

ASSIGNMENTS # 9 & 10

Insisting on his innocence, Randolph rejects every plea offer. The case then proceeds to the suppression hearing phase.

There are two hearings. At the Dunaway hearing, Randolph challenges whether the police had probable cause to arrest him. He seeks suppression of the lineup identification as derivative evidence of an unconstitutional arrest. At the Wade hearing, Randolph challenges the lineup on suggestiveness grounds. He seeks suppression of the lineup identification on that basis.

Tonight, you have received the defense memo on each point. You are to prepare the prosecution's response for one of these hearings. You are to submit a persuasive research memorandum of law based on NY state law and US Supreme Court precedent.

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: PART 26

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THE PEOPLE OF THE STATE OF NEW YORK, :
Respondent, :
-against- : MEMORANDUM
OF LAW
TERRY RANDOLPH, :
Defendant. :

-----X
IN LIGHT OF THE DUBIOUS NATURE OF THE
SEDATED AND CONFUSED COMPLAINANT'S
HOSPITAL PHOTOGRAPHIC IDENTIFICATION
AND THE POLICE ACTIONS SUBSEQUENT TO
THAT PROCEDURE, THE POLICE LACKED
PROBABLE CAUSE TO ARREST DEFENDANT.
U.S. CONST., AMENDS. IV, XIV; N.Y. CONST.,
ART. 1, §12.

Actions speak louder than words. Although the People contended that the complainant's hospital photographic "identification" of defendant provided probable cause to arrest him, even the police, by their actions, recognized that this "identification" by a woozy, confused and sedated complainant was unreliable. The police likewise recognized that defendant did not match the physical description of the shooter. Therefore, defendant's arrest was not supported by probable cause. Accordingly, this court should now hold that the police lacked probable cause to arrest defendant, suppress the lineup identification, which was a by-product of defendant's illegal arrest. U.S. Const., Amends. IV, XIV; N.Y. Const., Art. I, §12.

In order to arrest a person without a warrant, the police must have probable cause to believe that this individual had committed a crime. People v. Maldonado, 86 N.Y. 2d 631 (1995); People v. Johnson, 66 N.Y. 2d 398, 402 (1985). To meet this burden of establishing probable cause, "the People must introduce facts and circumstances, including the description upon which the police acted which, when viewed together, would lead a reasonable person possessing the same expertise as the arresting officer to conclude that an offense has been committed or is being committed and that the arrested person was the perpetrator". People v. Simpson, 174 A.D. 2d 348 (1st Dept. 1991).

Here, the police predicated their arrest of defendant solely upon an unreliable photographic identification of defendant by the complainant. By his own admission, however, based upon his medical condition, pain and sedated state, the complainant had absolutely no recollection of this identification procedure. Moreover, Detective Crowley, who conducted that identification procedure, admitted that the complainant was "woozy" and "confused" when he made his photographic identification of defendant. In addition, Crowley acknowledged that the complainant was sedated at the time of this procedure.

Of course, Crowley claimed verbally that this identification was reliable. His actions, however, belie that claim. After the complainant was released from the hospital, Crowley attempted two further identification procedures with him. First, Crowley had the complainant

view photographs on a computer in an effort to identify his assailant. Tellingly, defendant's photograph was not contained in this viewing. The reason for its absence is quite simple. The complainant's description of his assailant did not match defendant's physical appearance. Defendant is significantly older and heavier than the described assailant. In addition, defendant does not wear eyeglasses while the assailant did.

In assembling the computer display, Crowley chose to display individuals who possessed the described characteristics of the assailant. Thus, the detective recognized that defendant did not match the description of the assailant. His action, in displaying individuals who matched that description, demonstrated that Crowley doubted the reliability of the complainant's identification of defendant.

When this computer photographic identification procedure did not produce a positive identification, Crowley conducted a second post-hospital identification procedure with the complainant. This time Crowley took the complainant on a canvas of the neighborhood where he had picked up his assailant. This procedure also produced negative results.

Only after these two failed procedures did the police arrest defendant. Those failed procedures, however, demonstrate that the police doubted the reliability of the complainant's hospital photographic identification of defendant. Had they not doubted the reliability of that identification, the police would never have conducted these two post-

hospital release identification procedures. Thus, by their actions, the police showed that they did not possess probable cause to arrest defendant based on the hospital photographic "identification" of defendant by a sedated, semi-conscious, confused complainant. Therefore, the police lacked probable cause to arrest defendant prior to the lineup in this case. Since defendant's arrest was thus unlawful, this court must, in turn, suppress the complainant's lineup identification of defendant because it was a direct fruit of that illegal arrest. People v. Dodt, 61 N.Y.2d 408, 417 (1984).

IN LIGHT OF DEFENDANT'S DISTINCTIVENESS AT THE FACIAL LINEUP, THE IMPROPER POLICE COMMENTS TO THE COMPLAINANT PRIOR TO THE LINEUP AND THE FACT THAT DEFENDANT WAS THE ONLY LINEUP PARTICIPANT WHO RESEMBLED THE MAN IN THE "WANTED POSTER" WHICH HAD BEEN PREVIOUSLY DISPLAYED TO THE COMPLAINANT, THIS LINEUP WAS UNDULY SUGGESTIVE AND SHOULD BE SUPPRESSED. U.S. CONST., AMEND. XIV; N.Y. CONST., ART. I, §6.

The only evidence that tied defendant to the incident in question was the identification of the complainant. However, evidence of this facial lineup identification should be suppressed because the identification procedure employed by the police was impermissibly suggestive. Here, by his appearance and the fact that only defendant resembled the face of the individual displayed in the "wanted poster", he "stood out" from the other lineup participants and his selection by the

complainant as the shooter was thus a virtual certainty. Accordingly, this Court must now suppress the lineup identification in this case. U.S. Const., Amend. XIV; N.Y. Const., Art. I, §6.

"It is a matter of common experience that once a witness has picked out the accused at the lineup, he is not likely to go back on his words . . . so that in practice the issue of identity may . . . for all practical purposes be determined there and then, before the trial." United States v. Wade, 388 U.S. 218, 229 (1967). Because a "reliable determination of guilt is the essence of a criminal trial," evidence of a suggestive pretrial identification is inadmissible. People v. Adams, 53 N.Y.2d 241, 251-253 (1981). To determine whether "the conduct of identification procedures may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law", courts are obligated to employ a "totality of the circumstances" test. Foster v. California, 394 U.S. 440, 442, (1969), citing Stovall v. Denno, 388 U.S. 293, 302 (1967). Thus, the "test to be used in determining the propriety of the pre-trial identification is one of 'fairness'". People v. Logan, 25 N.Y.2d 184, 191 (1969).

Certainly, the law does not require that lineup fillers possess physical characteristics identical to those of the defendant. People v. Chipp, 75 N.Y.2d 327, 336 (1990). However, lineup fillers must be "sufficiently similar in appearance to the defendant so that no characteristic or visual clue could have oriented the viewer toward the

defendant as a perpetrator of the crimes charged." People v. Lunquist, 151 A.D.2d 505, 506 (2d Dept. 1989); People v. Breitenbach, 260 A.D.2d 389 (2d Dept. 1999). This is especially true since scientific studies have shown that any distinctive characteristic renders a lineup identification suspect. See Malpass & Devine, "Measuring the Fairness of Eyewitness Identification lineups," in Lloyd-Bostock & Clifford (Eds.) Evaluating Witness Evidence Chichester: Wiley (1983).

At the outset, it must be noted that every lineup is inherently suggestive. By its very nature, a lineup limits the potential suspect pool downward from the population as a whole to the chosen six. Thus, in any lineup, an arrested suspect has a one in six chance of being selected purely on a random basis.

Of course, it is true that no witness is required to make an identification at a lineup (i.e. he could claim that he recognizes no one). However, scientific studies have proven that when an eyewitness is told by the police that a suspect will appear in a particular lineup, the possibility of some identification being made (either correct or incorrect) by the witness is an almost certainty. Malpass & Devine, "Eyewitness Identification: Lineup Instructions and the Absence of the Offender," 66 J. Applied Psychology 343-350 (1981).

Notwithstanding this scientific reality, the mere intonation by the police of the fact that the witness will be viewing a lineup that contains a suspect is not enough, in and of itself, to contaminate a subsequent

lineup identification. People v. Logan, 25 N.Y.2d 184, 192 (1969), cert. denied, 396 U.S. 1020 (1970); People v. Badley, 147 A.D.2d 578 (2d Dept. 1989). Therefore, absent some visual clue that would direct a witness towards the suspect in the lineup in addition to the suggestive police comments, any resultant identification would be admissible at trial.

Here, besides the police improperly telling the complainant that he would have to come to the precinct to view a lineup because they had a suspect, (which virtually guaranteed that the complainant would identify someone), several distinctive visual clues directed the complainant towards defendant. See People v. Harris, 172 A.D.2d 560 (2d Dept. 1991) (improper police comment factor in this Court's suppression of lineup identification). Standing alone, any of these distinctive visual clues was sufficient to taint this identification procedure. Together they surely created a lineup "unnecessarily suggestive and conducive to irreparable mistaken identification."

First, the police conducted a "face only" lineup. By virtue of a sheet, the police completely covered the height, weight and body build of all of the lineup participants. In addition, the police forced all of the lineup participants to wear knit caps. Hence, the complainant could not see the hairstyles of any of the lineup participants. As a result, the complainant was forced to view a lineup that was reduced solely to the faces of the six men.

Defendant's face stood out from his fellow lineup participants for several salient reasons. First, the complainant had described his assailant as being clean-shaven. Nonetheless, three of the fillers bore readily apparent facial hair. Since the absence of facial hair was a major descriptive characteristic that the complainant had given to the police, he therefore could immediately exclude three of the lineup participants from consideration. Thus, the lineup had, in effect, been reduced to a lineup of three persons. This was unduly suggestive. See People v. Rojas, 213 A.D.2d 56, 70 (1st Dept. 1995) (facial hair disparity factor in court's determination that lineup was unduly suggestive).

Moreover, this significant lineup defect could easily have been remedied. The police could have asked the three persons who sported facial hair to shave. Since the police had the participants wear hats to disguise different hairstyles, they were well aware that they could have taken this simple remedial step to ensure that there was nothing distinctive about the participants' facial hair. Thus, their failure to take this simple remedial step must be seen as a conscious and deliberate attempt to get the complainant to identify defendant. Compare People v. LaMontagne, 135 A.D.2d 653 (2d Dept. 1987) (difference in facial hair of lineup participants remedied by use of false mustaches).

The only other significant descriptive characteristic that the complainant provided was that his assailant wore eyeglasses. It would have been very easy for the police to provide eyeglasses to each of the

lineup participants. They did not do so. Thus, the complainant viewed a lineup of individuals who did not possess this significant descriptive characteristic. This too tainted the lineup since the complainant had to make an identification based upon his imagined perception of what his assailant looked like without glasses.

More troublesome was the fact that this identification procedure was a face lineup. Here, the police had created a "wanted poster" in connection with this incident. By placing the imprimatur of the police on this poster as a person "wanted" by the police in connection with an attempted murder and robbery, the police had determined that a person looking like the individual displayed in the sketch was guilty of this crime. See People v. Colas, 206 A.D.2d 183, 190 (1st Dept. 1994) (error to show witness wanted poster with term "wanted for rape" displayed on it). That sketch only displayed the wanted person's face.

When Detective Crowley asked the complainant to view computer photographs in connection with this case after his release from the hospital, he was well aware that this "wanted poster" was prominently displayed in the precinct. Thus, prior to the lineup, the complainant came to the precinct and again saw the wanted poster which indicated that the police believed that the man who assaulted the complainant looked like the person displayed in the wanted poster.

Several days later, the complainant returned to the precinct to view the lineup. By reducing the lineup to faces only, the police had created

an identification procedure that had been reduced to the characteristics displayed in the wanted poster. See People v. Colas, 206 A.D.2d at 190 (display of wanted poster can taint subsequent identification procedures).

When one juxtaposes the lineup photograph with the "wanted poster" sketch, there is only one individual who looks like the man displayed in the sketch.¹ Not surprisingly, that man is defendant. Thus, under all of these circumstances, there is only one person that the complainant could have picked: defendant. Indeed, if a non-witness were asked to view the wanted poster and the lineup photographs and then asked to select the person who resembles the person depicted in the sketch, that non-witness would undoubtedly select defendant. Consequently, this lineup was the epitome of being "unduly suggestive". Therefore, in sum, the actions of the police in this case created an identification procedure that cannot pass constitutional muster. Consequently, the lineup in question was impermissibly suggestive and evidence of it should be suppressed by this Court.

¹ Since the wanted poster was based upon information supplied by someone other than the complainant, People v. Abreu, 95 N.Y.2d 806 (2000) is inapposite.