

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-19

P R E S E N T: HON. SEYMOUR ROTKER,
Justice.

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

- against-

Indictment No.: 3411 / 02

RUBEN RIOS,

Motion: To suppress identification
and statement.

Defendant.

-----X

JEFFREY BLOOM, ESQ.
Legal Advisor, Assigned Counsel
For the defendant

RICHARD A. BROWN, D.A.

BY: NINA PIRROTTI A.D.A.
Opposed

Upon the foregoing papers, and due deliberation had, the motion is denied. See accompanying memorandum this date.

Kew Gardens, New York
Dated: June 22, 2005

SEYMOUR ROTKER
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-19

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

BY: SEYMOUR ROTKER, J.S.C.

- against -

Indictment No. 3411 / 02

RUBEN RIOS,

Defendant.

-----X

The following constitutes the opinion, decision and order of the court.

The defendant was indicted and charged *inter alia* with the crime of burglary in the second degree. It is alleged that defendant on August 6, 2002, defendant broke into a dwelling and stole property therefrom.

Initially, counsel was assigned to represent defendant; however, because of defendant's conduct over a period of time, eight assigned attorneys were relieved for various reasons, including having threats made against them by defendant, and defendant's filing of grievances against them. Thereafter, defendant was directed by another Justice of this Court to represent himself and the current attorney was assigned as a legal advisor to the defendant.

Because of the defendant's conduct at various proceedings in court, defendant was also advised by another Justice of this Court that if he was disruptive in court or otherwise failed to come to court without good cause, the proceedings would go forward in his absence (Parker-type warnings).¹

On June 2, 2005, defendant did appear before this Court for a hearing. He was told that he should work with his legal advisor and otherwise participate in the process. The matter was adjourned to June 8, 2005 to conduct a pre-trial suppression hearing that defendant had requested. Nevertheless, on June 8, 2005, defendant refused to come into the courtroom. Since the defendant

¹People v. Parker, 57 N.Y.2d 136, 454 N.Y.S.2d 967 (1982).

was directed by another Justice to represent himself in the proceedings and had been advised that the proceedings would take place in his absence for his willful failure to appear and participate, and because defendant refused to appear in court for his hearing, this Court directed the legal advisor to participate in the examination of witnesses on behalf of the defendant. Counsel was also told to communicate this to the defendant. Thus, this Court directed that the hearing go forward in his absence (see records of proceedings of June 8, 2005, Part K-19).

As to the hearing, defendant, claiming that improper identification testimony may be offered against him, has moved to exclude the pretrial identifications, as well as, the prospective identification testimony of Aurora Tezecaca on the ground that they are inadmissible because the prior identifications of the defendant by the prospective witness were improper.

The People have the burden of going forward to show that the pretrial 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 improper, the People then have the burden of proving by clear and convincing evidence that the prospective in-court identification testimony, rather than stemming from the unfair pretrial confrontation, has an independent source.

Defendant, also claiming to be aggrieved by an unlawful search and seizure, has moved to suppress a screwdriver and a laundry bag seized from his person by Officer Luisa Lozano on October 15, 2002.

In this case, the People assert that the seizure of the property from the defendant's person was incident to a lawful arrest. The People have the burden, in the first instance, of going forward to show the legality of police conduct. Defendant, however, bears the ultimate burden of proving by a preponderance of the evidence that the physical evidence should be suppressed.

In addition, defendant, claiming to be aggrieved by an unlawful acquisition of evidence, has moved to suppress a statement made by him on October 15, 2002 to Officer Luisa Lozano on the ground that it was involuntarily made within the meaning of CPL § 60.45.

A confession or admission is admissible at trial in this State only if its voluntariness is

established by the People beyond a reasonable doubt.²

As part of his application, defendant also claims that he was arrested without probable cause.

Testifying at this hearing were Detective Richard Dietrich and Police Officer Luisa Lozano.

I find their testimony to be credible.

I make the following findings of fact:

Detective Richard Dietrich of the Queens Robbery Squad was assigned to investigate a burglary that had taken place on August 6, 2002 at 188-06 87th Drive, Queens, New York. He obtained information from Aurora Tezecaca³ that she had been present at her home on the day in question. She observed a male Hispanic, heavy set, approximately five feet nine inches tall, with short hair and a Hispanic accent inside her residence. The description provided by the witness generally matched the defendant's description. When she confronted the individual, later identified as defendant Ruben Rios, he stated to her that somebody had sent him to get this stuff, referring to jewelry and other property that he had taken. He thereafter left Tezecaca's home.

On August 13, 2002, Detective Dietrich received information that fingerprints were recovered from outside of another dwelling, which were the subject of a potential burglary that had nothing to do with this case, and were identified as belonging to the defendant, Ruben Rios. As a result of obtaining those prints, Detective Dietrich obtained a photograph of Ruben Rios. On August 21, 2002, a photo array which included the defendant, was shown to Ms. Tezecaca at her home. The array was fair and she identified the defendant from the array as the person who

²The People failed to adduce any testimony during the course of the hearing held before this Court on June 8 and June 16, 2005, of any statement made by the defendant to Officer Lozano or the circumstances under which the statement was allegedly made.

³The 710.30(1)(b) notice served by the People spells this witness' name: "Tenezaca" and a temporary order of protection in the court file spells her name: "Terezaca." The Court utilizes the spelling of the witness' name as found in the criminal court complaint in its decision.

burglarized her home. The array was shown by Detective Dietrich to the witness and he did not suggest to her any person to identify. As a result of the identification of the defendant in the array, Detective Dietrich prepared a wanted poster for Ruben Rios. The wanted poster was circulated among various police precincts throughout Queens County.

On October 15, 2002, while on an anti crime patrol, Police Officer Luisa Lozano observed an individual matching the description of the person on the wanted poster. That person, later identified as Ruben Rios, was stopped and arrested and taken to the 107th precinct.

Ms. Tezecaca was notified to come to the precinct and while awaiting her appearance, fillers were obtained for a six-person lineup which included the defendant. Defendant requested that he be given the opportunity to call his family so they could get an attorney for him. He was given a telephone, but never made any telephone calls.

A lineup was held which was fair in composition and non-suggestive. Ms. Tezecaca viewed the lineup and identified the defendant as the person who was in her home and stole her property. There was no suggestiveness by anyone to have Ms. Tezecaca identify the defendant.

I make the following procedural findings:

Initially, a defendant has a statutory and a constitutional right to be present at all material stages of trial. See CPL § 260.20; People v. Spotford, 85 N.Y.2d 593, 627 N.Y.S.2d 295 (1995); People v. Turaine, 78 N.Y.2d 871, 573 N.Y.S.2d 64 (1991). Under New York law, a defendant also has the more comprehensive statutory right to be present during the trial of an indictment. CPL § 260.20. The New York Court of Appeals has found that the defendant's presence is also generally required at ancillary proceedings, so long as the defendant can potentially contribute to the proceeding. See People v. Frost, 100 N.Y.2d 129, 760 N.Y.S.2d 753 (2003), citing People v. Sprowal, 84 N.Y.2d 113, 118, 615 N.Y.S.2d 328 (1994). A defendant's right to be present at trial where testimony is elicited upon the propriety of a search and seizure and a defendant's right to be present at a suppression hearing upon the same issue is indistinguishable. See People v. Anderson, 16 N.Y.2d 282, 266 N.Y.S.2d 110 (1965). Thus, a suppression hearing is a material

stage of the trial and a defendant has a right to be present.⁴

Nevertheless, a defendant can waive or forfeit his right to be present in a criminal proceeding where a defendant fails to appear. “A finding that [a defendant] waived his right to be present requires, at a minimum, proof that he was informed in some manner of the nature of the right to be present and the consequences of failing to appear for trial, that is, that the trial would proceed in his absence.” See People v. Brooks, 308 A.D.2d 99, 763 N.Y.S.2d 86 (2d Dept. 2003), citing People v. Parker, *supra*; People v. Toomer, 272 A.D.2d 990, 708 N.Y.S.2d 652 (4th Dept. 2000); People v. Lamb, 235 A.D.2d 829, 653 N.Y.S.2d 395 (3d Dept. 1997); People v. Underwood, 201 A.D.2d 597, 607 N.Y.S.2d 955 (2d Dept. 1994). Therefore, a waiver can be implied if it is clear that a defendant is aware that a trial will take place in his absence. See People v. Spotford, 85 N.Y.2d 593, 627 N.Y.S.2d 295 (1995).⁵

Here, defendant was told that the hearing would take place on June 8, 2005. On this date, defendant was actually present, having been produced by the Department of Corrections, but refused to come up to the courtroom or even the holding pen adjacent to the courtroom to conduct the hearing. Significantly, prior to this time, the defendant had been advised that all proceedings concerning this case would take place without him if he failed to cooperate. Thus, based upon the record and the totality of circumstances this Court made a finding that defendant’s refusal to appear was deliberate, having already been apprised that the hearing would be conducted without him. It was demonstrated that he forfeited and waived his right to be present at the hearing. See People v. Josey, 5 A.D.3d 398, 771 N.Y.S.2d 904 (2d Dept. 2004)(defendant forfeited right to be

⁴The statute’s purpose is: (1) “to prevent the ancient evil of secret trial and [2] to guarantee the defendant’s right to be present at all important stages of his trial. The significance of the suppression hearing is such that the rationale for requiring the defendant’s present at the trial applies with equal force to require his presence at the suppression hearing.” See Anderson, *supra* at 287.

⁵In Spotford, *supra*, the Court held that the “totality of the record” demonstrated that the defendant had knowingly, voluntarily and intelligently waived his presence when he failed to appear for a Ventimiglia hearing. In addition to finding an express waiver, the Spotford Court found that an implied waiver of presence was established on the record where the Judge told the defendant and his attorney to discuss the defendant’s absence for the hearing and to raise any objections before the trial began, which they did not. Furthermore, the record “clearly reflects that defendant knew that the Ventimiglia hearing had been scheduled and would proceed in his absence” when he asked to be excused through counsel to avoid a conflict with his employer.

present at Sandoval hearing by deliberate refusal to appear).

I make the following conclusions of law:

_____The Court now turns to a discussion of the substantive issues raised by defendant and which were the subject of the hearing. First, probable cause to arrest is present when the facts and circumstances known to the arresting officer, warrant a reasonable person with the same expertise to conclude that a crime is being, or was, committed, and that the defendant is the perpetrator. See People v. Maldonado, 86 N.Y.2d 631, 635 N.Y.S.2d 155 (1995); People v. Carrasquillo, 54 N.Y.2d 248, 455 N.Y.S.2d 97 (1981); People v. McCray, 51 N.Y.2d 594, 435 N.Y.S.2d 679 (1980); see also C.P.L § 70.10(2). The totality of circumstances gives rise to a finding of probable cause when it is more probable than not that the person to be arrested committed a crime. See People v. Carrasquillo, *supra* at 254; People v. Surico, 265 A.D.2d 596, 697 N.Y.S.2d 356 (3d Dept. 1999). This legal conclusion is made after all the facts and circumstances are considered together. See People v. Bigelow, 66 N.Y.2d 417, 423; 497 N.Y.S.2d 630 (1985). Although the facts and circumstances viewed separately may be insufficient to establish probable cause, when these factors are viewed in totality, probable cause may be found. Id.

An arrest does not need to be supported by knowledge and information which, at the time, exclude all possibility of innocence and point to the defendant's guilt beyond a reasonable doubt. See People v. Sanders, 79 A.D.2d 688, 433 N.Y.S.2d 854 (2d Dept. 1980); see also Jenks v. State, 213 A.D.2d 513, 623 N.Y.S.2d 916 (2d Dept. 1995); People v. Brunner, 248 A.D.2d 241, 671 N.Y.S.2d 214 (1st Dept. 1998).

Here, defendant matched the description of the perpetrator as described by the witness. His photograph was placed in a photo array during the course of the police investigation, as noted above. Once he was identified in the array by Ms. Tezecaca on August 21, 2002 the police clearly possessed probable cause to arrest defendant. Defendant, already identified in the photo array, was spotted by Officer Lozano on October 15, 2002, when she observed him and realized that he

was the individual in the wanted poster.⁶ Thus, the police possessed probable cause to arrest defendant.

Second, addressing defendant's claim that his identification should be suppressed, the New York State Constitution prohibits the introduction at trial of identification evidence obtained by the government or its agents, if the identification was secured through unduly suggestive means. An identification procedure is "unduly suggestive" if it "creates a substantial likelihood that the defendant would be singled out for identification." People v. Chipp, 75 N.Y.2d 327, 335, 553 N.Y.S.2d 72 (1990), *cert. denied* 498 U.S. 833 (1990).

At the pretrial hearing on the issue of undue suggestibility held before this Court, the People have met their burden of demonstrating that the noticed pre-trial identification procedure was legally conducted and not unduly suggestive, People v. Chipp, *supra*. The photo array employed was evaluated by the Court and is found to be proper and not impermissibly suggestive.⁷

Reviewing the actual lineup procedure itself to determine if any suggestiveness existed, this Court finds that the lineup was not improperly conducted or suggestive and is admissible.⁸ Upon reviewing the lineup photograph, the five fillers appeared reasonably similar in appearance to defendant. Case law does not require that stand-ins be identical to defendants. The constitutional proscription against suggestive lineups will be satisfied as long as there is a sufficient degree of resemblance among the fillers (People v. Burwell, 26 N.Y.2d 331 [1970]; People v. Baptiste, 201 AD2d 659 [2d Dept. 1994]; People v. Allah, 158 A.D.2d 605 [2d Dept. 1990]). That degree of resemblance was satisfied in this lineup. Nothing about the defendant singled him out for identification. (People v. Riddick, 645 N.Y.S.2d 90 [2d Dept. 1966], appeal denied 88 N.Y.S.2d 993 [1996]); *see* People v. Fuller, 185 A.D.2d 446, 586 N.Y.S.2d 366 (3d Dept. 1992).

⁶The "Wanted Poster" was entered into evidence as People's Exhibit "2" for purposes of the hearing.

⁷The photo array, which was examined by the Court, was entered into evidence as People's Exhibit "1" for purposes of the hearing.

⁸This Court viewed the actual lineup photograph which was entered into evidence as People's Exhibit number "3" for purposes of the hearing.

Defendant was given the opportunity to select a number to hold and he selected number "2". All fillers and defendant wore baseball caps during the lineup. Thus, the identification at the lineup or any potential in-court identification need not be suppressed.

Next addressing defendant's claim that property recovered from his person should be suppressed, the 4th Amendment of the United States Constitution and article I, § 12 of our State Constitution protect individuals "from unreasonable government intrusions into their legitimate expectations of privacy." US Const, 4th Amend; NY Const, art I, § 12; People v. Quackenbush, 88 N.Y.2d 534, 647 N.Y.S.2d 150 (1996), citing People v. Class, 63 N.Y.2d 491, 483 N.Y.S.2d 181 (1984), quoting U.S. v. Chadwick, 433 US 1, 7, 97 S. Ct. 2476 (1977). However, the Court of Appeals has justified a warrantless search incident to an arrest in two circumstances: to protect the public's safety and safety of the officer, and to prevent evidence from being destroyed or concealed. See People v. Wylie, 244 A.D.2d 247, 666 N.Y.S.2d 1 (1st Dept. 1997), citing People v. Smith, 59 N.Y.2d 454, 465 N.Y.S.2d 896 (1983); People v. Belton, 55 N.Y.2d 49, 447 N.Y.S.2d 873 (1982); People v. Gokey, 60 N.Y.2d 309, 469 N.Y.S.2d 618 (1983).

In this case, the officer executed a search incident to a lawful arrest. Under this exception, police are permitted to search a person who is lawfully arrested if the search closely follows the arrest, which is what occurred in the circumstances presented in this case. See Wylie, *supra* at 249.

Accordingly, the defendant's motion to suppress the pretrial identification, the prospective in-court identification, and the property recovered from his person is denied.⁹

The foregoing constitutes the opinion, decision and order of the court.

Kew Gardens, New York
Dated: June 22, 2005

SEYMOUR ROTKER
JUSTICE SUPREME COURT

⁹Although the People served notice of an alleged statement made by the defendant to law enforcement pursuant to CPL § 710.30(1)(a), and a hearing was granted to establish the admissibility of such statement, no evidence was presented upon this issue. Thus, the admissibility of such statement if warranted for rebuttal purposes, is left for the trial court's determination.

