TO BE SUBMITTED

NEW YORK SUPREME COURT

APPELLATE DIVISION--SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

RICHARD CLAYTON JACKSON

Defendant-Appellant.

Indictment No. 218-82

BRIEF FOR APPELLANT

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THE PEOPLE OF THE STATE OF NEW YORK,

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STATEMENT UNDER RULE 5531 CPLR

1. The Indictment Number of this case is 218-82.
2. The full name of the original parties are:
   The People of the State of New York, plaintiff;
   RICHARD JACKSON, defendant.
3. This action was commenced in the Supreme Court, Queens County.
4. The action was commenced by the filing of a Criminal Indictment on February 8, 1982. Issue was joined on March 3, 1982 when appellant, RICHARD JACKSON, interposed a plea of Not Guilty.
5. The subject action is criminal in nature and defendant was charged with the crime of Criminal Possession of a Weapon in the Second Degree.
6. On motion of the People, Indictment No. 2502-81 was consolidated with Indictment No. 218-82 on August 30,

1982, for purposes of a plea of guilty.

7. Appellant appeals from a Judgment of Conviction convicting him of the crime of Criminal Possession of a Weapon in the Second Degree, after a plea of guilty, rendered August 30, 1982, and from a sentence of incarceration for a minimum of three (3) years to a maximum of six (6) years rendered on November 10, 1982.

8. The appendix method of appeal is not being used.

SUPREME COURT OF THE STATE OF NEW YORK
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THE PEOPLE OF THE STATE OF NEW YORK,

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-against-

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BRIEF OF DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

This is an appeal of a conviction based upon a plea of guilty made on August 30, 1982 before the Honorable Philip J. Chetta, Justice of the Supreme Court, Queens County. The plea of guilty of Possession of a Weapon in the Second Degree, Section 265.03 of the Penal Law, covered two separate indictments--#218-82 (charging violation of Section 265.03 of the Penal Law) and #2502-81 (charging violation of Section 265.02 of the Penal Law)--which were consolidated for purposes of the plea. The plea only involved the facts relating to #218-82.

Timely notice of appeal was filed and this Court granted Appellant leave to appeal as a poor person and assigned LAWRENCE J. GROSS to prosecute the appeal.

The decision of the court below, made by the Hon. Robert T. Groh, J., and rendered on June 17, 1982, in defendant's suppression hearing, is appended to this brief.

QUESTIONS PRESENTED

1. Did the suppression court err in denying defendant's motion to suppress his incrimination statement?

a. Did denial by police of defendant's reqest to speak to his wife render his statement inadmissible?

b. Did the People fail to establish that defendant's statement was not wrongfully taken during an illegal detention following arrest without probable cause?

STATEMENT OF THE FACTS

Indictment #218/82 charged that the defendant on or about August 3, 1979, in Queens County, knowingly and unlawfully possessed a loaded firearm--a pistol--with intent to use unlawfully against another.

On August 3, 1979, one Roy Lee Clark was shot on a street corner in Queens County. (tr. 4-5). According to police

testimony, he later said that a person named "Richard" had shot him. (tr. 59). Subsequent investigation by the police led to information that the perpetrator was a Richard Clayton, though the basis of this information does not appear in the record. (tr. 60). On November 30, 1979, two individuals, Johnny Jordan and Hayward Cummings, who had been arrested on another matter, made a photographic identification allegedly linking the defendant to the crime.[1] (tr. 51-7). An alarm was issued and photographs of the defendant were distributed to police officers. (tr. 57).

It was not until May 28, 1981 that an arrest without warrant of the defendant was made by Police Detective Singleton. (tr. 97). The defendant was brought into the precinct station, told the nature of the charges against him, and subjected to interrogation while manacled to a chair. (tr. 126). He asked to speak to his wife upon arrival at the station and again during the interrogation. (tr. 126-8). But his request was refused and he was told that he could speak with her only after the interrogation was completed, although she had followed him to the station and was present at the time. (tr. 128). During this interrogation he made an incriminating statement which was recorded and transcribed.

The defendant was indicted twice on this charge. The first indictment--#1675/81-- was dismissed for insufficiency of the evidence with leave to represent. After the second

1 The photographs upon which the identification was based have been destroyed by the police (Letter from District Attorney, dated October 22, 1984, attached hereto as an exhibit).

indictment issued, defendant moved on March 16, 1982 to suppress the incriminating statement. A suppression hearing was held on June 17, 1982 before the Honorable Robert T. Groh, Justice of the Supreme Court, Queens County. Following the hearing, Judge Groh denied defendant's motion. The police subsequently destroyed the photographs which were among the evidence in question at the suppression hearing. (Letter from District Attorney, dated October 22, 1984, attached hereto as an exhibit).

ARGUMENT

I. THE SUPPRESSION COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS HIS INCRIMINATING STATEMENT.

A. Denial by Police of Defendant's Request to Speak to His Wife Rendered His Statement Inadmissible.

Defendant's recorded and transcribed oral statement was the fruit of a violation of defendant's rights. At his Huntley hearing, Police Detective Singleton testified that not only was defendant manacled to a chair during his interrogation (tr. 126), but his repeated requests to speak to his spouse, who was present at the precinct station, were denied by his interrogators. (tr. 126-8). This is precisely the kind of situation in People v. Talamo, 55 A.D.2d 506 (3rd Dept. 1977), in which the Appellate Division held that

> "Denying the request of a suspect undergoing custodial interrogation to phone his family makes inadmissible a subsequent confession. (cf. People v. Townsend, 33 N.Y.2d 37). Although the case at bar

> is different from Townsend in that here it was the defendant who attempted to contact his family rather than the family him, the essential point is the same, i.e., the police 'sealed off the most likely avenue by which the assistance of counsel may reach him.' (People v. Townsend, supra, p. 41)." Supra at 507.

See also, People v. Reome, 101 A.D.2d 632 (3rd Dept. 1984), in which the court held suppressible a confession where defendant inquired if she could call her sister.

In the instant case defendant asked to call his wife after the police brought him to the precinct station following his arrest. He again asked to speak to his wife during the interrogation. But, in derogation of defendant's rights, Detective Singleton told defendant that he could speak to his wife only after they had finished talking, even though she was present in the precinct. (tr. 126-8). Detective Singleton also testified that defendant was visibly upset during the interrogation (tr. 125), which is some evidence that, had the defendant had access to his wife, he may have used this most likely avenue to seek the assistance of counsel.

This is clearly the type of situation that the rule of Talamo is meant to prevent. Defendant spoke with his wife before being taken to the station house by the police (tr. 126). She followed him to the precinct station. Nevertheless, he was not allowed access to her. Had he been given his right to speak with her, they may well have sought counsel. This denial of rights was compounded by his being told that he could speak with his wife only after the interrogation was finished, thus placing him in a coercive situation. Defend-

ant's statement was tainted by the denial of his requests to see his wife and should have been suppressed by the court below.

The court's failure to suppress defendant's incriminating statement is a serious error and calls for vacating the plea of guilty. As stated by the Court of Appeals in People v. Ramos, 40 N.Y. 2d 610, 618-9,

> "Although there may be cases in which the error of admitting excludable evidence may not require reversal, it cannot be gainsaid that a confession is a most serious matter in the trial of a criminal case. It is enough in this case to note that the confession was a likely factor which might have induced the plea and might have affected substantially a verdict upon a trial.
>
> Accordingly, although there is other evidence in support of the defendant's guilt, the proper disposition would call for restoring the case to its prepleading status (People v. Hobson, 39 N.Y.2d 479; cf. CPL 470.55)"

It should be noted that, although the guilty plea constituted a complete disposition of a second indictment along with the one at issue, defendant's plea made no reference to the second indictment and thus does not stand in any way as an obstacle to reversal of the conviction.

B. The People Failed to Establish That Defendant's Statement Was Not Wrongfully Taken During an Illegal Detention Following Arrest Without Probable Cause.

Defendant, in his motion to suppress, asserted that his "confessions were obtained in violation of Dunaway v. New York, 442 U.S. 200 (1979), in that said confession was taken subsequent to the defendant's arrest and said arrest being

made absent probable cause." (Affirmation of E. Mayr, Esq., March 16, 1982, Section VIII).

The rule prohibiting admission of incriminating statements made during an illegal detention was plainly stated in People v. Nelson, 79 A.D.2d 171, 172-3 (4th Dept. 1981),

> Unless the People establish that the police had probable cause to detain a suspect, the detention takes on the quality of an illegal arrest and statements obtained by exploitation of an unlawful detention must be suppressed (Dunaway v. New York, 442 U.S. 200, 216; People v. Misuis, 47 N.Y.2d 979, 981.)."

In the suppression hearing in the case at bar, the People failed to establish that there was probable cause to detain the defendant. The record shows that the defendant was arrested without a warrant on May 28, 1981, almost two years after the crime occurred which he allegedly committed. Police Detective Singleton testified that his arrest on the street was based upon his recognizing defendant from a photograph he was carrying (tr. 100). This photograph had been circulated following the issuance of an alarm and after a purported photo identification had been made on November 30, 1979 (tr. 51-57). The sufficiency of this photographic identification was challenged during the suppression hearing and, as argued below, the suppression court erroneously ruled that the identification was reliable (which ruling cannot be adequately reviewed because of the destruction of the photographs by the police).

The record shows only two other pieces of information upon which the arrest was based, which neither individually, nor together were sufficient to establish probable cause.

1. Prior to the photo identification, the complainant had informed Police Detective Sullivan that the alleged perpetrator "was a guy by the name of Richard who shot him." (tr. 59). He gave no last name or description of this Richard (tr. 59). Nor is there any record that the complainant ever made a photo identification of his assailant. This information is clearly not sufficient to raise a suspicion as to who specifically was the alleged perpetrator.

2. Detective Sullivan testified that some time after complainant's statement he "received information from Police Officer Waddell that Richard's last name was Clayton." (tr. 60). This evidence is also an insufficient basis upon which to make a finding of probable cause because the record does not indicate the nature of that information. In People v. Horowitz, 21 N.Y.2d 55 (1967) the Court of Appeals ordered a further hearing on a motion to suppress in order to determine if there were sufficient facts to indicate the reliability of an informer. The Court stated that

> "The controlling principle seems to be that it is not necessary for the officer making the arrest to know of the reliability of the informer or to be, himself, in possession of information sufficient to constitute probable cause provided that he acts upon the direction of or a result of communication with a superior or brother officer or another police department provided that the police as a whole were in possession of information sufficient to constitute probable cause to make the arrest. This record does not show that any of the law enforcement

> officers had facts before them sufficient to indicate that this anonymous informer was reliable, or that the police had other information, not derived from the informer, which was sufficient, in itself, to constitute probable cause." 21 N.Y.2d at 60.

Similarly, in the case at bar, the record does not indicate if Officer Waddell's information was sufficient to constitute probable cause.

3. The addition of the purported photographic identification does not justify a "prudent belief on the part of the police" (People v. Nelson, supra at 173), that the defendant committed the crime. Because of the suggestibility of the photographic identification, the People failed to establish that the police, as a whole, were in possession of information sufficient to constitute probable cause. Horowitz, supra at 60.

Only one of the two individuals who made the photographic identification testified at defendant's suppression hearing--Hayward Cummings. He testified that he and the other individual--Johnny Jordan--were brought in to make the identification after their arrest on another matter (tr. 92-3). He further testified that, on the date of the crime, he was going to meet Johnny Jordan, heard a noise like a gunshot and allegedly saw the defendant walking briskly away from a crowd of people. (tr. 78-9).

According to the testimony of Detective Sullivan, Jordan "Heard a shot, looked up, seen Richard turning, seen Shorty falling to the ground and Richard turning and running with the gun in his hand." (tr. 68).

Although Cummings testified that he knew the defendant, he did not witness the crime. On the other hand, it is not known whether Jordan knew the defendant. In addition, the testimony that he saw defendant leave the scene of the crime carrying a gun is only hearsay. Cummings did not see the defendant with a gun and a weapon was never recovered by the police.

The combination of evidence might be sufficient to establish probable cause were the photographic identification found to be fair and reliable. But the record does not enable such a finding to be made. The suppression court's ruling that the identification was not suggestive was rendered without allowing defendant a full opportunity to cross-examine as to the differences and therefore suggestibility of the photographs used in the array. (tr. 62-65) Nor were they presented to the court in the manner that they were shown during the identification; the array had previously been disassembled. (tr. 45).

At the hearing defendant's counsel challenged the fairness of the array by questioning whether the filler photographs were similar to the defendant's photograph in such areas as skin color, facial hair, and head hair. (tr. 64-5). Defendant's counsel took the position that the photographs were dissimilar and attempted an inquiry into this issue; but the court foreclosed the inquiry, taking the position that the pictures spoke for themselves. Defendant's counsel objected, stating that "I want the record to be very clear as to these

descriptions on the photograph, because this might be subject to Appellate review". (tr. 64-5). The court responded, "I understand that. But again counselor, the Court will review all of the photos, the whole twelve and make a decision based on them". (tr. 65).

Now that the photographs have been destroyed by the police (letter at p. A1, below), effective review has been precluded. All that is known is that at least one of the filler photographs is dissimilar to defendant's. (tr. 63).

As stated in People v. Misuis, 47 N.Y.2d 979, 981 (1979),

> "It is 'incumbent upon the suppression court to permit an inquiry into the propriety of the police conduct' (People v. Wise, 46 N.Y.2d 321,329). Unless the People establish that the police had probable cause to arrest or detain a suspect, and unless the defendant is accorded an opportunity to delve fully into the circumstances attendant upon his arrest or detention, his motion to suppress should be granted (People v. Wise, supra)."

The Court of Appeals held in Misuis that "the court erred by unduly restricting the defendant's opportunity to test the validity of the People's case through the medium of cross-examination", supra at 981, ordered remittal for a new hearing on probable cause, and vacated defendant's guilty plea.

At a miminum, the same relief should be accorded the defendant in the case at bar. However, the situation in this matter is complicated because the photographic array has been destroyed by the police (Letter from District Attorney, dated October 22, 1984, attached hereto as an exhibit). The essential evidence which could substantiate defendant's claim has been concededly destroyed by the police.

This situation is essentially the same as in cases where the minutes of proceedings have not been preserved. In People v. Hill, 43 A.D.2d 563, 564 (2d Dept. 1973), the court stated that

> "On the present appeal from the judgment of resentence, the people concede that transcript of the minutes of defendant's trial and sentence was never prepared and that the stenographer who had recorded those proceedings is dead. In the absence of an adequate appellate record we are compelled to reverse the judgment and order a new trial." (citations omitted).

In People v. Poole, 41 A.D.2d 699, 699 (4th Dept. 1973), a judgment of conviction was vacated:

> Without such minutes [the trial transcript] it is impossible to make an appropriate evaluation and disposition of the issues arising form the evidence and rulings of the trial court which might be raised on appeal. Their loss must be deemed the loss of the right to appeal." (citations omitted).

See also, People v. Boone, 22 A.D.2d 982 (3rd Dept. 1964); People v. Himmel and Burtman, 10 A.D.2d 622 (1st Dept. 1960) (new trial ordered; conviction based upon lost statement of facts).

It clearly and logically follows that the loss of any part of the appellate record essential for proper review warrants reversal and vacation of a judgment or plea and new proceedings, or dismissal of the indictment, as appropriate. This Court, in People v. Foti, 83 A.D.2d 641, 641-2 (2nd Dept. 1981) implicitly recognized this proposition with regard to the failure to preserve a photographic array:

> "we find it necessary to comment on the identification procedures used by the police, although no remedial action is required on appeal since the

> resulting identifications were suppressed by the trial court. The victim was shown a photographic array which was not preserved. Thereafter, the victim viewed an informal lineup, consisting of four men including the defendant. No photograph was taken of this group. Thus neither the trial court nor this court has been able to review the suggestibility of the identification procedures. We view the failure of the police to preserve the evidence of these confrontations with strong disapproval."

In the case at bar remedial action is required. As argued above, defendant has appealable grounds concerning the photographic array used for identification upon which his plea should be vacated and further proceeding ordered. But an essential piece of the record upon which his appeal is based, the photographic array, has been destroyed by the police. In the absence of an adequate appellate record, defendant's plea must be vacated, and since a full determination of the issue of probable cause cannot be made without the photographs, defendant's incriminating statement must be vacated.

CONCLUSION

By reason of the foregoing, the court should vacate defendant's plea of guilty, suppress his incriminating statement and restore the case to the prepleading stage.

Dated: Elmhurst, N.Y.
June , 1985

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