

People v Alicea

2023 NY Slip Op 34823(U)

April 6, 2023

Supreme Court, Westchester County

Docket Number: Ind. No. 22-70746

Judge: Robert A. Neary

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AND
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ON 4-6-2023
WESTCHESTER
COUNTY CLERK**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

- against -

DECISION AND ORDER

JOSE ALICEA,

Ind. No. 22-70746

Defendant.

-----X
NEARY, J.

The defendant has been indicted for the crimes of Criminal Possession of Stolen property in the Third Degree, Criminal Possession of Stolen Property in the Fourth Degree and Unauthorized Use of a Vehicle in the Second Degree. It is alleged that on or about January 28, 2022, the defendant did knowingly possess a stolen 2016 Honda Pilot valued at over Three Thousand Dollars (\$3,000.00). The defendant seeks to exclude the identification testimony of several police witnesses on the ground that the identifications would not be admissible because

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of an improperly made prior photographic identification of the defendant by the prospective witnesses.

The People have the burden of going forward to show the 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 unfair pre-trial procedure or confrontation, has an independent source.

Per decision of this Court dated October 4, 2022, *Wade* and *Sandoval* hearings were ordered to be held prior to trial. On April 4, 2023 combined *Wade* and *Sandoval* hearing were held by this Court. At this combined hearing, the People called the following witnesses: Yonkers Police Officers Katie McEvoy, Ashley Callery and Michael DeRosa. The following exhibits were received into evidence during the hearing: two (2) USB video recordings. 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

On the morning of January 28, 2022, Yonkers Police Officer Katie McEvoy responded to the Nodine Hill section of the City on a report of a stolen vehicle. Once there, Police Officer McEvoy meet the owner of a reported stolen 2016 Honda Pilot. The owner told the officer that she had received a Facebook posting stating in substance that crackheads were selling items removed from the Honda on Riverview Place, a street located approximately a mile away. Officer McEvoy drove the owner to Riverview Place and they quickly located the Honda Pilot near number 25 Riverview Place.

Later that morning, police reviewed security video downloaded from cameras situated on Nodine Hill and Riverview Place. A blue jacketed male can be seen approaching the Honda Pilot earlier that morning on Nodine Hill and later exiting the same vehicle on Riverview Place.

A still photo (People's Exhibit No. 2) of the male was extracted from the video and given to Officer McEvoy. She showed the still photo to several fellow officers during a shift change that afternoon. One of them, Officer Ashley Callery, a five (5) year veteran who routinely patrols the Nodine Hill area of Yonkers, stated she recognized the man depicted in the photo as the defendant adding she had arrested him earlier that month. During that prior arrest and booking process, Officer Callery spent between two (2) and three (3) hours with the defendant.

On February 3, 2022, the defendant was arrested by Yonkers Police and charged with the theft of the Honda Pilot. Yonkers Police Officer Michael DeRosa, who regularly patrols

the Nodine Hill section of the City, has had several prior encounters in that area with the defendant, a local resident well known to Yonkers Police by virtue of over a dozen arrests in that municipality. While testifying before the Grand Jury in this matter, Officer DeRosa identified the defendant from both the still photograph (People's Exhibit No. 2) and video security footage (People's Exhibit No. 1).

CONCLUSIONS OF LAW

Where as here, the People assert that the pre-trial photographic identifications were merely confirmatory, they have the burden of proving that the identifying witness(es) had sufficient familiarity with the defendant as to rendered the identification impervious to any suggestiveness. To accomplish this, they must produce sufficient details explaining the extent and degree of the identifying witness(es) prior relationship and contact with the defendant. [See *People v. Rodriguez*, 79 NY2d at 452; *People v. Collins*, 60 NY2d 214, 219]. Factors a court may consider include, but are not limited to, the number of times the witness(es) viewed the defendant before the crime, the duration of any such observations, the nature of the encounters, the length of the time the defendant was viewed, and the time lapse between the viewing and the crime.

Officer Callery had arrested the defendant a few weeks before the present arrest. She spent between two (2) and three (3) hours in the company of the defendant while he was booked and processed. Officer DeRosa, a four (4) year police veteran assigned to the area where

the Honda was stolen, indicated he'd had several prior street encounters with the defendant and recognized him from the still and video photos acquired as evidence in this case.

While single photo identifications are generally frowned upon by the courts, it has been consistently held that such a viewing, as here, by trained police officers are more reliable than that of civilian witnesses and unlikely to be the result of undue suggestiveness or misidentification. In this case, both Officer Callery and Officer DeRosa had such significant prior contacts with the defendant that the Court is convinced that the People have shown their pre-trial identifications of the defendant were reliable and not constitutionally impermissible. The defendant has failed to establish by a preponderance of the evidence that the identification procedures employed were improper or unduly suggestive.

Accordingly, the defendant's motion to suppress the identification is in all respects denied.

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

Dated: White Plains, New York
April 6, 2023


ROBERT A. NEARY
SUPREME COURT JUSTICE

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People v. Jose Alicea
Indictment No. 22-70746

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