

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA : NO. 01-10,961  
:   
:   
vs. : CRIMINAL DIVISION  
: Supplemental Motion to Suppress  
ANTHONY WILLIAMS, :   
Defendant :

OPINION AND ORDER

Before the Court is Defendant’s Supplemental Pre-Trial Motion, filed February 27, 2002, in which he seeks to suppress two (2) separate identifications made at the time of the preliminary hearing in this matter, on May 22, 2001, contending such identifications were unduly suggestive. A hearing on the motion was held March 22, 2002, after which both the Commonwealth and Defendant filed briefs.

Defendant has been charged with homicide and related charges in connection with the killing of Kristopher Harris on or about November 18, 1999. In preparation for the preliminary hearing in this matter, Agent Stephen Sorage of the Williamsport Police Department arranged for the two (2) witnesses at issue here, Curtis Robinson and Jessica Kodak, to first report to the police station and then to be escorted by individual officers, for the safety of the witnesses, to the hearing at the County Courthouse. Agent Sorage escorted Mr. Robinson and Officer Lindauer escorted Ms. Kodak. Agent Sorage took Mr. Robinson to the second floor of the Courthouse and directed him to either stand or sit in an area outside of the Courtroom where the preliminary hearing was to be held. While Mr. Robinson was in the hallway outside of the Courtroom, Defendant was escorted by deputy sheriffs past Mr. Robinson and into the Courtroom. Defendant was wearing prison garb and was handcuffed and shackled. According to the testimony of Mr. Robinson, as Defendant walked by, Mr. Robinson’s mother, who was also present, asked Mr. Robinson if “that was the guy”, referring to

Defendant. Mr. Robinson indicated to his mother that, yes, he recognized Defendant as one of the participants in the murder he had witnessed. An officer standing nearby apparently heard the exchange between Mr. Robinson and his mother and reported such to Agent Sorage. Agent Sorage then questioned Mr. Robinson about the identification after the preliminary hearing, once they had arrived back at the police station. Mr. Robinson confirmed to Agent Sorage that he had recognized Defendant at the preliminary hearing as one of the individuals who had committed the murder.

Jessica Kodak was escorted from the police station to the Courthouse by Officer Lindauer and upon arrival at the Courthouse remained seated in the police vehicle for a short time. While Ms. Kodak was seated in the police vehicle, Defendant was escorted by sheriff's deputies past the vehicle, in prison garb, handcuffed and shackled. Ms. Kodak indicated while in the vehicle that she recognized Defendant as a participant in the homicide. Shortly thereafter she was escorted to the second floor of the Courthouse and directed to sit or stand in the hallway outside of the Courtroom where the preliminary hearing was to be held, the same area where Curtis Robinson was waiting. While there, Ms. Kodak again observed Defendant on his way to the Courtroom as had Mr. Robinson. In a telephone conversation with Agent Sorage after the preliminary hearing, Ms. Kodak revealed to Agent Sorage that she had recognized Defendant on both occasions.

Defendant seeks to suppress both identifications, contending that such were unduly suggestive. The Courts of this Commonwealth have recognized the inherent suggestiveness present in an identification made at an in-Court preliminary hearing. Commonwealth v Sexton, 400 A.2d 1289 (Pa. 1979). The ordinary circumstances of a typical preliminary hearing scenario have been found to be not unduly suggestive, however. Id. The suggestiveness of the confrontation is only a factor to be considered in determining the reliability of the identification evidence, the reliability of the evidence being the key to determining the admissibility of such. Id. The Court in Sexton reviewed the circumstances of the matter before it, finding an ordinary identification made at a certification hearing, and no factors which would render the situation unduly suggestive, and indicated that but for another issue, not relevant here, the defendant in that case would not be entitled to relief. In so stating, the Court referred to two (2) cases where it had been determined that a fair trial required the exclusion of the identification evidence, Commonwealth v Bogan, 393 A.2d 424 (Pa. 1978), and Commonwealth

v Fant, 391 A.2d 1040 (Pa. 1978). In Bogan, the identifying witness was told, prior to making an identification in a one-on-one confrontation at the police station, that the man in custody had confessed to killing her husband. In Commonwealth v Fant, the Commonwealth's witnesses were not sequestered and the Court therefore found that the suggestiveness of the in-Court identification was exacerbated by those witnesses hearing repeated testimony of other witnesses identifying the defendant and placing the defendant at the scene of the crime. The Court believes that nothing like the situations presented in either Bogan or Fant exists in the instant case.

With respect to the identification made by Jessica Kodak, especially considering the first identification made while she was seated in a vehicle outside the Courthouse, there was very little, if anything, to indicate to Ms. Kodak that the man being escorted past her was involved in the preliminary hearing which she was about to attend, as all incarcerated defendants are escorted from the same general area into the back of the Courthouse. Even with respect to the identifications made in the hallway of the Courthouse, the Court believes such to be no more suggestive, and probably in fact slightly less suggestive, than an actual in-the-Courtroom identification. Nothing in the testimony presented at the suppression hearing indicates any other circumstances which could have turned the suggestive nature of the identifications into unduly suggestive ones. And although Defendant points out that Mr. Robinson made a contrary identification prior to the preliminary hearing, while such may go to the weight of Mr. Robinson's identification, it does not affect its admissibility. Commonwealth v Ferguson, 475 A.2d 810 (Pa. Super. 1984).

Defendant also contends the identifications should be suppressed as they were made outside of the presence of counsel. While the Court agrees that a defendant has an absolute right to counsel during any post arrest identification procedure, Commonwealth v Glover, 412 A.2d 855 (Pa. 1980), the Court does not agree that Defendant in the instant matter was subjected to an "identification procedure." It appears from the testimony that the identifications made by Mr. Robinson and Ms. Kodak were unsolicited by either the District Attorney's Office or the police. According to Agent Sorage, both witnesses were asked to attend the preliminary hearing, as their testimony might be necessary to establish a prima facie case. Defendant makes much of the fact that neither was called at the preliminary hearing but it appears that the testimony given by Abdul Clark was sufficient and their

testimony was not needed. Defendant also points out that Abdul Clark had previously given a statement implicating Defendant and contends the Commonwealth should have been comfortable relying on his testimony alone, thus making it unnecessary to bring Mr. Robinson or Ms. Kodak to the preliminary hearing, but the Court will not fault the Commonwealth for erring on the side of caution. As no “identification procedure” had been set up, the right-to-counsel rule may not be applied

The Court thus finds that neither identification was made under unduly suggestive circumstances requiring its suppression.

ORDER

AND NOW, this 10<sup>th</sup> day of April, 2002, for the foregoing reasons, Defendant’s supplemental Motion to Suppress is hereby denied.

By the Court,

Dudley N. Anderson, Judge

cc: DA  
George Lepley, Esq.  
Craig Miller, Esq.  
Gary Weber, Esq.  
Hon. Dudley N. Anderson