

People v Lane

2018 NY Slip Op 33559(U)

July 17, 2018

County Court, Westchester County

Docket Number: 17-0769

Judge: Barry E. Warhit

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

-against-

DECISION & ORDER
Indictment No.: 17-0769

SIDNEY LANE,
Defendant.

-----X
WARHIT, J. **FILED**
JUL 17 2018

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant, Sidney Lane is charged under the within indictment, *inter alia*, with burglary in the first degree, attempted robbery in the first degree and assault in the second degree. By Decision and Order, filed December 20, 2017, Hon. Helen M. Blackwood granted the defendant's Omnibus Motion to the extent of granting hearings to determine whether the identification procedures employed were unlawful or improperly suggestive, whether there was probable cause for the defendant's arrest and whether any property recovered from his person in connection with his arrest was lawfully seized.

This Court commenced the ordered hearings on July 9, 2018 and completed same on July 13, 2018. Sgt. Mario Vecchiariello, Sgt. Darryl Benjamin, Det. Dennine Smiddy and Det. Sean Manning were called as witnesses for the People and each was cross-examined by counsel for the defendant. Having had the unique opportunity to observe each witness, hear their testimony and examine all documentary evidence offered, this Court makes the following findings of fact.

FINDINGS OF FACT

On July 19, 2017 Det. Benjamin, an approximately eleven year veteran of the City of Yonkers Police Department, was assigned to investigate a home invasion alleged to have occurred at 186 Underhill Street in the City of Yonkers. Det. Benjamin, testified that he arrived at that location at approximately 1:09 p.m. and engaged in brief conversation with fellow officers who had responded before him before traveling to a nearby hospital where the alleged victims, Minna Laputina and Sky Williams, were being treated for injuries reportedly sustained during the home invasion.

Det. Benjamin testified that he met and spoke separately with Minna Laputina and Sky Williams, each of whom had visible injuries and each of whom described the gun-point home invasion at their residence and advised that the individual who had unlawfully entered their home had fled in a gray Honda CRV bearing New York State license plate number HFJ 4711. Det. Benjamin testified that, based upon this information, upon returning to the detective division, he conducted an inquiry of license plate number HFG 4711. The system revealed that the owner of this vehicle is Gary Jennings, a septuagenarian. Thereupon, Det. Benjamin input the name Gary Jennings into the RIC1, a booking system utilized by the Yonkers Police Department. RIC1 revealed the car owner had a son, Gary Jennings, Jr. Det. Benjamin then checked stationery license plate readers (LPRs) within the confines of the City of Yonkers. Having learned that the gray CRV in question had traveled that day on Yonkers Avenue, Det. Benjamin broadcasted an alert directing fellow officers to be on the lookout for the gray CRV.

At about 5:00 p.m., the gray CRV car was stopped in the vicinity of 300 Yonkers

Avenue. Gary Jennings, Jr. was operating the car. Subsequent to the car stop Gary Jennings, Jr. admitted that he had driven the defendant, who is his co-worker and known to him as Sidney Lane and "Prov", to 186 Underhill Street during lunch earlier that day. Gary Jennings, Jr. identified the defendant Sidney Lane from a single photograph. Gary Jennings, Jr. was arrested and charged as a co-defendant under the within indictment number.

At about 7:00 p.m. on July 19, 2017 Det. Benjamin requested that officers transport Ms. Laputina and Mr. Williams to the Detective Division of the Yonkers Police Department. Significantly, Det. Benjamin did not advise these officers that a suspect had been developed in the home invasion nor did he provide the name, a description or photograph of the suspect to the transporting officers. In fact, Det. Benjamin had no direct contact with the transporting officers or their supervisor.

Det. Benjamin did prepare two photographic arrays which included the suspect Sidney Lane. To do so,, he used the RIC1 system. According to Det. Benjamin, he input the name Sidney Lane into RIC1 and retrieved a photograph of an individual of this name. Det. Benjamin then used the auto-populate feature of RIC1 to create a photographic array. This feature selects photographs of fillers who match the physical characteristics already input in the system for Sidney Lane. The identifying features include things such as age, skin tone, hair color and hair length. Det. Benjamin selected five of the photographs to populate the arrays. He then printed one photographic array in which Defendant Lane appeared in position 2 and a second photographic array in which Defendant Lane appeared in position 5. Detective Benjamin then printed two hard copies of each photographic array, one which included the names of the those

pictured and one which did not. Det. Benjamin filled out certain documents prior to the administration of the photographic arrays. These documents and all four photographic arrays were received in evidence for purposes of this hearing.

Det. Benjamin did not transport Ms. Laputina or her son Sky Williams to the police department nor did he have any contact with them. Sgt. Mario Vecchiarriello, a nineteen year veteran of the Yonkers Police Department, who as of July 19, 2017 was serving as a patrol officer, conducted the transport with his partner. Sgt. Vecchiarriello testified that at approximately 9:00 p.m. on July 19, 2017 he and his partner responded to a request to transport two civilians from 186 Underhill Avenue to the Detective Division. Sgt. Vecchiarriello acknowledged he was aware there had been a report of a home invasion at 186 Underhill Street earlier that day but denied having been advised as to the reason for the transport. The sergeant did not know the names of the individuals he transported. He described them as a male in his twenties and an older female. According to Sgt. Vecchiarriello neither he nor his partner engaged in conversation with either witness at the residence or during the approximately twenty minute drive to the police department. The patrol car used for the transport was equipped with a cage which separated the front and rear passenger seats. Further, Sgt. Vecchiarriello testified that upon arriving at the Detective Division, either he or his partner merely advised the two civilians to wait for the detectives. According to Sgt. Vecchiarriello, his only other interaction with the civilians occurred a little after 10:00 p.m. when he transported them home. Det. Benjamin and Sgt. Vecchiarriello did not have contact with one another nor did they discuss the case on July 19, 2017.

As above indicated, Det. Benjamin had no interaction with the civilian witnesses.

These witnesses met separately with Det. Sean Manning, a 9 year veteran of the Yonkers Police Department. Det. Manning testified he was assigned to conduct photographic arrays to assist Detective Benjamin and Detective Smiddy. Det. Manning testified he was not otherwise involved in the investigation, had not been to the scene, spoken to the witnesses or participated in any of the events which lead to a suspect having been developed. Additionally, Det. Manning was unaware of the suspect's name or appearance.

Det. Manning escorted Minna Laputina to an office outside the sight and hearing of her son Sky Williams. Prior to administering the photographic array prepared by Det. Benjamin, Det. Manning read instructions from a "Photo Array Form" which was received into evidence at the hearing. These instructions included, *inter alia*, a caution that the perpetrator may or not be included in the array, that individuals pictured in the array may not appear exactly as they did on the date of the incident as hairstyles and facial hair can change and a person's complexion may appear lighter or darker in a photograph than it really is. Upon Ms. Laputina having acknowledged she understood these and all of the instructions that had been read to her, Det. Manning presented a photographic array consisting of six (6) photographs to Ms. Laputina for her consideration. This photographic arrays did not include the names of any of the individuals pictured.

Det. Manning testified that at the time he presented this array he had no knowledge as to which, if any, of the individuals pictured was the possible suspect. He further testified that upon being shown the photographic array, Minna Laputina identified the defendant, whose photograph was in position five (5) of the array, as the

man who entered her home with a gun. At Det. Manning's request, Ms. Laputina circled the photograph of the individual she had identified, wrote her initials and wrote "the man who entered my house with a gun".

Det. Manning testified that after showing the photographic array to Ms. Laputina he escorted her back to the waiting area and brought her son, Sky Williams, to the office. Det. Manning testified that Ms. Laputina and her son did not engage in any conversation concerning the photographic array. As he had with Ms. Laputina, Det. Manning advised Mr. Williams he would be showing him a photographic array and provided information to him concerning the procedure from a "Photo Array Form". As above discussed, through the use of this form, Det. Manning specifically advised Mr. Williams that the individual who had entered his residence may or may not be among those pictured, that hairstyles, beards and moustaches can change and that a person's complexion may appear lighter or darker in a photograph than it really is. Upon Mr. Williams' having acknowledged that he understood these instructions, Det. Manning requested that Mr. Williams look at the array, which did not include names of the individuals pictured, and advise him as to whether he recognized anyone and, if so, from where. Det. Manning testified that when he presented this array to Mr. Williams, he himself was not personally aware which, if any, of the individuals pictured was the possible suspect. Det. Manning further testified that, upon being shown the photographic array, Sky Williams identified the defendant, whose photograph was in position two (2) of the array, as the individual who entered his house earlier in the day with a firearm. At Det. Manning's request, Mr. Sky circled the photograph of the individual he had identified, wrote his initials and also wrote that the man selected was

the one who entered his home with a firearm.

Subsequent to administering the photographic arrays to Ms. Laputina and Mr. Williams, Det. Manning returned the arrays and the completed forms to Det. Benjamin. The photographic arrays shown to Ms. Laputina and Mr. Sky were preserved and admitted into evidence for purposes of this hearing. Each of the individuals depicted in the array is a black male of a similar age and each is similarly dressed. Further, all six of the males depicted have short hair and five of them have some degree of facial hair.

Det. Smiddy, a sixteen year veteran of the Yonkers Police Department and a nineteen year veteran of police work, testified that she participated in arresting Defendant Sidney Lane on July 20, 2018. Significant to this hearing, Det. Smiddy offered no testimony concerning the recovery of any property from the defendant's person pursuant to his arrest. She did testify that, in connection with the arrest procedure, a bandage was removed from the defendant's cheek and this area was photographed. According to Det. Smiddy, additional photographs of the defendant's face, head and body were taken.

Before this hearing commenced it was determined that the People would not offer statements allegedly made by the defendant to the police during their case-in-chief. The Court (Blackwood, J.) ruled that in the event the People intended to use same for purposes of impeachment, Defendant would be entitled to a hearing to assess the voluntary nature of such statements. During the course of the within hearing counsel for the defendant informed this Court that such a hearing is not necessary as the defense does not contend the statements are the product of classic coercion.

CONCLUSIONS OF LAW

The police had probable cause to arrest the defendant. Prior to effectuating his arrest, two separate victims reported an alleged gun-point home invasion at their residence located at 186 Underhill Street in Yonkers on July 11, 2017. The alleged victims identified the car in which the defendant fled their home. Gary Jennings, Jr., whose father owns the vehicle in question, acknowledged having driven the defendant to 186 Underhill Street on the date and time of the alleged gun-point home invasion. Moreover, prior to the defendant having been arrested, each of the alleged victims of the gun-point home invasion identified the defendant as the person who had entered their home with a gun on July 11, 2017.

The defendant contends the identification procedure employed by the police requires suppression at trial and, further, submits the witnesses should not be permitted to make an in-court identification. 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). The People bear the burden of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness in the pre-trial identification procedure (see, *People v. Chipp*, 75 NY2d 327 [1990]). Upon the People meeting this initial burden, the defendant bears the ultimate burden of proving the procedure was unduly suggestive (see, *Id.*).

Recent amendments to New York State statutes now permit the People to introduced evidence of a photographic identification at trial where the procedure employed in administering the photographic array is "blind" or "blinded" (CPL §§ 60.25[c] and 60.30). The law defines a "blind or blinded procedure" as "one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproductions under circumstances where, at the time the identification is made, the public servant administering such procedure: (i) does not know which person in the array is the suspect, or (ii) does not know where the suspect is in the array viewed by the witness" (CPL § 60.25[c]). The photographic arrays at issue were prepared by Det. Benjamin. Det. Manning administered each of the arrays. The testimony adduced amply demonstrated that Det. Manning had not been assigned to investigate the alleged gun-point home invasion at 186 Underhill Street, that he had not communicated with the alleged victims or with the officers assigned to the investigation. Importantly, Det. Manning had no knowledge as to which individual pictured in the arrays was the potential subject nor did Det. Manning have knowledge of the potential subject's position in the respective arrays shown to Ms. Laputina and Mr. Sky. Consequently, the method the police employed in this instance meets the definition of "blind" or "blinded" (see, CPL § 60.25[c]).

It is further significant that the manner in which Det. Manning presented the photographic arrays was not suggestive. The evidence adduced demonstrates that Detective Manning specifically advised each witness that the perpetrator may or may not be depicted in the array, that the witnesses viewed the arrays separately and that the defendant's photograph filled a different position in each array. Further, Ms.

Laputina and Mr. Williams did not communicate with one another concerning the defendant's identity or their viewing of the photographic arrays.

The procedures employed in connection with the array were not unduly suggestive, unlawful or conducive to an irreparably mistaken identification. This Court now considers whether either of the photographic arrays at issue was on its face 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. Ragnauth*, 24 AD3d 472 [2005], *lv. denied* 6 NY3d 779 [2006]). In connection with a photographic array, a defendant is not entitled to be surrounded by photographs of people nearly identical in appearance to him (see, *Chipp*, 75 NY2d at 336). Each of the photographic arrays at issue consisted of six photographs depicting males of similar age, race and build; each had a short haircut and five had some degree of facial hair. None of the individuals portrayed in the array is marked by a scar or tattoo and all are dressed similarly (see, *People v. Mason*, 152 AD2d 750 [2d Dept. 1989]; *People v. Campbell*, 149 AD2d 719 [2d Dept. 1989], appeal denied by 74 NY2d 737); *People v. Reid*, 137 AD2d 844 [2d Dept. 1988]). Each of the fillers in the arrays bears a sufficient likeness to the defendant such that there existed little likelihood that the defendant would be singled out based upon a 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, any minor difference in skin tone amongst the fillers or between the fillers and the defendant, when considered in conjunction with the similarity of their age and facial features is insufficient to create a

substantial likelihood that defendant would be singled out for identification. (see, *People v. Henderson*, 170 AD2d 532 [2d Dept. 1991]).


Based upon the foregoing, this Court finds the People have met their burden of establishing the use of "blind" or "blinded" procedures in connection with the administration of the photographic array, the reasonableness of the police conduct and the lack of any undue suggestiveness in the pre-trial identification procedures. Conversely, the defendant has not met his burden of demonstrating proof, by a preponderance of the evidence, that the procedures employed with respect to either of the photographic arrays at issue was unduly suggestive and conducive to an irreparably mistaken identification. Accordingly, this Court need not reach a determination as to whether an independent basis exists for either of the witnesses' in-court identifications of the defendant (see, *Chipp*, 75 NY2d at 335) and the photographic arrays are admissible at trial as are in-court identification procedures by each witness.

A *Mapp* hearing was ordered with respect to property recovered from the defendant's person¹. Nevertheless, the evidence demonstrates that no such property was recovered. Consequently, this Court need not make findings as to the admissibility

¹To the extent the People indicated, in an excess of caution, they included testimony regarding the defendant's arrest photograph, the People are permitted to introduce this photograph at trial. Photographs taken of a defendant at the time of the arrest are not "testimonial evidence" and, as such, are not excludable and do not violate the 5th Amendment (see, *People v. Peters*, 135 AD2d 841 [2d Dept. 1987]). Arrest photographs may be admitted to corroborate other testimony or evidence (see generally, *People v. Gordon*, 131 AD2d 588 [2d Dept. 1987]). Moreover, in this instance, the defendant had a visible bite mark in his arrest photograph which mark has either fully healed or significantly faded as of the present time (see, *People v. Laguer*, 58 AD2d 610 [2d Dept. 1977]).

of property recovered from the defendant's person. The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
July 17, 2018



HON. BARRY E. WARHIT
Westchester County Court Judge

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