

People v George
2016 NY Slip Op 32711(U)
November 29, 2016
County Court, Westchester County
Docket Number: 16-0427
Judge: Barry E. Warhit
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

AARON GEORGE and MICHAEL DJUKIC

Indictment No.: 16-0427

Defendants.

-----X
FILED

WARHIT, J.

NOV 29 2016

TIMOTHY C. IDONI
COUNTY CLERK

COUNTY OF WESTCHESTER

Defendant Aaron George is charged under the within indictment with, *inter alia*, Murder in the second degree, Criminal Possession of a Weapon in the second degree, and Tampering with Physical Evidence; Defendant Michael Djukic is charged, *inter alia*, with Criminal Possession of a Weapon in the second degree, Criminal Facilitation in the second degree and Tampering with Physical Evidence.

By Decision and Order, filed and entered September 9, 2016, this court (Neary, J.) found each defendant to be entitled to a pre-trial *Wade* hearing. The court had also granted defendant Djukic's application for a *Mapp* hearing. However, as it is conceded that no property was recovered from defendant Djukic's person, the defense withdrew their previous request for such hearing.

On November 7, 2016, this Court conducted a combined pre-trial *Wade* hearing at which Detective Edward Rutledge of the City of White Plains Police Department ("White Plains Police Department") testified and, through his testimony, the following exhibits were received into evidence: a redacted color copy of the photographic array

and two (2) redacted Photo Array Forms with respect to defendant Djukic and a redacted color copy of the photographic array and two (2) redacted Photo Array Forms with respect to defendant George¹.

Upon having had the unique opportunity to observe Det. Rutledge's demeanor and hear his testimony, this Court finds he testified credibly in all respects. Accordingly, and upon the record adduced, this court makes the following findings of fact and reaches the following conclusions of law.

FINDINGS OF FACT

On April 17, 2016, Dominique Hospi was shot and killed in Westchester County in the vicinity of 90 South Kenisco Avenue in the City of White Plains. Detective Edward Rutledge, a seventeen year veteran of the White Plains Police Department, was one of the detectives assigned to the investigation. In this capacity, at approximately 3:15 p.m. on April 17, 2016, Det. Rutledge met with and interviewed an alleged eyewitness. During this interview, the witness recounted his observations, signed a statement memorializing same and, relevant to this proceeding, indicated he was willing to view photographic arrays for the purpose of attempting to identify either or both of the individuals he had observed in the vicinity of 90 South Kensico Avenue at the time of the shooting. The witness left the White Plains Police Department after about 2 hours. Thereafter, the White Plains police were able to assemble photographic arrays. At Det.

¹Redactions were made, consistent with a previously issued Protective Order, as to the name and other identifying information of the alleged eyewitness. The originals of these documents were moved into evidence at this hearing for the sole purpose of permitting this Court to conduct an *in camera* review. Upon such review, this Court is satisfied that, but for the redactions, the copies are exact duplicates of the originals.

Rutledge's request, the eyewitness returned to the White Plains Police Department at about 9:45 p.m. on April 17, 2016.

Det. Rutledge met with the witness in a "detective work room", which is an office-like setting. Prior to presenting the witness with any photographs for consideration, Det. Rutledge informed the witness that the arrays he would be shown may or may not contain photographs of the suspects. Det. Rutledge also prepared the witness for the identification procedure by reading to him from a pre-printed Photo Array Form used by the White Plains Police Department. Specifically, Det. Rutledge read to the witness that he would be shown a photographic array containing six (6) photographs, that he should take as much time to look at it as he wanted and that the perpetrator may or may not be among the pictures. Det. Rutledge also read: "[i]ndividuals presented in the photo array may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change" and "[p]ay no attention to any markings that may appear on the photos, or any other difference in the type or style of the photographs". Det. Rutledge also read warnings that directed the witness not to "discuss with other witnesses what you see, say or do during" the identification procedure." According to Det. Rutledge's testimony, when he finished reading the warnings, the witness orally indicated he understood and, at the detective's request, initialed the Photo Array Form to acknowledge his understanding.

Det. Rutledge testified that he then placed a photographic array in front of the witness. This array consisted of color photographs of defendant Djukic and five other white, males of a similar age. Det. Rutledge testified that, upon being shown the array, the witness placed his finger on photograph number 1 and stated "that's him, but he

had a little facial hair and was not as clean cut". Det. Rutledge testified that he then asked the eyewitness three questions from the pre-printed Photo Array Form.

In response to being asked, "Do you recognize anyone?", the witness responded "yes". In response to being asked, "[i]f you do, what is the number of the person you recognize?", the witness stated number one. Finally, in response to being asked, "From where do you recognize that person?", the witness stated, in substance, "when I saw the vehicle make a U-turn, I got a good look at him."

According to Det. Rutledge, after the witness made this oral identification, the witness signed his name on the photographic array under a sentence which reads: "I have identified Photo #1 as the suspect on 4-17-2016" and also signed the Photo Array Form from which the warnings had been read. The original photographic array was preserved and made available to this Court for purposes of this hearing. Defendant Djukic is depicted in the photograph in the first position.

Det. Rutledge testified that he then commenced the second photographic identification proceeding by again reading the instructions and advisements to the witness from another copy of the pre-printed the Photo Array Form. According to Det. Rutledge, the witness interrupted and, upon confirming that the detective intended to read the same instructions he had just read in relation to first photographic array, the witness indicated he understood and that he did not wish to have the warnings repeated. Det. Rutledge accommodated the witness, but had him initial a Photo Array Form to memorialize his understanding of the warnings. Det. Rutledge then showed the witness the second photographic array.

According to Det. Rutledge, the witness scanned this array and immediately

pointed to #5 and stated, in substance, "Shit, that's him. I know that kid from the hill . . . what a shame." The witness responded affirmatively when directly asked by Det. Rutledge asked him if he recognized anyone by indicating that he recognized the person depicted in the photograph in position #5 of the array. At that time Det. Rutledge did not ask the witness to provide additional information regarding from where he recognized that individual. However, after the proceeding, as the Detective and witness were exiting the "detective work room", the witness volunteered, in substance, that the individual depicted in photograph #5 was the person he had seen remove a mask and enter the rear passenger door of a vehicle earlier that day in the vicinity of 90 South Kenisco Avenue.

The witness memorialized the above described identification by circling defendant George's photograph on the array and by signing his name on the Photo Array Form. The original photographic array was preserved and made available to this Court for purposes of the hearing. The array consists of photographs of defendant George and five other similarly aged black males. Under each photograph, there is a numeric sequence. Defendant George is depicted in position 5.

Of further relevance to the within hearing, Det. Rutledge testified that, throughout the time the witness was at the White Plains Police Department on April 17, 2016, he was in his company except for a bathroom break. Moreover, Det. Rutledge denied the witness had substantive conversations with any member of the White Plains Police Department other than him prior to making his statement or participating in the identification procedures. Further, Det. Rutledge testified that, to his knowledge, the witness had not been shown photographs of the deceased. Finally, Det. Rutledge

denied having knowledge that an associate of the deceased was allegedly pictured in one of the photographic arrays.

CONCLUSIONS OF LAW

It is well settled that a suggestive or otherwise improper identification procedure violates due process and is not admissible to determine the guilt or innocence of a defendant (*U.S. v. Wade*, 388 US 218). At a *Wade* hearing, the People are required to establish the reasonableness of the police conduct and the lack of any undue suggestiveness in regard to the pre-trial identification procedures employed (see, *People v. Chipp*, 75 NY2d 327 [1990]). The burden then shifts to the defendant who must establish, by a preponderance of the evidence, that the identification procedure employed with regard to him was impermissibly suggestive and conducive to an irreparably mistaken identification (*Id.*). With regard to the instant hearing, the People met their burden. Defendants did not.

Under the totality of the circumstances, the photographic arrays at issue were not so "impermissibly suggestive as to give rise to a substantial likelihood of ... misidentification" (see, *Neil v. Biggers*, 409 US 188 [1972]; and see, *People v. Ragunauth*, 24 AD3d 472 [2005], *lv. denied* 6 NY3d 779 [2006]). The law does not require that a defendant be surrounded by people nearly identical in appearance to him (see, *Chipp*, 75 NY2d at 336).

Each of the photographic arrays at issue consisted of a defendant and five fillers. Like arrays have been found to be permissible (see, *People v. Campbell*, 149 AD2d

719 [2d Dept. 1989]; *People v. Rolston*, 109 AD2d 854 [2d Dept. 1985]). As to defendant Djukic, he and each of the fillers depicted is an adult, Caucasian male. The defendant and each of the fillers has dark, short hair. Further, as to defendant George, he and each of the fillers depicted is a Black adult male. All of the fillers have short hair and each is of similar complexion. Upon consideration, this court finds the fillers bear a sufficient likeness to each defendant in age and general appearance such that there existed little likelihood of either defendant being singled out based upon particular characteristics (see, *People v. Avent*, 29 AD3d 601 [2d Dept. 2006]; *appeal denied* 9 NY3d 1004 [2007]; see also, *People v. Flores*, 102 AD3d 707 [2d Dept. 2013]). Moreover, and significantly, the record is devoid of any evidence that the police implied either defendants' identity to the witness, verbally or otherwise, or made attempts to prompt a particular identification. Further, the testimony adduced demonstrates that the witness was cautioned that the suspects may or may not be included in the array and that any markings, including numbers, on the array should be ignored. The evidence adduced conclusively proves that, upon scanning each array, the witness made an identification immediately or nearly so and that he did so not only by indicating the number of the photograph selected but by making an affirmative statement.

Having found that the People have met their burden of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness in the pre-trial identification procedure and having further found that neither defendant has offered proof, by a preponderance of the evidence, that either of the identification procedures at issue was unduly suggestive and conducive to an irreparably mistaken identification, this Court need not determine whether an independent basis exists for

the witness' in-court identification of defendants (*see, Chipp*, 75 NY2d at 335).

Accordingly, and based upon the foregoing, each of the defendants' motions to suppress the prospective identification testimony of the witness is denied.

The foregoing constitutes the opinion, decision and order of the court,

Dated: White Plains, New York
November 29, 2016



HON. BARRY E. WARHIT
Westchester County Court Judge

JAMES A. McCARTY
Acting District Attorney, Westchester County
111 Dr. Martin Luther King, Jr. Boulevard
White Plains, New York 10601
Attention: ADA Nadine Nagler

ANDREW PROTO, ESQ.
Attorney for Defendant Djukic
One North Broadway, Suite 401
White Plains, New York 10601

TROY SMITH, ESQ.
Attorney for Defendant George
34 South Broadway, Suite 218
White Plains, New York 10601

CLERK OF THE COURT