2019 WL 1303993
Supreme Court, Appellate Division,
Fourth Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
Jamil A. KNOX, Defendant–Appellant.

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KA 16–01552
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Entered: March 22, 2019

Synopsis

Background: Defendant was convicted in the Supreme Court, Monroe County, Thomas E. Moran, J., of criminal possession of weapon in the second degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] showup identification was unduly suggestive, and

[2] defendant was entitled to a new *Wade* hearing.

Reversed.

West Headnotes (4)

[1] Criminal Law

Showup identifications are disfavored, since they are suggestive by their very nature.

Cases that cite this headnote

[2] Criminal Law

Showup identifications are not presumptively infirm, but must be shown to be reasonable under the circumstances, i.e., justified by exigency or temporal and spatial proximity to the crime, and, if so, whether the showup as conducted was unduly suggestive.

Cases that cite this headnote

[3] Criminal Law

Showup identification was unduly suggestive, absent any exigency or spatial proximity to the crime scene, and given that the showup occurred approximately 90 minutes after the occurrence of the crime, while defendant was handcuffed and flanked by police.

Cases that cite this headnote

[4] Criminal Law

Inasmuch as witness who identified defendant at unduly suggestive showup identification procedure did not testify at *Wade* hearing, the People failed to establish that witness had an independent basis for his in-court identification of defendant, and thus, defendant was entitled to a new *Wade* hearing.

Cases that cite this headnote

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered July 22, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of weapon in the second degree (two counts).

Attorneys and Law Firms

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JAMIL A. KNOX, DEFENDANT–APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

MEMORANDUM AND ORDER

***1** It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to **suppress** testimony regarding the showup identification of defendant by the noncomplainant witness is granted and the matter is remitted to Supreme Court, Monroe County for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03[1][b]; [3]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v. Danielson*, 9 N.Y.3d 342, 349, 849 N.Y.S.2d 480, 880 N.E.2d 1 [2007]), we reject defendant's contention in his pro se supplemental brief that the verdict is against the weight of the evidence (*see generally People v. Bleakley*, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 [1987]).

[1] **[2]** Defendant contends in his main brief that Supreme Court erred in refusing to **suppress** certain showup identification testimony with respect to him. We agree. "Showup identifications are disfavored, since they are suggestive by their very nature" (*People v. Ortiz*, 90 N.Y.2d 533, 537, 664 N.Y.S.2d 243, 686 N.E.2d 1337 [1997]; *see People v. Johnson*, 81 N.Y.2d 828, 831, 595 N.Y.S.2d 385, 611 N.E.2d 286 [1993]). Such procedures, however, "are not presumptively infirm" (*People v. Duuvon*, 77 N.Y.2d 541, 543, 569 N.Y.S.2d 346, 571 N.E.2d 654 [1991]), but must be shown to be " 'reasonable under the circumstances—i.e., justified by exigency or temporal and spatial proximity [to the crime]—and, if so, whether the showup as conducted was unduly suggestive' " (*People v. Cedeno*, 27 N.Y.3d 110, 123, 31 N.Y.S.3d 434, 50 N.E.3d 901 [2016], *cert denied*— U.S. ——, 137 S.Ct. 205, 196 L.Ed.2d 133 [2016]; *see People v. Gilford*, 16 N.Y.3d 864, 868, 924 N.Y.S.2d 314, 948 N.E.2d 920 [2011]).

[3] In this case, two showup identification procedures were conducted approximately 90 minutes after the crime, about five miles from the scene of the crime. The first showup, which is not at issue on appeal, occurred in the victim's hospital room and resulted in the victim identifying defendant as the person who shot him. The second showup—i.e., the one challenged on appeal—occurred in the hospital parking lot shortly after the first showup. During the second showup procedure, the noncomplainant witness to the shooting identified defendant as the shooter. We conclude that, "[g]iven the identification made by the victim" during the first showup, the noncomplainant witness's identification conducted far from the scene of the crime "is not rendered tolerable in the interest of prompt identification" (*People v. Seegars*, 172 A.D.2d 183, 186, 568 N.Y.S.2d 361 [1st Dept. 1991], *appeal dismissed* 78 N.Y.2d 1069, 576 N.Y.S.2d 216, 582 N.E.2d 599 [1991]). The identification was also unjustified insofar as the noncomplainant witness was not present at the hospital as a victim (*cf. People v. Blanche*, 90 N.Y.2d 821, 822, 660 N.Y.S.2d 375, 682 N.E.2d 976 [1997]; *People v. Rivera*, 22 N.Y.2d 453, 455, 293 N.Y.S.2d 271, 239 N.E.2d 873 [1968], *cert denied* 395 U.S. 964, 89 S.Ct. 2107, 23 L.Ed.2d 750 [1969]). The People have proffered no reason that a lineup identification procedure would have been unduly burdensome under the circumstances (*see Seegars*, 172 A.D.2d at 186–187, 568 N.Y.S.2d 361). Absent any exigency or spatial proximity to the crime scene, and given that the showup occurred "approximately 90 minutes after the occurrence of the crime, while defendant was handcuffed and" flanked by police, we conclude that, under the totality of the circumstances, the second "showup identification procedure was infirm" (*People v. Burnice*, 113 A.D.3d 1115, 1115, 978 N.Y.S.2d 554 [4th Dept. 2014]). We further conclude that this error was not harmless, particularly because the victim could not identify his assailant at trial.

***2** **[4]** Inasmuch as the witness who identified defendant in the second showup procedure did not testify at the *Wade* hearing, "the People did not establish that [he] had an independent basis for [his] in-court identification of defendant" (*People v. Hill*, 53 A.D.3d 1151, 1151, 860 N.Y.S.2d 780 [4th Dept. 2008]), and "there is no evidence upon which this Court can base such a determination" (*People v. Walker*, 198 A.D.2d 826, 828, 604 N.Y.S.2d 403 [4th Dept. 1993]). We therefore conclude that defendant is entitled to a new *Wade* hearing on that issue (*see People v. Blunt*, 71 A.D.3d 1380, 1382, 897 N.Y.S.2d 323 [4th Dept. 2010]). Thus, we reverse the judgment, grant that part of defendant's omnibus motion seeking to **suppress** the showup identification testimony

of the noncomplainant witness, and remit the matter to Supreme Court for a new *Wade* hearing on the issue of whether that witness had an independent basis for his in-court identification of defendant, and a new trial on counts one and two of the indictment, if the People are so advised.

We have considered the remaining contentions in defendant's pro se supplemental brief, and we conclude that they are either unpreserved or without merit.

All Citations

--- N.Y.S.3d ----, 2019 WL 1303993, 2019 N.Y. Slip Op. 02230