COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

**FILED and ENTERED**

**WESTCHESTER COUNTY CLERK**

-against-

**HEARING DECISION**

Indictment No. 21-0155

ALEXIS ROSE,

Defendant.

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CACACE, J.

By Indictment Number 21-0155, the defendant presently stands charged with a single count of Murder in the Second Degree pursuant to Penal Law § 125.25(1), a single count of Criminal Possession of a Weapon in the Second Degree pursuant to Penal Law § 265.03(3), a single count of Criminal Possession of a Weapon in the Second Degree pursuant to Penal Law § 265.03(1)(b), a single count of Criminal Contempt in the First Degree pursuant to Penal Law § 215.51(b)(i), and a single count of Criminal Contempt in the Second Degree pursuant to Penal Law § 215.50(3), all of which are alleged to have been committed by the defendant within the on March 5, 2021. The defendant was arraigned under the instant indictment before the County Court, Westchester County (Minihan, J.), in the presence of counsel on March 31, 2021, and entered a plea of not guilty to all charged counts.

The defendant filed an omnibus motion seeking various forms of relief on May 14, 2021, and by Decision and Order dated June 9, 2021, the County Court, Westchester County (Minihan, J.) granted relief requested to the extent that a pre-trial hearing was ordered (1) pursuant to

*People v Huntley* (15 NY2d 72) and *Dunaway v New York* (442 US 200) to address the defendant's general claim that his noticed statements were involuntarily made within the meaning of CPL 60.45, presumably as the product of impermissible coercion and/or undue pressure, and in the absence of his knowing and voluntary waiver of his *Miranda* rights in violation of the defendant's rights under the Fifth Amendment to the United States Constitution, as well as the defendant's claim that his noticed statements were obtained by the police as the product of an unlawful arrest in violation of the defendant's rights under the Fourth Amendment to the United States Constitution,[1] (2) pursuant to *Mapp v Ohio* (367 US 643) and *Dunaway v New York* (442 US 200) in order to address defendant's challenge to the propriety of any search resulting in the seizure of property not obtained pursuant to a search warrant, and (3) pursuant to *United States v Wade* (388 US 218) and *People v Rodriguez* (79 NY2d 445) to address the defendant's claim that the identification procedures utilized by the police with respect to the noticed identifications were unduly suggestive.[2]

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[1]Notably, prior to the commencement of this combined pre-trial suppression hearing, the People withdrew their CPL 710.30 notice of intention to introduce evidence on their direct case at trial regarding the defendant's noticed statements made on March 5, 2021 at approximately 11:20 PM, and on March 6, 2021 at approximately 2:45 AM, leading this Court to address only the defendant's challenge to the admissibility of the noticed statement made on March 5, 2021 at approximately 11:02 PM through this proceeding.

[2]Although the County Court, Westchester County (Minihan, J.), by Decision and Order dated June 9, 2021, further granted relief requested by the defendant to the extent that a pre-trial hearing was ordered to address the defendant's general claim that his noticed statements were obtained as the product of a violation of his right to counsel pursuant to the Sixth Amendment to the United States Constitution, the defendant's failure to pursue such argument, and to otherwise sustain his burden during this combined suppression hearing to identify any legal basis upon which the application of Sixth Amendment principles would warrant the suppression of his noticed statements obviates the need for this Court to further address that ground through this proceeding (*see People v Rosa*, 65 NY2d 380).

The defendant filed a motion to reargue seeking relief pursuant to CPLR 2221(d) on February 28, 2023, and by Decision and Order dated March 1, 2023, the Supreme Court, Westchester County (Minihan, J.) granted relief requested to the extent that the scope of the previously ordered pre-trial suppression hearing was expended to include the defendant's apparent challenge to the veracity of the affiant with regard to the date of his execution of the search warrant which he reported upon the search warrant return that he had presented to Judge Quinones of the Yonkers City Court on March 10, 2021.

In accordance therewith, this Court conducted a combined *Huntley/Dunaway*, *Mapp/Dunaway*, and *Rodriguez/Wade* hearing on March 2 and 9, 2023, and having heard the testimony of Detectives Michael Hollywood, Sean McCormack, Neal Cromwell and Marissa Romano, and Sergeants Javier Lugo and Douglas Brady of the City of Yonkers Police Department (YPD) on behalf of the People, whereas the defendant elected not to present any witnesses on behalf of the defense, and I give full credence to their testimony.

Based upon the testimonial and documentary evidence adduced on behalf of the People during this combined pre-trial suppression hearing, this Court makes the following findings of fact and reaches the following conclusions of law:

## FINDINGS OF FACT

On March 5, 2021, Dets. Hollywood, Cromwell and Sgt. Brady of the YPD responded to 157 Warburton Avenue in the City of Yonkers (hereinafter, the crime scene) at approximately 9:00 PM, in response to a reported shooting at that location. After arriving at the crime scene, Dets. Hollywood and Cromwell, and Sgt. Brady entered the residence situated thereat and observed a male subject lying upon the floor of the entry hallway, later identified as Shaun Hutchinson (hereinafter, the victim), who appeared to be deceased as the result of several apparent gunshot wounds. Following this observation of the victim, Det. Cromwell spoke with a woman outside of the residence who had identified herself as Shamaya Green and had related that an individual known to her as Alex, whom she knew to be the former boyfriend of her niece named Janelle, had brushed past her upon entering Janelle's apartment and had used a gun to shoot the victim before brushing past her a second time while leaving the crime scene. After speaking with Ms. Green, Det. Cromwell spoke with her niece, Janelle Cummings, within her apartment, who advised him that the victim was the father of her child, and that the shooter had previously been her boyfriend for 2½ years and was named Alexis Rose, images of whom she possessed within her cellular telephone. Upon Det. Cromwell's request, Ms. Cummings used her cellular telephone to show him with a digital photograph of Alexis Rose, and a digital photograph of his white BMW automobile that reflected his license plate number which was admitted into evidence during this proceeding as People's Exhibit 2D.

Thereafter, Det. Cromwell arranged to have Janelle Cummings transported to the YPD Headquarters, where he met with later that night at approximately 10:00 PM, after he had

electronically obtained a photograph of Alexis Rose from e-JusticeNY and had transposed same onto a single sheet of paper. Upon meeting with Janelle Cummings, Det. Cromwell took a formal statement from her and showed her this transposed photograph of Alexis Rose, upon which she wrote "[t]his is Alexis Rose who shot Shaun Hutchinson [a]t my house at 157 Warburton [A]venue" and her signature, as well as "3/5/21" and "10 PM", which was admitted into evidence during this proceeding as People's Exhibit 2B.

Following his return to YPD Headquarters later that night, Sgt. Brady met with Ms. Green, who had previously related to Det. Cromwell at the crime scene that she had known Alex through his relationship with her niece for between 2 and 2½ years. In response to Ms. Green's report, Det. Cromwell provided Sgt. Brady with an unmarked paper copy of the defendant's photograph that he had obtained earlier that night from e-JusticeNY, and Sgt. Brady displayed that transposed photograph to Ms. Green at approximately 10:44 PM that night, upon which she wrote "[t]his is my niece's ex-boyfriend. I know him as Alex. He is the man that I heard come up the stairs and shoot Shaun before running away" and her signature, "3/5/21" and "10:44 PM", which was admitted into evidence during this proceeding as People's Exhibit 3B.

Shortly thereafter, having utilized information obtained from witnesses and the e-JusticeNY portal which included an image of Alexis Rose, members of the YPD responded to the area of 4007 Hill Avenue in the Bronx and successfully located him as he exited his residence at that location, and then apprehended him after he had entered his white BMW automobile later that night at approximately 11:02 PM. After the members of the YPD approached Alexis Rose to apprehend him, one of them asked him for his name, and he replied, in substance, that his name was Alexis Rose.

After having determined that a resident of a neighboring apartment at the crime scene named Roman Perez should be interviewed at YPD Headquarters, Det. Cromwell arranged to have Sgt. Lugo meet with Mr. Perez there later that night after Det. Cromwell had first provided him with a photographic array depicting an image of Alexis Rose in conjunction with images of five additional individuals of similar appearance that he had generated through use of the photo services tab of the e-JusticeNY portal. Upon meeting with Mr. Perez at approximately 1:29 AM on March 6, 2021 in the squad room of the YPD Headquarters, Sgt. Lugo read instructions aloud and provided him with the single sheet of paper that reflected the photographic array that Det. Cromwell had prepared earlier, upon which Mr. Roman drew a circle around the image of Alexis Rose which he initialed, and he wrote "Number 2 is [the] guyI have seen driving bmw before around house", as well as his signature, "03/06/21" and "1:29 AM", which was admitted into evidence during this proceeding as People's Exhibit 4B.

Subsequently, at approximately 3:33 PM on March 8, 2021, Det. Cromwell presented an affidavit in support of a search warrant to Judge Thomas Quinones of the Yonkers City Court, who signed a search warrant order authorizing the YPD to conduct a search of the contents of two safes and a lockbox that were recovered from a bedroom within 4007 Hill Avenue in the Bronx. On March 10, 2021, Det. Hollywood presented a search warrant return to Judge Quinones of the Yonkers City Court, upon which he had written that this search warrant had been executed on March 6, 2021. When confronted with this discrepancy, Det. Hollywood testified that his notation indicating that the search warrant for the safes and lockbox had been executed on March 6, 2021 was erroneous, as he had actually executed the search warrant on March 8, 2021.

Conclusions of Law

Turning first to consider that branch of the defendant's suppression application concerning his challenge to the veracity of Det. Michael Hollywood with regard to the notation that he placed upon a search warrant return that he had presented to Judge Quinones of the Yonkers City Court on March 10, 2021, which reflected his assertion that he had executed a search warrant for the defendant's two safes and a lockbox on March 6, 2021 pursuant to a search warrant that had not been issued until March 8, 2021, the Court credits the veracity of Det. Hollywood's testimonial acknowledgment that he had made a typographical error by incorrectly writing March 6, 2021 rather than correctly writing March 8, 2021. Based upon the foregoing, to the extent that the defendant can be understood to claim that the search warrant authorizing the search of the defendant's safes and lockbox had contained materially false and/or misleading allegations which were knowingly made in reckless disregard for the truth, the Court finds that the evidence adduced during this hearing reflects no showing of any misconduct upon which suppression of the evidence recovered pursuant to the execution of that search warrant would be proper (*see People v Alfiinito*, 16 NY2d 181; *see also Franks v Delaware*, 438 US 154; *People v Hanlon*, 36 NY2d 558).

Turning next to consider that branch of the defendant's suppression application which concerns his claims that his noticed statements were involuntarily made within the meaning of CPL 60.45(2)(a), and were otherwise obtained in the absence of his knowing and voluntary waiver of his *Miranda* rights, the Court notes that when seeking to make use of the noticed statements which have been attributed to him on their direct case at trial, the People bear the

burden of first establishing the voluntariness of those statements beyond a reasonable doubt (*see People v Anderson*, 42 NY2d 35, 38; *People v Huntley*, 15 NY2d 72; *People v Loucks*, 125 AD3d 890), and that the defendant knowingly, voluntarily and intelligently waived his or her so-called *Miranda* rights (*Miranda v Arizona*, 384 US 436, 444) prior to making the noticed statements (*see People v Williams*, 62 NY2d 285, 288-289). Should the People meet their burden to show such voluntariness and waiver, the defense shall then bear the corresponding burden of persuasion (*see People v Santos*, 112 AD3d 757, 758; *see also People v Aveni*, 100 AD3d 228, 237). In this regard, whether inculpatory statements have been rendered involuntary depends upon an analysis of the "totality of the circumstances" under which such statements were made by the defendant (*People v Guilford*, 21 NY3d 205, 208), which includes the particular characteristics of the defendant such as his age and mental state, as well as the conditions surrounding the questioning, the temporal duration of the questioning, and the manner in which the police dealt with the defendant, in order to determine whether or not the defendant's will to choose to make a statement had been overborne to the point where his statement was not the product of an essentially free and unconstrained choice (*see People v Mateo*, 2 NY3d 383, 413).

With specific regard to the defendant's general challenge to the voluntariness of the noticed statement he made when he was being apprehended by officers of the YPD on March 5, 2021, upon the ground that same was involuntarily made in some manner, the record reveals that this noticed statement was obtained in the absence of an advisement to the defendant of his so-called *Miranda* rights, and his knowing, voluntary and intelligent waiver of such rights. Although defense counsel argues that the defendant was subject to custodial interrogation in the absence of *Miranda* warnings when he was asked for his name as members of the YPD apprehended him

within his vehicle, this Court finds that the limited question posed to the defendant by a member of the YPD, under the existing circumstances, did not amount to interrogation since it appears to have been designed to merely clarify the nature of the situation the police were confronted with to confirm that they had correctly identified the defendant as "Alexis Rose" before effectuating his arrest (*see People v Huffman*, 41 NY2d 29, 34; *see also People v Valentin*, 118 AD3d 823; *People v Baker*, 27 AD3d 887, 888). Consequently, as *Miranda* warnings are required only when a suspect is subjected to both custody and interrogation, or "custodial interrogation", the People were not obligated to demonstrate that the noticed statement made by the defendant on March 5, 2021, at approximately 11:02 PM, had followed his voluntary, knowing and intelligent waiver of the privilege against self-incrimination and his right to have retained or appointed counsel present during the questioning, commonly referred to as *Miranda* rights, in order to demonstrate the voluntariness of that noticed statement (*see People v Paulman*, 5 NY3d 122; *see also People v Berg*, 92 NY2d 701). Based upon the foregoing, the failure of any member of the YPD to advise the defendant of his so-called *Miranda* rights in advance of his utterance of the noticed statement he made on March 5, 2021, at approximately 11:02 PM, does not constitute a violation of the defendant's rights under the Fifth Amendment to the United States Constitution pursuant to the requirements established by the United States Supreme Court in *Miranda v Arizona* (384 US 436).

To the extent that the defendant can be understood to challenge the admissibility of his noticed statement as the alleged product of his unlawful arrest in the absence of probable cause, and can be further understood to challenge the seizure of any physical evidence resulting from a search of his person as a similarly alleged product of his unlawful arrest without probable cause,

the adduced evidence reveals that such physical and statement evidence was obtained by the YPD subsequent to two distinct identifications made by identified civilian witnesses who advised them that the defendant was the perpetrator of the homicide that had occurred in the area of 157 Warburton Avenue approximately one hour earlier, which is sufficient to establish that the YPD was lawfully entitled to arrest the defendant for that alleged homicide based upon probable cause that was derived from two identifications of him as the perpetrator (*see People v Read*, 74 AD3d 1245; *see also People v Martin*, 221 AD2d 568). Consequently, as the YPD police officers who had arrested the defendant during the late night hours of March 5, 2021, were lawfully entitled to do so, and to thereupon ask him for his name and search his person incident to his arrest without violating his Fourth Amendment rights pursuant to *Dunaway v New York* (442 US 200), this Court finds that the noticed statement evidence and any physical evidence recovered from the defendant's person by the YPD incident to his arrest is not subject to suppression due to the lawfulness of the defendant's arrest (*see People v Harris*, 77 NY2d 434; *see also People v DeSantis*, 46 NY2d 82; *People v Green*, 212 AD2d 630).

Turning last to consider the defendant's challenge to the trial admissibility of the three noticed identifications upon his claim that they were the product of unduly suggestive identifications procedures, the Court will first turn to consider the two identifications alleged to have been made on March 5, 2021 through the YPD's display of a single photograph of the defendant to these two distinct identification witnesses. In this regard, the Court notes that in seeking to elicit an in-court identification of the defendant on their direct case at trial, the People bear the burden of establishing the propriety of the police-arranged out-of-court identification procedures employed, and if they cannot, the People then bear the burden of showing, by clear

and convincing evidence, that the in-court identification of the defendant would be based upon the witness' independent source, rather than the impermissibly suggestive pre-trial identification procedure. Upon consideration of the defendant's claim that the noticed identifications made on March 5, 2021 were unduly suggestive because they were made through the display of a single photograph, this Court finds that the evidence adduced during this hearing established that these noticed identifications were confirmatory in nature as a matter of law. This conclusion is based upon the evidence adduced during this proceeding which reflected that these two identification witnesses, Janelle Cummings and Shamaya Green, had been intimately acquainted with the defendant's appearance over a period of approximately 2-2½ years as a consequence of Ms. Cumming's romantic relationship with him during that period. Based upon the adduced evidence, this Court finds that these two identification witnesses possessed such a degree of familiarity with the defendant's appearance at the time of their respective police-arranged identifications of the defendant on March 5, 2021, that both of these identification witnesses are legally deemed to have been impervious to any police suggestion when the defendant's single photograph was displayed to them during the police arranged identification procedure that was conducted with respect to each of them pursuant to *People v Gisendanner* (48 NY2d 543) and *People v Rodriguez* (79 NY2d 445), and their progeny. Accordingly, as these challenged identification procedures were merely confirmatory in nature, it is unnecessary for the Court to conduct a hearing pursuant to *United States v Wade* (388 US 218) to further examine the suggestiveness of the circumstances under which these two noticed identifications were made, and the defendant's motion to suppress the People's introduction of this identification evidence at trial is denied.

With respect to the remaining noticed identification made on March 6, 2021, the Court notes that this identification was alleged to have been made through the use of a so-called photographic array, and the Court finds that the evidence adduced during this suppression hearing established that this noticed identification, as made by Roman Perez at approximately 1:26 AM, on March 6, 2021, was not the product of an impermissibly suggestive identification procedure. This conclusion is based upon the Court's findings that the individuals depicted in the photographs comprising the photographic array printed upon People's Exhibit 4B were of sufficiently similar appearance to negate any claim that the identification witness' attention was improperly drawn to the defendant's photograph. Specifically, the Court's examination of People's Exhibit 4B revealed that the defendant's photograph was not noticeably distinguished from the other photographs within the array in a manner which was in any way likely to draw the attention of the identification witness to the defendant's photograph (*People v Lee*, 207 AD2d 953-954), nor was there any evidence adduced which suggested that the manner in which the photographic array was displayed to the identification witness was unduly suggestive (*see People v Owens*, 275 AD2d 905; *see also People v Price*, 256 AD2d 596; *People v Rogers*, 245 AD2d 1041). Accordingly, the Court finds that the positive identification of the defendant made by Roman Perez through the use of the photographic array that was admitted into evidence during this proceeding as People's Exhibit 4B was not the product of an unduly suggestive identification procedure.

Based upon the foregoing, the defendant's suppression application concerning the People's proposed admission at trial of evidence recovered from the defendant's two safes and lockbox pursuant to the execution of a search warrant on March 8, 2021 is hereby denied, the

defendant's suppression application concerning the People's proposed admission at trial of evidence of the noticed statement he made on March 5, 2021 is hereby denied, and the defendant's suppression application concerning the People's proposed admission at trial of three in-court identifications of the defendant by three distinct witnesses who made noticed out-of-court identifications of the defendant is hereby denied. Accordingly, the People will be permitted to seek the introduction of all such challenged evidence on their direct case during the trial of this matter.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
March 24, 2023

Honorable Susan Cacace
County Court Judge

TO: Honorable Miriam Rocah
District Attorney of Westchester County
County Courthouse
111 Dr. Martin Luther King, Jr., Blvd.
White Plains, New York 10601
Attention: A.D.A. John O'Rourke

Office of Clare Degnan, Esq.
The Legal Aid Society of Westchester County
Attorneys for Defendant
150 Grand Street
White Plains, New York 10601
Attn: Jessica Hugel, Esq.