

**This opinion is uncorrected and subject to
revision in the Official Reports. This opinion
is not available for publication in any official
or unofficial reports, except the New York Law Journal,
without approval of the State Reporter or the
Committee on Opinions (22 NYCRR 7300.1)**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-11

-----x
THE PEOPLE OF THE STATE OF NEW YORK : BY: JOSEPH KEVIN MCKAY, J.
: :
-against- : DATE: September 17,2001
: :
WILLIAM GONZALEZ and : INDICT. NO. QN11190/2000
ALFREDO VEGA, : :
Defendants :
-----x DECISION AND ORDER

Defendant Gonzalez filed a written motion on September 13, 2001, seeking preclusion of the undercover police officer's identification testimony at trial on the basis of a lack of notice from the District Attorney under CPL 710.30(1)(b). Upon the oral application of co-defendant Alfredo Vega, the Court permitted Vega to join in this motion without objection. The District Attorney opposed the motion by Affirmation dated September 17, 2001. The motion was heard on short notice, also without objection.

The indictment arises out of a standard buy and bust operation by the New York City Police Department involving an alleged street sale of a small quantity of heroin to an undercover police officer. After the completion of pre-trial motions and other proceedings, the case was referred to this Court for trial.

Because of the admitted lack of identification notice regarding the undercover officer's identification of the defendants, they did not seek a Wade hearing or suppression of identification testimony in their omnibus motions. Co-defendant Vega, however, did receive a Mapp hearing at his request, which did not include Gonzalez, from whom no physical evidence had been taken at the time of his arrest. After the Mapp hearing, held on May 9, 2001 before another Judge, Vega's motion to suppress the physical evidence was denied.

Both defendants in their omnibus motions sought the same preclusion relief now requested in this motion. The motion Court granted that relief only to the extent of precluding any identification for which statutory notice was required. When defense counsel applied to the same motion Court for reconsideration, the issue was then referred to the trial Court.

All parties concede that the undercover police officer, approximately five to ten minutes after the sale, made an identification of both defendants at the scene as the persons who sold heroin to the undercover. It is clear that the defendants are not entitled to a Wade hearing under those circumstances. People v.

Wharton, 74 N.Y.2d 921 (1989). Moreover, for such confirmatory identifications statutory notice pursuant to CPL 710.30(1)(b) is not required. People v. Cebollero, 252 A.D.2d 529 (2d Dept. 1998), lv denied 92 N.Y.2d 981 (1998); People v. Guzman, 197 A.D.2d 705 (2d Dept. 1993), lv denied 82 N.Y.2d 896 (1993); People v. Overton, 192 A.D.2d 624 (2d Dept. 1993), lv denied 82 N.Y.2d 757 (1993). See, People v. Rodriguez, 79 N.Y.2d 445 (1992). The fact that such notice may be gratuitously served does not change the character of the identification nor require that a Wade hearing be granted. People v. Allen, 162 A.D.2d 538 (2d Dept. 1990), lv denied 76 N.Y.2d 851 (1990).

The thrust of the defense argument in this motion is that People v. Gethers, 86 N.Y.2d 159 (1995), changes the legal landscape in this area, at least implicitly. This is so, the argument goes, because Gethers recognizes that the defense may have a right to suppress an identification, apart from undue suggestibility, based on the lack of probable cause for the arrest. Without identification notice, the defense further reasons, the Gethers issue will not be considered because of the dilemma created by the statute and the case law whereby preclusion is forfeited when the defense moves for and receives a suppression hearing. CPL

710.30(3); People v. Kirkland, 89 N.Y.2d 903 (1996); People v. Merrill, 87 N.Y.2d 948 (1996). That is the proffered reason why the defendants moved only for preclusion in this case, and did not move for a Gethers hearing. The defense argument fails for three reasons.

First, the argument is circular because it depends upon and assumes the validity of the notice requirement, instead of proving its validity. In other words, there can be no cognizable harm to the defense in risking forfeiture of the preclusion claim if such claim is worthless to begin with, because notice is simply not required, as all the cases to date hold.

Secondly, the forfeiture of preclusion should not apply herein in any event to bar the defense from moving to suppress the identification, because a Gethers motion is not based upon a due process Wade violation claim, but rather is derived from the wholly separate law of search and seizure. Accordingly, the statutory notice and forfeiture provisions of CPL 710.30, as a matter of statutory construction, should have no bearing on a Gethers claim. Admittedly, no precedent squarely on this point has been found by counsel or the Court. However, the interplay of People v. Mendoza,

82 N.Y.2d 415 (1993) with Gethers, as found in People v. Wright, 256 A.D.2d 106 (1st Dept. 1998), lv denied 94 N.Y.2d 831 (1999), illustrates the principle. No factual showing under Mendoza would be required to obtain a Wade hearing under CPL 710.30(1)(b), but the clear reasoning of the Wright decision is that such a showing is necessary as a condition of granting a Gethers hearing. This means that CPL 710.30 does not govern Gethers hearings, and the defense should not fear forfeiture of preclusion in cases where such a claim is worth preserving.

Finally, with particular reference to the facts and circumstances of this case, the defense has not made, and as far as can be discerned from this record, is not able to make an adequate showing under People v. Mendoza, supra, to be entitled to a probable cause Gethers hearing. See, People v. Wright, supra. The Mapp hearing held for co-defendant Vega established that, pursuant to descriptions given to the arresting officer by the undercover police officer, both defendants were detained near the scene of the sale and identified by the undercover officer shortly thereafter. Neither at the Mapp hearing nor at oral argument of this motion before this Court did either defense counsel challenge the sufficiency the descriptions given to justify the brief detention

of the defendants before the identifications were made. Similarly, no such challenge was made in the moving papers filed in support of this motion. It therefore appears that a Gethers hearing was not warranted in this case and the claimed inability to move for such hearing based on a failure of notice is no loss at all.

For all of the foregoing reasons the motion on behalf of each defendant is hereby DENIED in all respects. The parties are directed to proceed to trial on September 20, 2001, assuming, in the wake of the unspeakable and tragic World Trade Center disaster of September 11, 2001, jurors and necessary police witnesses become available.

IT IS SO ORDERED.

.....
JOSEPH KEVIN MCKAY, A.J.S.C.