

People v Smith

2018 NY Slip Op 33774(U)

September 10, 2018

County Court, Westchester County

Docket Number: 18-0216

Judge: Anne E. Minihan

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**FILED
AND
ENTERED**
ON Sept. 10 2018
**WESTCHESTER
COUNTY CLERK**

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

FILED 

- against -

SEP 10 2018

DECISION AND ORDER
Indictment No. 18-0216

CHRISTOPHER SMITH,

THOMAS G. UDONI
COUNTY CLERK
COUNTY OF WESTCHESTER
Defendant.

-----X
Minihan, J.,

The defendant, Christopher Smith, has been indicted on one count of robbery in the first degree (PL § 160.15[3]), one count of robbery in the second degree (PL § 160.10[1]) and two counts of assault in the second degree (PL §§ 120.05[2] and 120.05[6]) in connection with an incident that allegedly occurred on November 12, 2017 at 24 West Grand Street in the City of Mount Vernon wherein the defendant, together with Shaquan Houston, Jalin Williams and a fourth unapprehended man, approached the complaining witness and, with the intent to cause him physical injury, slashed at his body with a knife-like instrument, struck him about the body and forcibly stole his jacket, a sum of United States currency, car keys and other personal items. In the course of this incident, the People allege that the complaining witness suffered lacerations and substantial pain.

The People filed timely notice of their intent to introduce testimony regarding an observation of the defendant at the time and place of these events by the complaining witness who previously identified the defendant from a photographic array on December 19, 2017 at approximately 12:33 p.m. at the Office of the District Attorney. The People also provided notice regarding this witness's identifications from video recordings shown during the presentment of this case to the grand jury. By omnibus motion, the defendant sought suppression of the noticed identifications.

By decision and order dated July 3, 2018, this court (Fufidio, J.) granted so much of that branch of the defendant's motion for omnibus relief as seeks suppression of the noticed identifications to the extent of ordering a pre-trial *Wade* hearing. The court also directed that a pre-trial *Sandoval/Ventimiglia* hearing be held. On September 6, 2018, immediately prior to commencement of pre-trial hearings, the People withdrew the CPL 710.30 notice as to the identifications made from the video recordings at the grand jury on the ground that the parties agreed that these were not identifications necessitating CPL 710.30 notice.

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On September 6, 2018, this Court conducted the *Wade* hearing, limited to the noticed identification related to the photographic array. The People's sole witness was Roger Bock, Investigator with the Westchester County District Attorney's Office. The defense called no witnesses and presented no evidence. This Court gives full credence to the testimony of the People's witness, whose testimony I found to be candid, plausible and fully credible. The People's exhibits in evidence consisted of the photographic array (one with numbers under the photographs and the other with the names of the individuals depicted) and the accompanying identification procedure instructions, identification statement and envelope.

I make the following findings of fact and conclusions of law:

FINDINGS of FACT

On December 19, 2017 at about noon, Investigator Roger Bock, an 18-year veteran of the Westchester County District Attorney's Office and a former officer and detective for the Mount Vernon Police Department, was asked by a fellow investigator to conduct three photographic array procedures. Investigator Bock was told that they related to a robbery that had occurred a few weeks prior in the parking lot of a CVS in Mount Vernon and that he was to show three different "blind" photographic arrays to the complaining witness, "DM." Investigator Bock explained that in a "blind" procedure the photographic array is shown to a witness by someone who does not know who the suspect is and that, in this case, he was not aware of who the suspects were.

Describing the events as they occurred, Investigator Bock testified that he received the three arrays in three sealed envelopes from Investigator Mohammad and marked the envelopes "first," "second," and "third", for the order in which he intended to show them. To conduct the procedure in private, he took DM to a room on the 3rd floor of the District Attorney's Office. With only himself and DM in the room, he conducted the procedures. When he got to the third array, the one relevant to the instant matter, he read the instructions verbatim from the sheet as he had with the two previous procedures. Investigator Bock told DM, "As part of the ongoing investigation that occurred on November 12, 2017 at the parking lot of CVS in Fleetwood, you will view a photo array. It consists of six photographs of individuals. Each photograph has a number underneath the photograph. Take whatever time you want to view the photo array. The perpetrator may or may not be among the pictures. Do not assume that I know who the perpetrator is. I want you to focus on the photo array and not to ask me or anyone else in the room for guidance about making an identification during the procedure. Individuals pictured 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. Photographs may not always depict the true complexion of a person; it may be lighter or darker than shown in the photo. Pay no attention to any markings that may appear on the photos, or any other difference in the type or style of the

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photographs. Do not discuss with any other witness what you see, say, or do during this procedure. After you have had an opportunity to view the photo array, I will ask you the following four questions: Do you recognize anyone? If you do, what is the number of the person you recognize? From where do you recognize the person? Describe in your own words your level of confidence about the identification. I may ask you follow up questions. This investigation will continue regardless of whether you make an identification. Will you consent to having us record this procedure on audio and video?"

DM declined consent to record the identification procedure. After he had read the instructions, DM signed the instruction form acknowledging that the instructions had been read to him prior to being shown an array. DM was then given the sealed envelope containing only the array while the investigator retreated to a position about 10 feet away, where he could observe, report and memorialize his observations of DM. DM recognized the defendant's photograph immediately. Investigator Bock instructed DM to circle the number of the photograph and to initial it. DM complied and marked the array accordingly.

Investigator Bock asked DM if he recognized anyone in the photo array, to which DM responded, "Lil' Chris, number 2." DM stated that the number of the person he identified was number 2 and that he recognized him "from that night. He was the one that cut me in the CVS parking lot." When asked to describe, in his own words, his level of confidence about the identification, DM responded that he was "Absolutely confident." On the form where his responses had been recorded by Investigator Bock, DM placed the date ("12/19/17"), the time ("1233") and his signature. The investigator concluded the procedure by placing all documents, including the arrays (the one that was shown to DM with numbers under the pictures as well as the version with the names beneath the photos, which had not been given to Investigator Bock until after the procedure was complete and had not been shown to DM), the instruction sheet and the photo array form into an evidence bag which was then sealed and placed into evidence. He told Investigator Mohammed what had happened during the procedures and completed a report describing the same events.

The array that DM viewed contained the defendant's photograph in the second position along with the photographs of five other young African-American men. The six photographs depict men of similar age, complexion, facial features and hair style. The brown background of defendant's photograph is virtually identical to that of two other photographs and the backgrounds in the remaining three photographs are each lighter or darker than those three photographs. Investigator Bock testified that he did not know who had prepared the array or where those photographs had come from and that he first saw the photographs after DM opened the sealed envelope.

CONCLUSIONS of LAW

The determination whether a pre-trial identification procedure was unduly suggestive is subject to a long-established “burden-shifting mechanism” whereby the People initially bear the burden to prove the fairness of the procedure itself, that is the reasonableness of the police conduct and the lack of undue suggestiveness (*People v Holley*, 26 NY3d 514 [2014]). If the People make that required showing, the burden shifts to the defendant to sustain the ultimate burden to prove that the identification procedure was unduly suggestive (*People v Chipp*, 75 NY2d 327, 335 [1990]; *see also People v Jones*, 2 NY3d 235, 244 [2004]; *People v Coleman*, 73 AD3d 1200, 1203 [2d Dept 2010]).

Here, the People satisfactorily demonstrated the lack of suggestiveness in the identification procedure itself and the specific manner in which the photo array was shown to DM, the complaining witness. Before DM was shown the subject array, Investigator Bock gave DM thorough, detailed instructions. As this was the third array, DM had already twice heard precisely the same instructions read to him in the minutes before viewing the subject array. As per the instructions, DM knew that the array would have six photographs, each with a number underneath it, that he could take whatever time he needed to view the array, that the perpetrator’s image might or might not be among the photos, that he was not to assume that the investigator knew who the perpetrator was, that he was to focus on the photo array and not seek guidance of any sort during the procedure, that features such as head and facial hair are subject to change and that the images might not depict the actual complexion of the person depicted, and that he was to disregard any markings on the photos. Almost immediately upon viewing the array, DM positively, confidently, and without hesitation identified the defendant from his photograph in the second position.

On this record, the People established that the array itself was not unduly suggestive. The photographs of the defendant and the five fillers depict individuals reasonably similar in appearance. There was no substantial likelihood that the defendant would be singled out for identification. There was no significant or obvious discrepancy in age, race, gender, facial features, height, weight, hair style or complexion. Indeed, the defendant does not seriously contest this.

The defendant does not meaningfully dispute that the identification procedure was conducted under permissible circumstances. Rather, defendant seeks suppression of the identification on the ground that the People violated CPL 720.35 in using in the array his arrest photograph from a prior arrest that resulted in a youthful offender adjudication. Defendant points out that under CPL 720.35 records pertaining to youthful offender adjudications are confidential and argues that the illegal use of the photograph tainted the identification procedure such that any in-court identification should be suppressed.


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CPL 720.35(2), provides, in pertinent part, that all official records and papers relating to a youth who has been adjudicated a youthful offender “are confidential and may not be available to any person or public or private agency . . .” except “upon specific authorization of the court.” Here, the Office of the District Attorney used the defendant’s photograph in the subject array without seeking or obtaining any permission of the court or the defendant.

However, the investigative use of a photograph of a defendant taken in a prior arrest which ultimately resulted in a youthful offender adjudication for subsequent prosecutorial purposes is not improper and does not warrant suppression (*see People v Creech*, 183 AD2d 777 [2d Dept 1992]; *People v Gallina*, 110 AD2d 847 [2d Dept 1985]; *see also People v Patterson*, 78 NY2d 711 [1991]). Here, the placement of defendant’s prior arrest photograph in the array shown to DW had no bearing upon the reliability of the identification procedure from which he was identified. Thus, defendant’s suppression argument fails, and his motion is denied.

This constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
September 10, 2018



Hon Anne E. Minihan, A.J.S.C.

TO:

HON. ANTHONY A. SCARPINO
District Attorney, Westchester County
By: ADA John O’Rourke

RICHARD FERRANTE
Counsel to Defendant Christopher Smith