

MEMORANDUM

SUPREME COURT: QUEENS COUNTY  
CRIMINAL TERM, PART K-8

THE PEOPLE OF THE STATE OF NEW YORK :

: BY ROBERT CHARLES KOHM,  
: Supreme Court Justice

VS.

: DATED: January 12, 2004

HECTOR FRAZIER,

: INDICT. NO. 501/2003

Defendant.

By: Barbara Byrne, Esq.  
For the Motion

Hon. Richard A Brown, D.A

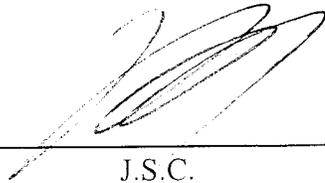
By: ADA Kevin Fogarty, Esq.  
Opposed

The following papers numbered  
1 to 3 submitted on this motion.

Notice of Motion, and Affidavits Annexed.....	1 - 2
Answering and Reply Affidavits.....	3
Affidavit.....	
Minutes.....Memoranda of Law.....	4

Upon the foregoing papers and after a hearing, the defendant's motion to suppress identification testimony is denied. See the accompanying memorandum decision dated January 12, 2004

Dated: Kew Gardens, N.Y.  
January 12, 2004

  
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J.S.C.

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<b>Defendant.</b>	:	
	:	
	:	

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The defendant moves to suppress identification testimony contending that the People failed to establish an independent source for the complainant's identification of the defendant. The People oppose the application in all respects.

The People called the complaining witness, John Yeamans, whose testimony was credible and worthy of belief. He testified that on January 16, 2003 he was installing a chimney liner at approximately 10:30 or 11:00 in the morning at a property located at 134<sup>th</sup> Road in Laurelton, Queens. At that date, time and place, he observed from his vantage point on the roof a car near his van which was parked at the curb. As he came down from the roof, the car left the area, quickly returned and parked behind his van. At this juncture the driver exited his vehicle and began to open boxes in the back of the van questioning the complainant about the amount of money he made. From a distance of less than twelve inches, the individual next displayed a gun and demanded the complainant's wallet. After handing over his wallet, the complainant, refusing to lay down on the pavement, jumped into the back of his van. After some additional conversation with the perpetrator, the complainant was able to run into a backyard and call the police.

The complainant stated the weather conditions were dry and it was daylight at the time of this five minute incident. He described his assailant as a black male, approximately 5' 8", 163lbs., about 35 years of age wearing a gray denim jacket and black hat. He also stated this individual wasn't shaven but had no beard. He described the gun as a large black weapon with a wooden handle.

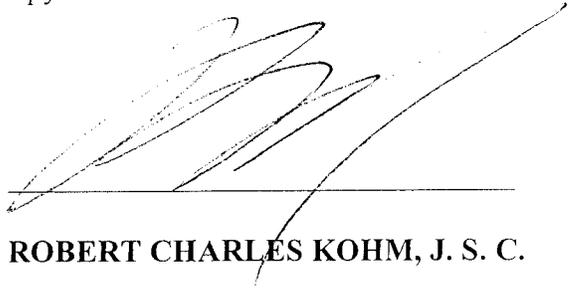
Subsequently, at the police precinct, on two separate occasions, he viewed police photographs and a lineup, at which lineup he identified the defendant. By stipulation, photographs of the lineup and the photo array were admitted into evidence at the hearing together with the complaint report. (The People have conceded that the lineup procedure employed by the police must be suppressed in that the police violated the defendant's right to counsel.)

After reviewing the evidence adduced at the hearing, and the defendant's memorandum

of law, that evidence supports the conclusion that the complainant had an independent basis for identifying the defendant. The People established by clear and convincing evidence that the in-court identification was based upon the complainant's independent observations of the defendant which lasted approximately five minutes in good lighting conditions. In addition, the complainant observed the defendant from a close distance and had conversations with him. Accordingly, notwithstanding the tainted lineup procedure, the complainant will be permitted to make an in-court identification of the defendant at trial.

This constitutes the Order and Decision of this Court.

The Clerk of the Court is directed to forward a copy of this Decision and Order to the District Attorney and Defense Counsel.



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**ROBERT CHARLES KOHM, J. S. C.**