

People v Bobbitt

2023 NY Slip Op 34652(U)

January 11, 2023

Supreme Court, Westchester County

Docket Number: Ind. No. 20-70275-01

Judge: Robert A. Neary

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**FILED
AND
ENTERED
ON 1-11-2023
WESTCHESTER
COUNTY CLERK**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

- against -

JOHN BOBBITT aka "BLACK",

Defendant.

-----X
NEARY, J.

Legacy 274/202

DECISION AND ORDER

Ind. No. 20-70275-01

FILED
JAN 11 2023
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

The following constitutes the opinion, decision and order of the Court.
The defendant has been indicted for the crimes of Murder in the Second Degree,

Criminal Possession of a Weapon in the Second Degree and Menacing in the Second Degree. It is alleged that on or about April 28, 2020, the defendant intentionally shot and killed one Kashawn Smith in the City of Mount Vernon. The defendant claiming to be aggrieved by the improper or unlawful acquisition of evidence has moved to suppress a statement allegedly made

by him to detectives of the Mount Vernon Police Department on July 13, 2020 in Newark, New Jersey on the ground that it was involuntarily made, and to exclude the identification testimony at trial of several civilian witnesses on the ground that the identifications would not be admissible because of an improperly made prior photographic identification of the defendant by the prospective witnesses.

The People have the burden of going forward to show that any pre-trial identification procedure was not constitutionally impermissible. The defendant, however, bears the burden of establishing by a preponderance of the evidence that the procedure was impermissible.

If the procedure is shown to be impermissible, the People have the burden of showing by clear and convincing evidence that the prospective in court identification testimony, rather than stemming from the pre-trial procedure or confrontation, has an independent source.

The People must establish the voluntariness of the statement attributed to the defendant beyond a reasonable doubt before it is admissible at trial.

Per the decision of the Hon. David Zuckerman dated December 11, 2020, *Huntley, Wade* and *Sandoval* hearings were ordered to be held prior to trial. On January 10, 2023, combined *Huntley* and *Wade* hearings were held by this Court. At this combined hearing, the People called the following witnesses: Police Officer Abdu Lawrence and Police Officer Nicholas Smith of the Westchester County Police Public Safety. ATF Agent Dave Wilson also testified. The following exhibits were received into evidence during the hearing: certain Grand

Jury testimony, a video tape statement of the defendant, two (2) still photographs and a *Miranda* Card. The defendant called no witnesses and offered no evidence.

The Court finds the testimony offered by the People's witnesses to be plausible, candid, and fully credible. This Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACTS

At about 10:15 P.M. on April 28, 2020, Mount Vernon police officers responding to a report of shots fired arrived outside 25 Millington Street, a multiple family residence. There they discovered the lifeless body of Kashawn Smith, age thirty-eight (38), a local citizen. He had sustained multiple gunshot wounds to the head and torso.

Subsequent investigation by Mount Vernon detectives and an ATF agent led to an interview of one Shondu Young, an individual who told police she heard the shooting and saw the defendant whom she knew by nickname "Black" leaving the scene immediately thereafter.

On May 1, 2020, Ms. Young met with Mount Vernon Police Department Officer Abdu Lawrence who had no prior involvement with the above homicide investigation nor any connection with either the defendant or deceased. The witness was shown a six (6) pack color photo array and selected the defendant's photograph located in the first position as the man seen leaving the scene. Additionally, Ms. Young testified before the Grand Jury (People's Exhibit 4) in substance, that she lived in the same building complex as "Black" for at least three (3) years and saw him daily.

At some point during May of 2020, Orpheus Sinclair was interviewed by investigators and stated in substance he was at the scene of the shooting and observed the defendant arguing with the deceased just before hearing the gun fire. Mr. Sinclair told the investigators he has know the defendant for many years, socialized with him and even exchanged cell phone numbers. The witness also knew the defendant's girlfriend and daughter. He also identified the defendant from a photograph./

On June 24, 2020, Latoya Jordan was interviewed at an ATF office in Yonkers, New York by Agent Dave Wilson. She indicated she knew the man nicknamed "Black" from the Mount Vernon neighborhood where they resided. She reported having many mundane encounters with "Black" over the years on the street and various neighborhood establishments. Ms. Jordan produced a cell phone video depicting "Black" and three (3) female s engaging in a good natured "water fight" early in the evening on the night of the homicide. When shown a six (6) pack color photo array containing the defendant's picture, she initially declined to identify any of the participants in the array. However, not long after, as the interview continued, Ms. Jordan viewed the same array a second time and identified the defendant as the man she observed near the crime scene on April 28, 2020. Ms. Jordan's familiarity with the defendant is supported by multiple incidents captured on surveillance video reviewed by police depicting her in the company of the defendant.

On June 9, 2020, investigators obtained court authorization (later extended) to utilize pen register/traps and trace/GPS locator devise in an effort to determine the defendant's whereabouts. Use of this equipment resulted in the defendant being taken into custody in

Newark, New Jersey on July 13, 2020. While in custody in Newark on July 13, 2020 and after being advised of his *Miranda* rights, the defendant was interviewed by Mount Vernon detectives and provided an electronically recorded statement denying any involvement in the murder of Kashawn Smith and detailing his friendship with the deceased and his movements on the evening of the homicide. Later that day, a warrant charging the defendant with Murder in the Second Degree was filed in Mount Vernon and lodged in Newark, New Jersey. On July 20, 2020, the defendant waived Extradition and returned to Westchester.

CONCLUSIONS OF LAW

WADE ISSUES:

Attached to the Indictment in this case were six (6) CPL Section 710.30 Notices. Prior to commencing the instant hearing the People withdrew three (3) of those notices and proceeded with the others as indicated above.

While generally, single photo identifications can be said to be *per se* unduly suggestive and frowned upon, there are exceptions.

‘When a crime has been committed by a . . . long time acquaintance of a witness there is little or no risk that comments by the police however suggestive will lead the witness to identify the wrong person.’ [See *People v. Carmona*, 185 AD3d 600 and *People v. Rodriguez*, 79 NY2d 445].

The three (3) witnesses who identified the defendant in this case and whom the People intend to call at trial all had longstanding familiarity with him. Their claims to have associated with the defendant as neighbors and friends over many years is corroborated by surveillance video placing them together socially on multiple occasions. Indeed, prior to making a photographic identification it was one of the witnesses that supplied police with a video she recorded of the defendant on the day of the homicide. Under these circumstances, the Court finds the three (3) identifications mentioned above are clearly confirmatory and impervious to any improper police suggestibility. It should be noted also police scrupulously adhered to the preferred Double Blind manner of displaying photographic arrays and that the location of a suspects picture in the first position is of little, if any consequence, when the make-up of the array – as here – does not draw a viewer's attention to any one individual.

After examining each array, the Court determines there was nothing unduly suggestive in the composition of the arrays or the manner in which they were presented to the witnesses. It is well settled that there is no requirement that all participants in a photo array or lineup be identical in appearance, rather, all that is needed is that the 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 AD2d 625]. In the instant case, the arrays shown to the witnesses did not highlight or single out the defendant.

Regarding the identifications made both by a single picture and photo arrays, the Court finds the People have met their burden of showing the procedures employed by police

were not constitutionally impermissible and the identifications were confirmatory. The defendant has failed to establish the contrary to be true.


HUNTLEY ISSUES:

There has been no credible evidence adduced at this hearing to support an argument that the defendant invoked any of his *Miranda* rights while being questioned in Newark. The record is devoid of any coercion, trickery, deceit or other misconduct on the part of those officers conducting the interview. The tone of the interview was conversational, calm and non-confrontational.

Based upon the foregoing, the defendant's motions to suppress the noticed statement and identifications are denied in their entirety.

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

Dated: White Plains, New York
January 11, 2023



ROBERT A. NEARY
SUPREME COURT JUSTICE

People v. John Bobbitt aka "Black"
Indictment No. 20-70275-01

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