

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.: 00208 - 03

ANDERSON ZAMBRANO  
JOHN CEBALLOS  
CARLOS ACUNA

MOTION: TO SUPPRESS  
IDENTIFICATION, TANGIBLE  
PROPERTY, AND STATEMENT

Defendant.

-----X

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
THOMAS SHEEHAN, ESQ.  
For the Defendant, Zambrano

JOSEPH JUSTIZ, ESQ.  
For the Defendant, Ceballos

MIGUEL GONZALEZ, ESQ.  
For the Defendant, Acuna

RICHARD A. BROWN, D.A.

\_\_\_\_\_  
BY: PAUL SCHRAETER, A.D.A.  
Opposed

Upon the foregoing papers, and due deliberation had, the motions are granted in part and denied in part. See accompanying memorandum this date.

Kew Gardens, New York  
Dated: November 24, 2003

\_\_\_\_\_  
SEYMOUR ROTKER, J.S.C.

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

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

BY: SEYMOUR ROTKER

- against -

Indictment No. 00208 -03

ANDERSON ZAMBRANO  
JOHN CEBALLOS  
CARLOS ACUNA

Defendant.

-----X

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

An indictment has been filed against the defendants accusing them *inter alia* of the crime of gang assault in the first degree. The charge is that the defendants, acting in concert with each other, on November 26, 2002, in Queens County caused serious physical injury to Anthony Lugo with use of a dangerous instrument.

Defendants, claiming that improper identification testimony may be offered against them, have moved to exclude the pretrial identifications as well as the prospective identification testimony of Anthony Lugo (as to each defendant), Adelaida Gonzalez (as to defendant Ceballos), Stephanie Rodriguez (as to defendants, Zambrano and Acuna) and Jessica Sylvester (as to defendants, Zambrano and Acuna) on the ground that they are inadmissible because the prior identifications of the defendants by the prospective witnesses were improper and that the defendants were detained without probable cause for the purpose of having them identified.

The People have the burden of going forward to show that the pretrial identification procedures were not constitutionally impermissible. The defendants, however, bear the burden of establishing, by a preponderance of the evidence, that the procedures were impermissible. If

the procedures are 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, Anderson Zambrano, claiming to be aggrieved by an unlawful search and seizure, has moved to suppress a shirt, seized from his person by Officer Terrence O'Hara on November 26, 2002.

Defendant, John Ceballos, claiming to be aggrieved by an unlawful search and seizure, has moved to suppress *inter alia* a dangerous instrument and a jacket, seized from his person by Officer Terrence O'Hara on November 26, 2002.

Defendant, Carlos Acuna, claiming to be aggrieved by an unlawful search and seizure, has moved to suppress *inter alia* dangerous instruments and a knapsack, seized from his person by Officer Terrence O'Hara on November 26, 2002.

In this case, the People assert that the seizures of the various items from the defendants' persons were incident to lawful arrests. The People have the burden, in the first instance, of going forward to show the legality of police conduct. Defendants, however, bear the ultimate burden of proving by a preponderance of the evidences that the physical evidence should be suppressed.

Defendant Acuna, also claiming to be aggrieved by an unlawful acquisition of evidence, have moved to suppress a statement made by him on November 26, 2002, to Officer Terrence O'Hara 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.

A pretrial suppression hearing was held before me on November 14 and 17, 2003.

Testifying at the hearing was Police Officer Terrence O'Hara of the 110<sup>th</sup> Precinct.

I find his testimony to be credible.

**I make the following findings of fact:**

On November 26, 2002, Police Officer Terrence O' Hara was working on an Anti-Crime Patrol in Queens County. Officer O'Hara while on patrol went to 90<sup>th</sup> Street and Corona Avenue, Queens, New York, and arrived at approximately 4:30P.M. At the location he met someone who identified himself as Anthony Lugo. Lugo said he was attacked by three people and was punched, pushed and stabbed. O'Hara saw some blood oozing from under the defendant's jacket sleeve. The perpetrators were generally described as male Hispanics whose ages ranged between sixteen and twenty and one of whom was wearing a "spider shirt."

Lugo was taken on a canvas of the area but within fifteen minutes or so he told the officer he was not feeling well and wanted to go to the hospital. An ambulance was called to the scene and Lugo and Officer O'Hara were taken to Elmhurst Hospital. At the hospital, while Lugo was in the emergency room, an unnamed nurse told Officer O'Hara that two other males who claimed that they were assaulted were in the pediatric emergency room. Officer O'Hara went to the location and saw two males. As he was approaching them, friends of Lugo, Ms. Sylvester and Ms. Rodriguez, observed these two males from a distance of about ten feet and excitedly told Officer O'Hara that the two males had been involved in the attack on Lugo. Officer O'Hara walked over to the two individuals (Acuna and Zambrano) and started talking to them. Officer O'Hara in words or substance stated to Acuna, "Did you guys call the police?" and Acuna in words or substance said, "My friend, (referring to Zambrano) got hit in the head," (Zambrano had a lump on the back of his head). At that point, Officer O'Hara saw Acuna fiddling with

something in his sweatshirt pocket and O'Hara took a knife from Acuna. Acuna was also carrying a knapsack. O'Hara recovered a second knife from the knapsack. Neither Acuna nor Zambrano were handcuffed or told they were under arrest.

O'Hara told Acuna in Zambrano's presence that they got the guy (apparently referring to the one who assaulted Zambrano). He asked them if they would walk down the hall to look at this other guy (referring to Lugo). Zambrano and Acuna were taken to the emergency room where Lugo was being treated and Lugo was asked by Officer O'Hara whether or not these were the guys that attacked him. In their presence Lugo said, "No." Zambrano and Acuna were led out of the room and Officer Ferrar (phonetically) was asked to watch them. Lugo was then asked by Officer O'Hara, what was going on about the identification and Lugo indicated that he was nervous and did not want to identify the people, but that they were actually involved in the attack on him.

Zambrano was wearing a "spider shirt" which was taken from him.

Ceballos who was present at the hospital emergency room was observed and pointed out by Gonzalez (who did not speak English). By her actions she inferred that Ceballos was the third person who attacked Lugo.

Ceballos was detained and brought in the room where Lugo was being treated. Officer O'Hara asked Lugo if he recognized Ceballos. Lugo answered, that he was one of the guys who attacked him. Ceballos had a knapsack which was searched and a box cutter taken from it. He also had a black jacket which was taken from him.

**I make the following conclusions of law:**

The first of the many issues raised by the facts before the Court concerns Officer O'Hara's initial confrontation of defendants Acuna and Zambrano in the pediatric emergency room of Elmhurst Hospital.

In evaluating this or any police action, the Court must consider whether it was justified in its inception and whether it was reasonably related in scope to the circumstances which rendered its initiation permissible (People v Cantor, 36 NY2d 106, 111). Pursuant to the fundamental principles articulated by the Court of Appeals in People v. De Bour, 40 NY2d 210 (1976), the trial Court must examine whether the intensity of any given police action can be reasonably justified by the articulated facts and circumstances as perceived by the officer or officers. The goal is to balance the legitimate needs of law enforcement against the rights of the citizenry to be free from unwarranted government interference. The standard to be applied is that of reasonableness, the touchstone of the Fourth Amendment. (See People v Chestnut, 51 NY2d 14; People v Lemmons, 40 NY2d 505, 508; Pennsylvania v Mimms, 434 U.S. 106, 108-109; Delaware v Prouse, 440 U.S. 648, 653-654; Camara v Municipal Ct., 387 U.S. 523.) For "[i]t must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." (Elkins v United States, 364 U.S. 206, 222; see, also, People v Rivera, 14 NY2d 441, 447, cert den 379 U.S. 978.). The greater the specific and articulable indications of criminal activity, the greater may be the officer's intrusion upon the citizen's liberty.

### **Search and Seizure of Physical Evidence [Knives] from Defendant Acuna**

The evidence adduced at the hearing establishes that Officer O'Hara approached Acuna and Zambrano in possession of a significant amount of relevant information. He had spoken to one Anthony Lugo and had been told that Lugo had been assaulted and stabbed by three male Hispanics aged sixteen to twenty years of age. One of these men was said to be wearing a distinctive "spider shirt". A nurse at the hospital had stated that two young men were in another area of the hospital complaining that they had been assaulted. Two individuals (Stefanie Rodriguez and Jessica Sylvester) who identified themselves as friends of Mr. Lugo and who had been present at the scene of the assault had spontaneously pointed to Acuna and Zambrano and had identified them as Lugo's assailants.

Although this information could be said to justify fairly intrusive police action, Officer O'Hara decided to take a more cautious and restrained approach. He walked over to the suspects and asked "Did you guys call the police?". To this defendant Acuna responded that "my friend got hit in the head". It is significant to note that at the time of this conversation Officer O'Hara was investigating an assault in which one participant had been stabbed and seriously injured. It is also significant that no backup officer was present and that he was in a crowded hospital emergency room.

Officer O'Hara saw Acuna fiddling with something in his sweatshirt pocket. He reached in and removed a knife. The Court finds that this action was taken to insure the officer's personal safety and that of the other people present in the hospital. It was "reasonably related in scope and intensity to the information the officer initially (had), and to the information he gather(ed) as his encounter with the citizen unfold(ed) (Cf. People v De Bour, 40 NY2d 210.)".

Depending upon the degree of credibility that one assigns to the civilian witnesses who pointed out the defendants as perpetrators of the assault, it is possible to argue that the officer had "probable cause" to believe that the defendants were guilty of a felony<sup>1</sup>. He certainly had "reasonable suspicion" that the suspects had been personally involved in criminal activity (a felony assault). Armed with "probable cause", an arrest is authorized which carries with it the right to search not only the subject's person but the area under his immediate control, People v. DeSantis, 46 NY2d 82 (1978); Chimel v. California, 395 US 752 (1969). Armed with "reasonable suspicion", an officer has the authority to frisk a suspect if (he) reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed [CPL 140.50(3)].

Neither the Criminal Procedure Law nor the Penal Law contain a legal definition of the term "frisk". In his dissenting opinion in People v. Rivera, 14 NY2d 441 (1964), Judge Fuld wrote that a "frisk" is a species of search and, in point of fact, both decisions and dictionaries so define it. Thus, the Connecticut Supreme Court wrote that "The 'frisking' of the defendant, as he stood against the car, to see if he was armed was also a search of the person" (State v. Collins, 150 Conn. 488, 491) and Webster's New International Dictionary ([2d ed.], p. 1010) likewise indicates that to "frisk" means to "search (a person), as for concealed weapons, stolen articles, etc., especially. after arrest, as by running the hand rapidly over the clothing, through the pockets, etc.".

---

<sup>1</sup> Generally, information obtained from an identified citizen informant can be presumed reliable on the theory that an "identified" individual could be prosecuted for false reporting, People v. Hicks, 38 NY2d 90 (1975). However, in this case, the source of knowledge of the crime possessed by these witnesses is unclear. The evidence established that they were present at the scene when the officers arrived but not whether their information about the incident came from personal observation, from conversations with Lugo or from some other source.

The proper question to ask with respect to a determination of the legality of Officer O’Hara’s actions is not whether what he did was a “frisk” or a “search”. All frisks are searches. Whether the police officer “pats down” a suspects outer clothing or directly reaches into his pocket makes no difference. Quoting Judge Fuld again “it is the slightest touching which is condemned, and the reason for this is that the insult to individuality, to individual liberty, is as grave and as objectionable in one case as in the other”<sup>2</sup>.

The question then is whether the “search” was reasonable. Pursuant to People v. Cantor, 36 NY2d 106 (1975), whether or not a particular search or seizure is to be considered reasonable requires weighing the government's interest in the detection and apprehension of criminals against the encroachment involved with respect to an individual's right to privacy and personal security (Terry v. Ohio, *supra*; Camara v. Municipal Ct., 387 U. S. 523). In conducting this inquiry we must consider whether or not the action of the police was justified at its inception and whether or not it was reasonably related in scope to the circumstances which rendered its initiation permissible. (Terry v. Ohio, *supra*, at p. 19; Cupp v. Murphy, 412 U. S. 291; People v. Kuhn, 33 NY2d 203.)

The governmental interest at issue here is the safety of the officer. The question is whether the action taken by Officer O’Hara was limited in scope to that objective or whether it was, instead, motivated by a desire to locate or recover contraband or evidence. The officer’s motivation must be inferred from the facts. At the time of the initial confrontation with the suspects, he had a reasonable suspicion that they had been involved in a felony assault involving knives. Because he was investigating a crime which involved the alleged use of a weapon or weapons, he had a right to fully pat down the suspects. He chose not to do so. He made no attempt to invade either suspect’s physical space until he noticed Acuna “fiddling” with something in his pocket. This observation triggered a reasonable concern for his own safety which he prudently and directly addressed by reaching into the suspect’s sweatshirt pocket and

---

<sup>2</sup> CPL 140.50(3) codifies an officers right to “frisk” in connection with a forcible stop. In relevant part, it reads that an officer who “reasonably suspects that he is in danger of physical injury, he may **search** [emphasis added]” a suspect “for a deadly weapon or any instrument...capable of causing serious physical injury”.

recovering what turned out to be a knife. The action taken by the officer was significantly less intrusive than a full body pat down which was clearly authorized<sup>3</sup>.

The Court finds, therefore, that, viewed in light of the totality of the circumstances presented to the officer in this case, his actions which resulted in the seizure of the knife were actually less intrusive than a full frisk of the suspect and were, therefore, authorized by law.

The search of the suspect's knapsack which uncovered a second knife is more problematic. This aspect of the police action was more intrusive than the seizure of the knife from the defendant's sweatshirt and consequently requires greater justification. The rationale for both a "frisk" associated with a forcible stop and a "search incident to a lawful arrest" is to assure the safety of the officer in performing his duties. In this case, Officer O'Hara had no reason to suspect that a weapon was secreted in the knapsack or that it posed an immediate threat to his or anyone else's safety, see People v. Allen 280 AD2d 270 (1<sup>st</sup> Dept., 1970); People v. Wylie, 244 A.D.2d 247 (1<sup>st</sup> Dept., 1997) lv. denied 91 N.Y.2d 946 (1998). Unlike the search that uncovered the knife which was a protective one, the evidence indicates that this search was motivated by a desire to obtain contraband or evidence. There being no probable cause to support this, the search was unauthorized and its fruit must be suppressed.

The Court notes that the People did not argue that the second knife could be admitted pursuant to the "inevitable discovery" exception to the exclusionary rule. This doctrine was articulated by the Court of Appeals in People v. Fitzpatrick, 32 NY2d 499(1973). Pursuant to Fitzpatrick and to a number of cases that follow it, evidence obtained through the exploitation of illegal police conduct "need not be suppressed if the prosecution can establish, by a very high degree of probability, that, had the illegal conduct not occurred, a lawful event or series of events would have taken place which would have led inevitably to the discovery of the evidence".

---

<sup>3</sup> The Court is aware of a number of cases that appear to hold that the act of reaching into a pocket as opposed to a pat down of the suspects outer clothing constitutes a "full blown" search requiring probable cause and not a "frisk" which can be justified by the lower "reasonable suspicion" standard, People v. Cobb, 208 AD2d 453 (4<sup>th</sup> Dept., 1994); People v. Johnson, 277 AD2d 875 (4<sup>th</sup> Dept., 2000); People v. Hill, 171 AD2d 1017 (4<sup>th</sup> Dept., 1991); People v. Doris A. 163 AD2d 63 (1993). These cases, however, are distinguishable because in them there was never any articulated basis to conclude that the officers' actions were motivated by self protection. All of these cases were fishing expeditions without probable cause as opposed to limited protective searches justified by reasonable suspicion.

**Showup Identification of Acuna and Zamprano by the Complainant and the Seizure of Physical Evidence [Shirt] from Zambrano**

Officer O’Hara’s next relevant action was to inform Acuna and Zambrano that the individual whom they claimed had assaulted Zambrano was elsewhere in the hospital. He asked them if they would go with him to take a look at this individual. Despite the fact that two knives had been recovered from Acuna, the suspects were not under arrest and readily agreed to accompany the officer<sup>4</sup>. They proceeded to the emergency room where Mr. Lugo was awaiting medical treatment. Upon arrival at that location , Officer O’Hara asked Lugo if the suspects were the individuals who had assaulted him. He responded in the negative. After the suspects had left the room, Officer O’Hara had a further conversation with Mr. Lugo. Lugo told him that he had been nervous and afraid to make an identification in the presence of the suspects. He told the officer that Acuna and Zambrano had, in fact, committed the assault.

Following the identification of the suspects by the complainant Lugo, Officer O’Hara had “probable cause” to believe that a felony had been committed and that the defendants had committed it, People v. Gonzalez, 138 AD2d 622(2nd Dept., 1988). A custodial arrest was authorized and effected [CPL 140.10(1)]. A “spider shirt” which matched the description of the one which Lugo had seen during the assault was seized from defendant Zambrano. This seizure was authorized incident to the lawful arrest.

The defendants Acuna and Zambrano argue that the showup procedure which resulted in their identification by Lugo was both unnecessarily suggestive and the fruit of an illegal arrest. Since the defendants had not been arrested or even detained at the time of the identification the only issue is that of “unnecessary suggestiveness”.

Showups have been viewed by the courts to be inherently suggestive. They have been “widely condemned” and “strongly disfavored” as a reliable method of securing an identification, People v. Riley, 70 NY2d 532 (1987). Lineups are preferred. Showups, however, are permitted if there is some necessity

---

<sup>4</sup>. Officer O’Hara’s motives in asking the suspects to go with him to have a look at Mr. Lugo are not entirely clear from the evidence. He may have been using deception to secure their cooperation or he may actually have wanted to obtain more evidence before making an arrest. It is clear, however, that at the time of the showup itself the suspects were neither arrested nor detained. Thus, there can be no Fourth Amendment basis to suppress the identification testimony.

to resort to the procedure or if it is conducted in close temporal and spacial proximity to the crime. In the latter case, potential suggestivity can, in proper circumstances, be outweighed by presumed reliability of an identification made shortly after the event when the witness's memory is fresh and by the possibility that an innocent suspect could be promptly released, People v. Duvvon, 77 NY2d 541 (1991)

What specific degree of temporal and spacial proximity will be sufficient to justify a showup as opposed to a lineup has not, and perhaps cannot be, definitively articulated in advance. The acceptable length of the gap in time and space between the crime and the identification can, however, be extended where any delay is explained or justified by reference to an "unbroken" and "fast moving" chain of events, People v. Andrews, 255 AD2d 328 (2<sup>nd</sup> Dept., 1998). In this case, the identification occurred within an hour or two of the assault and at an unspecified distance from the crime scene. However, the identification and the crime are linked by an "unbroken chain of events". The perpetrators had fled the scene prior to the arrival of the police. They were encountered by chance a few hours later. The original complaint was still under investigation.

As discussed previously, when Officer O'Hara first approached the suspects he may or may not have had probable cause to effect an arrest. The evidence establishes that he was not convinced that he had acquired sufficient evidence of guilt and, consequently, took a more cautious approach. Instead of arresting two possibly innocent individuals and holding them in custody until a lineup could be arranged, he escorted them to the complainant and simply asked if these were the culprits. This question was clearly suggestive. So was the fact both suspects were introduced to the witness at the same time. The officer's actions, however, are excusable on two grounds. First, it is crystal clear that his intent was not to secure an eyewitness identification of individuals who, through some investigation of his own, he had determined to be guilty. Commendably, he wanted to be sure that he was arresting the proper party or parties. Secondly, in People v. Love, 57 NY2d 1023 (1987) the Court of Appeals signaled that it would tolerate "less than ideal" procedures in the "interest of prompt identification".

Neither can the officer's questioning of the witness following his failure to make an initial identification of the suspects be viewed as an attempt on his part to coerce or influence an improper identification. In an obvious effort to see what future course his investigation should or could take, he simply asked about the witness's unexpected reaction to the showup. He learned that Lugo had acted out of a reasonable fear of retaliation should he name the perpetrators as his assailants and he learned that, at least in Lugo's mind, these were the individuals who should be arrested.

The Court finds that the showups, though suggestive, were justified pursuant to People v Duuvon, 77 NY2d 541 (1991)<sup>5</sup>. They were an expedient reasonably relied on in the interest of obtaining a “prompt on scene” investigation.

### **Showup Identification of Ceballos by Lugo and the Seizure of Physical Evidence [Knife and Jacket]**

The final police action of the afternoon was triggered when a young woman named Adelaida Gonzales, who was also a friend of Lugo’s but who could not communicate in English, indicated to Officer O’Hara by gestures that another individual present in the hospital had been somehow involved in the incident. Based upon this information Officer O’Hara had reasonable suspicion sufficient to require this individual to travel the short distance to the complainant’s location for the purpose of ascertaining whether or not further police action would be warranted, People v. Hicks, 68 NY2d 234 (1986).

Upon arrival at the complainant’s location, O’Hara asked the neutral question “Do you recognize this man?”, whereupon the complainant identified the suspect as the third perpetrator. This individual was then arrested. He identified himself as John Ceballos. A search incident to the arrest resulted in the seizure of a box cutter from the defendant’s knapsack and of a black jacket from his person. Both of these seizures were justified as incident to the lawful arrest. The search of Ceballos’ knapsack as opposed to Zambrano’s was authorized because at the time of the search of Ceballos’ property the officer had actually determined to take him into custody. The search of the bag was necessary to insure that it did not contain anything that Ceballos could use to assault the officers or to effect an escape. In addition, the invasion of privacy incident to the search of the bag was far less than that involved with the custodial arrest.

---

<sup>5</sup> The defendant cites People v. Johnson, 274 AD2d 402 (2<sup>nd</sup> Dept., 2000). The defendant in that case was already in custody for a robbery when a showup was conducted regarding a second robbery. Since the defendant was subject to lawful detention for the first crime, there was no immediate “necessity” to conduct a showup as opposed to a lineup for the second offense. In this case, far from being irrevocably in custody, the suspects might not have been arrested at all if they were not identified by the witness in the showup.

### **The Defendant Acuna's Statement to Police**

The defendant Acuna has moved to suppress a statement which he allegedly made to Officer O'Hara on the afternoon of his arrest. According to the People's notice of intent the substance of the statement was "I was in a fight earlier today". As testified to at the hearing, however, the statement was "My friend (Zambrano) got hit in the head". Whatever the substance of the statement, the evidence adduced at the hearing established (1) that it was not the product of actual physical coercion or of unauthorized trickery on the part of law enforcement, (2) that it was not the product of an illegal arrest since the defendant was not arrested or even detained when he allegedly made it and (3) since the defendant was not under detention the statement was not the product of custodial interrogation which would have required the prior administration of Miranda warnings. Therefore, there is no basis for suppression of the statement and, assuming its relevancy as an admission, the People may introduce it at trial.

### **Point out Identifications by Gonzalez, Rodriguez and Sylvester**

Finally, the defendant Ceballos has moved to suppress identification testimony by Adelaida Gonzalez and the defendants Acuna and Zambrano have moved to suppress similar testimony by Stephanie Rodriguez and Jessica Sylvester. All three of the defendants contend that suppression is required by CPL 710.30 because they were identified in unnecessarily suggestive police arranged showups. CPL 710.30 is, by its terms, limited to "police arranged confrontations". The evidence introduced at the hearing establishes that the police did nothing to "arrange" identifications of any of the defendants by these witnesses. The "point out" identifications which did occur were the spontaneous product of an accidental encounter between the witnesses and the suspects. There being no governmental action involved there exists no basis for the suppression of any of the identification testimony, see People v. Dixon, 85 NY2d 218 (1995), People v. Capel, 232 AD2d 415 (1<sup>st</sup> Dept., 1995)..

Accordingly, the defendant Acuna's motion to suppress the knife recovered from his knapsack is granted. All other motions to suppress physical evidence are denied. All motions to

suppress identification testimony are denied. The defendant Acuna's motion to suppress a statement is denied.

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

Kew Gardens, New York  
Dated: November 24, 2003

---

SEYMOUR ROTKER, J.S.C.