



184 A.D.2d 657, 587 N.Y.S.2d 166
(Cite as: **184 A.D.2d 657, 587 N.Y.S.2d 166**)

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Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Respondent,
v.
Kelvin C. HAREWOOD, Appellant.

June 15, 1992

Joel A. Brenner, East Northport (Richard Langone, on the brief), for appellant. Carl A. Vergari, Dist. Atty., White Plains (John Charles Zuroski and **Maryanne Luciano**, of counsel), for respondent.

*657 Appeal by the defendant from a judgment of the Supreme Court, Westchester County (Rosato, J.), rendered January 3, 1990, convicting him of criminal sale of a controlled substance in the third degree (two counts), and criminal possession of a controlled substance in the third degree (two counts), upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, without a hearing, of that branch of the defendant's omnibus motion which was to suppress identification testimony. ORDERED that the matter is remitted to the Supreme Court, Westchester County, to hear and report on that branch of the defendant's omnibus motion which was to suppress identification testimony, and the appeal is held in abeyance in the interim. The Supreme**167 Court, Westchester County, is to file its report with all convenient speed. In his omnibus motion, the defendant sought, *inter alia*, to suppress identification testimony by an undercover police officer on the ground that two photographic identifications by the officer were impermissibly suggestive. The People maintained that no hearing was required because the identifications were made as part of an investigation and were confirmatory. We find that the court erred in denying the defendant's motion without a hearing (see, *People v. Rodriguez*, 79 N.Y.2d 445, 583 N.Y.S.2d 814, 593 N.E.2d 268; see, e.g.,

People v. Hayes, 162 A.D.2d 410, 556 N.Y.S.2d 922; *People v. Baron*, 159 A.D.2d 710, 553 N.Y.S.2d 195; see generally, *People v. Wharton*, 74 N.Y.2d 921, 550 N.Y.S.2d 260, 549 N.E.2d 462). We therefore remit the matter to the trial court for a hearing to determine whether the viewing of the photographs was an improper identification procedure or was merely confirmatory in nature. Since no determination has been made that the police employed a suggestive identification procedure, the appeal may be held in abeyance for a posttrial hearing (see, *People v. Williams*, 182 A.D.2d 490, 582 N.Y.S.2d 406; cf., *People v. Burts*, 78 N.Y.2d 20, 571 N.Y.S.2d 418, 574 N.E.2d 1024). We reach no other issues at this juncture.

LAWRENCE, J.P., and EIBER, O'BRIEN and COPERTINO, JJ., concur.

N.Y.A.D. 2 Dept. 1992.
People v. Harewood
184 A.D.2d 657, 587 N.Y.S.2d 166

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