Wallace, 113 AD3d 413, 414 (1<sup>st</sup> Dep't 2014). See also Stansbury v. California, 511 US 318 (1994). Here, the defendant was not in custody at the time the officer posed a single question; indeed, a reasonable, innocent person in the defendant's position would not have considered himself in custody at this point in the encounter. People v. Yukl, 25 NY2d 585, 589 (1969); People v. Wallace, supra. Moreover, the officer's investigatory question to the defendant was not an interrogation that required Miranda warnings. People v. Huffman, supra. Accordingly, the defendant's motion to suppress his statements is denied.

### The Wade Motion

At the defendant's Supreme Court arraignment, the People served written notice pursuant to CPL § 710.30(1)(b) that they intended to offer on their direct case the testimony that two witnesses identified the defendant in separate procedures: a show-up identification by Andrew

Reece and a “confirmatory photograph book” identification by Romaine Barker at Kings County Hospital. Neither notice nor a Wade hearing is legally required for a confirmatory identification. Nevertheless, the People consented to a hearing.

#### The Show-Up with Witness Andrew Reece

At a Wade hearing, the People have the initial burden of going forward to establish that the pretrial identification procedure was not unduly suggestive; it is the defendant’s ultimate burden to prove that the procedure was unduly suggestive. People v. Chipp, 75 NY2d 327 (1990).

It is well settled that prompt civilian show-up identifications are admissible when they occur at or near the crime scene, and where “exigent circumstances exist; for example, the police need to know if they have the right person or should keep looking, or the victim has been mortally wounded and may not be around later to identify an attacker.” People v. Howard, 22 NY2d 388, 402 (2013). In addition, show-ups are permissible when they are “part of an unbroken chain of events or ongoing investigation. Id.; People v. Duuvon, 77 NY2d 541, 544-45 (1991). Thus, in Duuvon, the Court of Appeals observed that the show-up identification was permissible because it was part of an “unbroken chain of events—crime, escape, pursuit, apprehension and identifications—all within minutes and within a New York City block and a half.” 77 NY2d at 544-545.

The evidence at the hearing established the requisite exigency, proximity, and reliability. The entire series of events, from Officer Farquharson’s receipt of the radio run to Mr. Reece’s identification of the defendant, took approximately ten minutes. The officer first met Mr. Reece about two minutes after the radio run, as he and his companions carried the unconscious and

bleeding victim to seek help. Clearly, the circumstances were exigent—the stabbing victim needed urgent medical care, and there was no possibility that he could participate in any identification procedure on the scene. Mr. Reece and the others told Officer Farquharson that they knew the defendant because they played soccer together almost every weekend, that his first name was Dwayne, what he was wearing, and the direction in which he fled. Officer Farquharson immediately took off on his bicycle and within minutes, located the defendant. The defendant's appearance was consistent with the witnesses' description, and he confirmed that his name was "Dwayne." Shortly thereafter, Mr. Reece arrived on the scene and identified the defendant.

Nor does the fact that the defendant was handcuffed at the time of the show-up, under the totality of the circumstances here, render the identification procedure unduly suggestive. Duuvon at 544 ("the fact that the defendant was handcuffed in the patrol car alone does not transform viewing into an unduly suggestive one"). See also People v. Gilford, 65 AD3d 840, 841 (1<sup>st</sup> Dep't 2009), aff'd, 16 NY3d 864, 868 (2011)(show-up admissible where defendant was handcuffed and spotlighted by bright "take-down" lights on top of the patrol car). The defendant's motion to suppress the show-up identification is denied.

#### The Photographic Identification by Witness Romain Barker

The defendant's initial complaint about the victim's photographic identification is that a Wade hearing is not the appropriate vehicle to determine whether an identification is confirmatory. He insists that if the People believed that Mr. Barker's identification of him was confirmatory, they should have opposed a Wade hearing, and asked the court to review the grand jury minutes, which clearly establish that the victim and the defendant were well known to each

other.<sup>1</sup> The defendant also claims that he was not “on notice” of the People’s position that the witness’ identification was confirmatory. The defendant is mistaken.

First, the People served timely and legally sufficient notice of their position that Mr. Barker’s identification of the defendant was “confirmatory.” The “Notice Pursuant to CPL 710.30(1)(b),” which is part of the court file in this matter, describes the identification procedure at Kings County Hospital as a “confirmatory photograph book.” Therefore, the defendant was on notice of the identification itself and the People’s position that the identification was “confirmatory.”

Since a confirmatory identification does not require notice pursuant to CPL § 710.30, it is true that the People had the option to argue before the motion court that the grand jury testimony established the parties’ familiarity with each other as a matter of law. Furthermore, evidence of a witness’s pretrial photographic identification of an accused is not even admissible in the prosecution’s case-in-chief, thereby providing a second independent ground to exclude it from the dictates of CPL § 710.30. People v. Grajales, 8 NY3d 861 (2007); People v. Cioffi, 1 NY2d 70 (1956); People v. Caserta, 19 NY2d 18 (1966). Nonetheless, perhaps in an exercise of caution because it is not unheard of for an appellate court to take a different view of a case, the People consented to a Wade hearing, which afforded the defendant the most expansive pre-trial litigation opportunity on the subject of this identification. The defendant was given timely,

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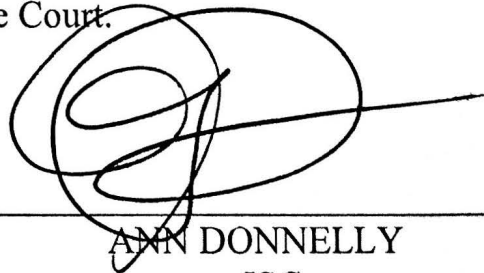
<sup>1</sup>The defense urges the Court to ignore the evidence before the grand jury on the subject of the witness’ familiarity with the defendant. Of course, when the People oppose a Wade hearing because the parties are known to each other, a court is permitted to consider the grand jury testimony. People v. Rodriguez, 47 AD3d 417 (1<sup>st</sup> Dep’t 2008); People v. Rumph, 248 AD2d 142 (1<sup>st</sup> Dep’t 1998); People v. Won, 208 AD2d 393 (1<sup>st</sup> Dep’t 1994). In this case, while the complainant’s testimony before the grand jury established that he knew the defendant very well, the evidence at the hearing was sufficient to establish the witness’ familiarity with the defendant without resort to the grand jury minutes.

complete notice and an opportunity to litigate this issue, and he cannot be heard to complain now that a more limited hearing would have better served him and the law.

Having the benefit of a full Wade hearing in this case, the Court now addresses the defendant's substantive complaint – that there was insufficient evidence adduced at the hearing that the victim's photographic identification of the defendant was confirmatory. When the People claim that an identification procedure is confirmatory, they have the burden to show that “the protagonists are known to one another...that the witness knows the defendant so well as to be impervious to police suggestion.” People v. Rodriguez, 79 NY2d 445, 452 (1992). The hearing evidence supports the conclusion that the complainant's prior relationship with this defendant meets that standard.

First, the victims' brother and sister told Officer Farquharson that their family knew the defendant from Guyana, and that he and the complainant had grown up there together, establishing that they knew each other for years. Second, one of the eyewitnesses, Andrew Reece, told the officer that the defendant and the complainant were part of a group that played weekly soccer games in Prospect Park. Under these circumstances, “there is virtually no possibility that the witness could misidentify the defendant,” Id. at 451. See also People v. Jacobs, 65 AD3d 594 (2d Dep't 2009); People v. Waterman, 56 AD3d 329 (1st Dep't 2008). Accordingly, the defendant's motion to suppress this confirmatory photographic identification is denied.

This constitutes the Decision and Order of the Court.



ANN DONNELLY  
JSC

DATED: Brooklyn, New York  
June 23, 2014

**HON. ANN DONNELLY**