

Court of Appeals, State of Michigan

ORDER

People of MI v Robert Lee Kelly

Docket No. 310640

LC No. 12-001757-01-FH

Christopher M. Murray
Presiding Judge

Cynthia Diane Stephens

Michael J. Riordan
Judges

The Court orders that the motion for immediate consideration is GRANTED.

In lieu of granting leave to appeal, pursuant to MCR 7.205(D)(2), the Court orders that the May 18, 2012, order of the Wayne County Circuit Court is REVERSED to the extent that the trial court suppressed the identification made by the witnesses at a photographic lineup conducted by the Detroit Police Department on the basis that an attorney was not present. Because the initiation of adversarial judicial proceedings had not occurred at the time of the lineup as defendant was not yet charged with any crimes, defendant was not entitled to have counsel present at the photographic lineup. *People v Hickman*, 470 Mich 602, 603-604; 684 NW2d 267 (2004), overruling *People v Anderson*, 389 Mich 155; 205 NW2d 4611 (1973) (to the extent that *Anderson* extended the right to counsel to when defendant was in custody, which was before the initiation of adversarial proceedings).

Accordingly, the matter is REMANDED for reconsideration of the suppression ruling to the extent that the trial court also suppressed the witnesses' identifications because defendant was in custody and a corporeal lineup was not conducted. The trial court's lengthy remarks made on the record at the May 18, 2012, hearing indicates that it may have found the failure to do so excusable since defendant was in custody at the Ingham County jail for a parole violation and was not in custody for the current charges. See *People v Wyngaard*, 151 Mich App 107, 113; 390 NW2d 694 (1986).

The motion for stay is DENIED.

Pursuant to MCR 7.215(F)(2), this Court further directs that this order shall take immediate effect. The Court retains no further jurisdiction.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JUL 06 2012

Date


Chief Clerk