

People v Hairston

2016 NY Slip Op 32715(U)

June 2, 2016

County Court, Westchester County

Docket Number: 15-0908

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</p> <p>ON _____, 2016</p> <p>WESTCHESTER COUNTY CLERK</p>
--

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

- against -

ERYC HAIRSTON,

Defendant.

Indictment No: 15-0908

FILED
DECISION AFTER HEARING
JUN 02 2016
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

ZAMBELLI, J.

The defendant has been indicted for the crimes of Murder in the First Degree, Murder in the Second Degree (two counts), Attempted Robbery in the First Degree (two counts) and Criminal Possession of a Weapon in the Second Degree allegedly committed on or about July 8, 2015, in the County of Westchester.

By decision and order dated November 16, 2015, the Honorable Robert Neary granted defendant's motion to suppress solely to the extent of ordering Huntley, Wade and Sandoval/Ventimiglia hearings.

The hearing was held on May 25, 2016 wherein the following members of the Yonkers Police Department gave testimony: Detective Michael Kostewich, Detective Neal Cromwell, Detective Sergeant Louis Venturino, Detective Russell Kilgore, Police Officer Dawn Lebzelter, and Detective Scott Griffith.

FINDINGS OF FACT

The credible evidence adduced at the hearing on this case established that on July 8, 2015 at approximately 2:00 am Michael Vega was walking home with his friend Kenedy Gonzalez. According to Vega's statement to the police, they bought food at a food truck on South Broadway, Yonkers which they ate at a park in Park Hill. They walked down Waverly street when a black male came from behind them to ask them if they had any cigarettes or weed. The black male was wearing a white t shirt, red basketball shorts. He was short, approximately 5'2", 25-30 years old. They said no. The black male walked in front of them, turned and pointed a silver hand gun at Kenedy and told them to empty their pockets. As Vega started to hand the male black his watch, Kenedy swiped at the gun. The black male shot Kenedy twice. Vega ran to find the police. Police Officer Lebzelter was a short distance away at Park Hill Avenue and Linden Street setting up the crime scene of a stabbing. She testified that Vega ran up to her and her partner, Police Officer Madison and told her his friend had been shot. Police Officer Lebzelter, Police Officer Madison, and Sergeant Walker ran to 176 Waverly Street, approximately one and one-half blocks from the scene of the stabbing incident. They arrived at 176 Waverly in less than a minute. Upon arrival she saw a Spanish male who told her he had just been shot. He was shot at 120 Waverly Street, approximately two blocks away. According to Detective Griffith, the location of 176 Waverly is approximately 200' from 120 Waverly. There was blood on his shirt, on his upper chest. He was standing. He had just run down the block. He was conscious but he was definitely in shock. He appeared scared. It took him a couple of times to answer questions but he was able to answer questions until the

ambulance arrived. He sat on the stoop. They were giving him medical treatment. He gave his name, date of birth, where he lived. While waiting for the ambulance, Police Officer Lebzelter asked him what the suspect looked like. He told her he was a black male, white t-shirt, red shorts and had a silver handgun. The shooter was about his own height. The description of the shooter was sent over the air. Kenedy told her he had been on Valentine Lane at a friend's house. He walked down South Broadway where they bought food from a food truck. He went into Columbus Park, ate his food and then walked down Waverly to go home. At that point a male walked up to him, asked him for a cigarette he said no and then at some point the male shot him. As he spoke, the Emergency Service Unit was rendering aid to him.

At approximately 4:00 a.m., Detective Kostewich was in the detective division with Vega. Vega told the officers at the scene that he did not know the shooter but got a good look at the guy. Vega gave an oral and written statement to Detective Kostewich. Vega was shown the Yonkers Top Shooter and Top Robbers which are approximately 10 photos in each. He did not see defendant in any of those photos. On July 13, 2015, at approximately 2:00 p.m., Vega came into the detective division to view yearbooks from Gorton High School for the period 2009-2015. The detective had viewed photos and video surveillance of the area of Waverly Street which depicted the suspect walking with two other males. Vega remembered two other males across the street. He thought that he recognized one of the males as someone he had played sports against in high school.

These two males were later identified as Shaquan Tucker and Jameek Mills. Vega looked at the yearbooks but did not see Tucker, Mills or the suspect in any of the

books.

After July 13, more surveillance videos were provided which showed the suspect meeting with three other men on the corner of School Street and Herriot. One of the males in the video was tracked on the video to an apartment at 205 South Broadway. This male was identified as Anthony Austion. Austion had an outstanding warrant on an unrelated matter. He was picked up on the warrant on July 16, 2015. He talked about the night of July 8, 2015. He was shown still photos of the video of the males with him on the video. He told them one of them was his friend Shaquan Tucker, one was Meeks and with regard to the guy with the white shirt and red shorts he knew the guy but he just didn't know his name. Austion said the guy was a short dude, 28 years old, short hair, facial hair. Detective Kostewich put into the RICI system: 28 years old, plus or minus five years; five foot two, plus or minus three inches, 140 pounds, plus or minus 25 pounds, black male, black hair. Two hundred twenty four photos were generated (Exhibit 25). Vega viewed the photos on the computer. Before doing so however, the Detective told him that he was going to show him several photos. The person involved in the incident may or may not be in the photos. Features could be easily changed such as hair, facial hair, goatee, mustache, beard, and that the lighting of the photo could affect the complexion of the individual. Austion said he understood the instructions. On page 3, picture 10, Austion said that was the man with the white shirt and red shorts who was on the video. Austion was told to go through the rest of the photos to make sure he didn't see anybody else. He looked through the rest of the photos and did not identify anyone else. The photos were printed out. The same instructions were given to him. Austion identified the same

individual which was on page 3, photo numbered 34 as the guy who was on the video with him who was the guy who had walked with him on School Street. Austion circled the picture and signed it.

On July 17, at approximately 11:30 a.m., the Detective picked up Vega at his house to bring him into the detective division to look at photos. Prior to showing Vega the photo array in evidence as Exhibit 23, the Detective read the instructions on the second page of the Exhibit. The defendant's photo appearing in the array was generated by Detective Griffith and Detective Kostewich. After being read the instructions, Vega was shown the array. He identified defendant's photo as the man who shot Kenedy Gonzalez. Vega circled the picture and initialed it. Later that same day, Detective Griffith and Detective Kostewich went to Jacobi Hospital to meet with Shaquan Tucker. Tucker had been the victim of a stabbing. Griffith was the detective assigned to the stabbing case. Detective Kostewich asked him to speak to him about a separate incident. Tucker at first didn't respond. He was then shown the stills photos at which point Tucker remembered the evening. Tucker was in the still photos shown to him. He was asked if he could identify the male with the white shirt and red shorts in the photo and said that he could identify him. He knew him from the neighborhood but didn't know his name. He knew him as "Main's" brother who was locked up upstate. The detective later learned that Main was Jermaine Hairston. Kostewich then instructed Tucker that he would be showing him a six pack photo array. The person in question may or may not be in the photos. Certain features such as hair, facial hair, beard, and mustache could easily be changed, that the complexion of the male in the photo could be altered due to light. He said he understood.

Exhibit 27 was then shown to him. He identified defendant's photo as the male with the white shirt and red shorts. Tucker circled the picture and initialed it.

On July 27, 2015, Detective Madaus received an anonymous phone call reporting that Eryc Hairston was in Manhattan on 552 W. 146th Street. At approximately 10:00 p.m., Detective Kilgore as well as other detectives went to the location. Defendant was observed outside the building. Defendant was handcuffed, placed under arrest, and placed in Detective Kilgore's vehicle along with Detective Mullin and Police Officer Dougherty. While the detectives and officer were speaking to each other about matters unrelated to the incident defendant would chime in. At one point defendant asked for a cigarette and then said "No, I watched the first 48."¹

On July 28, 2015, at approximately 3:00 p.m. detectives gathered five fillers for a line up. The descriptors of each filler were memorialized in Exhibit 50. Detective Cromwell picked up Vega for the purpose of transporting him to the detective division to view the lineup. Vega was told he would view a line up. Nothing else was said to him about the lineup. Nothing was said to him about any arrests being made. Sergeant Venturino met with Vega. He instructed Vega concerning the lineup which instructions were audio and video recorded and played during the hearing Exhibit 63. Vega signed that he understood the instructions. Vega was told that they were going to raise the shade and there would be six people there, that the suspect may or may not be there and the Sgt repeated the rules previously explained to him. When the shade was raised Vega

¹ The People stipulated that the detective's actual hearing testimony would not be elicited during the trial and that the foregoing statement made by defendant would be the extent to which the detective would be permitted to testify.

immediately identified defendant in seat three. Pictures of the lineup, lineup instructions and the descriptors of the individuals in the lineup were admitted in evidence as Exhibit 48,50, 64 and 65.

On May 3, 2016, in the process of preparing for trial, Detective Griffith, the trial attorneys for the People and Michael Vega reviewed the videos. Vega explained to them what was depicted in the video. The portion which was played for Vega in prepping for trial was played in court, Exhibit 60. Detective Griffith never identified anyone for Vega and never confirmed whatever Vega described on the video.

CONCLUSIONS OF LAW

Defense counsel herein relies on and adopts the arguments made by previous counsel in the defense's omnibus motion.

At the outset, the court concludes that a witness' identification of individuals on a surveillance video in which the witness appeared, did not constitute an identification procedure. (See, People v. Gee, 286 A.D.2d 62 at 66) The police showed Austion the stills from the surveillance video at a time where the perpetrator was of unknown identity. The photos were not shown to confirm the identity of a known subject. (People v. Gee, Id).

On July 16, 2015, Anthony Austion identified himself and the other males on the video from the day of the incident. He knew defendant but did not know him by name. After providing the detective with the description of the defendant, the detective put the description range in the RIC1 system which generated 224 photos. The witness scrolled through the system and identified the defendant as the other male in the video whose name he did not know who was with them that night. The photos were printed out and

Austion pointed to defendant's photo, circled and signed it. There was nothing unduly suggestive in the procedure and no evidence of improper conduct by the police.

It is settled that there is no requirement that all participants in a photo array be identical in appearance; rather, all that is required is that all participants resemble each other sufficiently so as not to create a substantial likelihood that the defendant will be singled out for identification (see, People v. Velez, 222 A.D.2d 625, lv denied 88 N.Y.2d 887; Matter of Raymond, 178 A.D.2d 288).

Having obtained the name of the suspect from Austion, the detectives brought Vega into the detective division to view a photo array on July 17, 2015. Vega was read the instructions from Exhibit 23. He identified the defendant's photo as the person who shot Kenedy. He circled and signed it.

Later that day, the detectives brought stills from the video Tucker was in to Tucker who was in Jacobi Hospital. Tucker knew all the people in the video including the male in the white tshirt and red shirts but didn't know his name. He knew the male from the neighborhood. The detective showed a photo array, Exhibit 27, to him with appropriate instructions before showing the array. Tucker picked defendant's picture as the person with the white t shirt and red shorts in the video.

In conclusion, the photo arrays shown to Vega and Tucker did not single out the defendant. Moreover, the police did not engage in any improper conduct or suggest in any manner that either witness select the photo of the defendant (see e.g., People v. Edwards, 199 A.D.2d 574, 575, lv denied 83 NY2d 804).

Statement enroute to the Detective Division

A spontaneous, volunteered statement is one made without any external prompting (see, People v. Lynes, 49 N.Y.2d 286) as opposed to one that is elicited directly or indirectly (see, People v. Lucas, 53 N.Y.2d 678, People v. Maerling, 46 N.Y.2d 289, 301-303, 413 N.Y.S.2d 316, 385 N.E.2d 1245; People v. Lanahan, 55 N.Y.2d 711, 447 N.Y.S.2d 139, 431 N.E.2d 624) or otherwise induced by police action (see, People v. Bodner, 75 A.D.2d 440). There is no evidence that detectives prompted or induced defendant to make the statement in the vehicle enroute to the detective division on July 27, 2015. In conclusion, his statement was spontaneous.

The Line Up of July 28, 2015

Defendant contends that the right to counsel had attached since defendant had been booked. There was an attorney from the Legal Aid Society in the building at the time defendant was booked.

The right to counsel for lineup purposes generally does not attach prior to the commencement of formal proceedings, though other significant judicial activity may implicate its protective cloak (see, People v. Coleman, 43 N.Y.2d 222, at 225); (People v. Chipp, 75 N.Y.2d 327). In the instant case it is undisputed that formal proceedings had not commenced. The police booking process does not implicate judicial activity. Therefore defendant's right to counsel had not attached.

Defense counsel in the omnibus motion contended the fillers in the line up were unduly suggestive because of the display of the defendant's tattoo. No issue has been

raised concerning a tattoo at the hearing. Defense counsel instead contends the age disparity created an unduly suggestive line up. The People agree there is an age disparity but when looking at the photos of the line up, they contend defendant does not stand out.

“...corporeal lineups, properly conducted, generally provide a reliable pretrial identification procedure and are properly admitted unless it is shown that some undue suggestiveness attached to the procedure. 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, it is the defendant who bears the ultimate burden of proving that the procedure was unduly suggestive (People v. Berrios, 28 N.Y.2d 361, 321 N.Y.S.2d 884, 270 N.E.2d 709).”

People v. Chipp, 75 N.Y.2d 327, 335, 552 N.E.2d 608, 612-13 (1990).

The line up information sheet, Exhibit 50, shows that two fillers are more than 20 years older than the defendant and one filler is 17 years older than the defendant. Each person is dressed identically in a black long sleeved sweatshirt, black pants, with a black baseball cap. They are all seated. They are all African American men with similar skin tone. No hair is shown. However, the dramatic age difference makes defendant stand out. He is very clearly much younger than almost every filler. Accordingly, the lineup is unduly suggestive and therefore inadmissible on the People's case in chief.

With regard to Vega's viewing of the video in preparation for trial, there is no evidence that there was any improper conduct by any member of law enforcement.

The foregoing constitutes the decision and order of the court.

Dated: White Plains, New York
June 2, 2016



BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

Hon. James A. McCarty
Acting District Attorney, Westchester County
111 Dr. Martin Luther King, Jr. Blvd.
White Plains, New York 10601
Attn: Jean Prisco, Esq.

Theodore J. Brundage, Esq.
500 Mamaroneck Avenue, Suite 320
Harrison, New York 10528

Nancy Barry
Chief Clerk