

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:
	:
vs.	: NO. 1896-2006
	:
TERRANCE GANT,	: CRIMINAL ACTION - LAW
	:
Defendant	: Omnibus Pre-trial Motion

**DATE: June 21, 2007**

**OPINION and ORDER**

Before the court for determination is the Omnibus Pre-trial Motion filed by Defendant Terrance Gant on March 28, 2007. The Motion will be denied. The witness's identification of Gant as the robber was not the product of an unduly suggestive procedure; therefore, the identification did not deprive Gant of his due process rights. Accordingly, the identification will not be suppressed nor will the witness be precluded from providing an identification at trial.

**I. BACKGROUND**

**A. Facts**

**1. The Robbery**

On July 15, 2006, sometime before 9:00 a.m., Dawn Butters arrived at the PNC Bank ("the Bank") located at 137 West Fourth Street, Williamsport, Pennsylvania. Butters worked as a teller at the Bank. Butters was waiting in the near by parking deck for a co-worker. As she was waiting, Butters noticed a metallic pink, sporty looking car pull up to the rear area of the Bank. Butters saw that there was only one individual in the car – the black male driver. The car left the area and

returned two more times to the rear of the Bank while Butters was waiting. Eventually, Butters's co-worker arrived, and the two entered the Bank.

At around 10:00 a.m., two black males entered the Bank. One of the black males approached Butters's teller window. The black male displayed a handgun to Butters and gave her a note telling her to put money in a bag. Butters complied, and placed money in a bag. The black male was less than two feet away from Butters and about eye level with her. The encounter lasted several minutes. Butters recognized this black male as the same one she had seen earlier in the day driving the metallic pink car. After the black male got the bag back from Butters, he and the other black male exited the Bank through the rear.

The Williamsport Bureau of Police were notified of the robbery and responded to the Bank. Agent Raymond Kontz interviewed Butters, and she provided him a description of the two robbery suspects. With regard to the individual that was at her teller window, Butters described him as a black male in his mid-twenties standing five feet seven inches tall with a thin build medium complexion wearing white sneakers, dark cargo pants, a hooded long sleeve shirt, a black cap, and large sunglasses that covered his eyes. Butters told Agent Kontz that there was nothing obstructing the lower part of the suspect's face. Butters also told Agent Kontz that this individual did not have any facial hair and had a small ponytail at the base of his hairline. With regard to the second suspect, Butters described him as a black male standing about three inches taller than the first suspect with a medium build and a medium complexion wearing dark boots, dark pants, a zippered jacket over a hooded sweatshirt, and a black cap. Butters also told Agent Kontz that the second

suspect had facial hair. The descriptions were broadcast over the police radio, and a search was conducted, but produced no results.

## **2. The ATM**

On October 7, 2006, about five months after the robbery, Butters was at her teller window when she noticed a black male enter the foyer area of the Bank where an ATM is located. The foyer area is adjacent to Butter's teller window and separated by large glass windows and glass doors. The ATM is approximately fifteen feet away from Butters's teller window.

The black male entered the foyer and then left. Later, Butters noticed that the same black male returned to the foyer area. This time he went to the ATM. The black male had the hood of his sweatshirt up covering his head, and, while at the ATM, the black male had raised his right arm and placed his right hand on the ATM partially obscuring his face from anyone looking at him from the side. Every so often, the black male would peak out from underneath his arm. From her position at her teller window, Butters had a side profile view of the black male's face while he used the ATM. Despite his attempts to conceal his identity, Butters recognized this black male as the individual who had displayed the hand gun to her and demanded money on July 15, 2006.

From her teller window, Butters is able to see the parking area in front of the Bank through the glass windows and doors. While the black male was at the ATM, Butters saw a metallic pink car in the parking area. She recognized it as the same car she had seen pull up to the rear area of the Bank three times on the day of the robbery and driven by the robber.

As the robber was using the ATM, Butters notified a Bank security guard. He went outside and obtained the car's license number. The security guard returned to the Bank, and the robber

left. After the robber had gone, the Williamsport Bureau of Police was notified that one of the July 15, 2006 robbery suspects had just been at the Bank.

The Police obtained the car's license plate number from the security guard. A check of the number revealed that the car was registered to Gant. Agent Kontz and Officer Stiles made contact with Gant at his parent's residence. Subsequently, Gant was arrested and charged with crimes arising out of the July 15, 2006 robbery of the Bank.

### **3. The Photo Array**

Several hours after seeing Gant at the ATM on October 7, 2006, Butters went to Police Headquarters at City Hall to view a photo array. The photo array was prepared by Officer Styles. It consisted of eight photographs arranged in two rows of four. None of the photographs contained any biographical information nor was any such information near the photos. Gant's photograph was the second one from the left in the top row.

Butters was shown the photo array and told to point out the person she recognized as the robber. Butters picked out three photographs. She picked out Gant's and the photographs of individuals located to Gant's immediate left in the top row and immediately below Gant in the bottom row. Butters said that these individuals could possibly be the one who robbed her on July 15, 2006, but she could not be one hundred percent sure which one it was. Thus, Butters was unable to provide a positive identification from the photo array.

### **4. The Preliminary Hearing**

A preliminary hearing was held in this case on January 19, 2007 before Magisterial District Judge Allen P. Page, III. Butters was called to testify at that hearing. While on the stand, she

provided an in-court identification of Gant as the individual who displayed the handgun to her and demanded that she place money in a bag on July 15, 2006. When Butters made this identification, Gant was wearing an orange jumpsuit typically worn by inmates at the Lycoming County Prison and was seated at the defense table. Also, Gant was the only black male seated at the defense table.

### **B. Gant's Argument**

In the Omnibus Pre-trial Motion, Gant asserts a Motion to Suppress Evidence and a Motion *in Limine*. In the Motion to Suppress, Gant asserts that Butters's identification of him at the preliminary hearing must be suppressed. Gant argues that her identification was tainted by the fact that Butters failed to positively identify the robber when she was shown a photo array on October 7, 2006 and by the fact that the conditions at the preliminary hearing were unduly suggestive in that Gant was dressed in an orange jumpsuit and was the only black male seated at the defense table. In the Motion *in Limine*, Gant asserts that Butters should be precluded from providing an in-court identification at trial of him as the robber. Gant argues that any such identification would be tainted by the unduly suggestive preliminary hearing identification.

## **II. ISSUES**

There are two issues before the court. They are:

- (1) Must Butters's preliminary hearing identification of Gant as the robber be suppressed as the result of an unduly suggestive procedure?
- (2) Must Butters be precluded from providing an in-court identification at trial of Gant as the robber if her preliminary hearing identification of Gant as such was the result of an unduly suggestive procedure?

### **III. DISCUSSION**

Butters's preliminary hearing identification of Gant as the robber was not the product of an unduly suggestive procedure and will not be suppressed. Butters's identification of Gant at the preliminary hearing was reliable. Since the preliminary hearing identification was reliable, Butters will not be precluded from providing an identification at trial.

#### **A. Motion to Suppress Evidence**

##### **1. Standard of Review**

When a motion to suppress evidence has been filed, the Commonwealth bears both the burden of production and persuasion to prove that the challenged evidence was not obtained in violation of the defendant's rights. Pa.R.Crim.P. 581(H); *Commonwealth v. West*, 834 A.2d 625, 629 (Pa. Super. 2003), *app. denied*, 889 A.2d 1216 (Pa. 2005). The Commonwealth bears the burden of establishing by a preponderance of the evidence that the challenged evidence is admissible. *Commonwealth v. Lindblom*, 854 A.2d 604, 605 (Pa. Super. 2005), *app. denied*, 868 A.2d 1198 (Pa. 2005); *Commonwealth v. Smith*, 784 A.2d 182, 186 (Pa. Super. 2001).

##### **2. Admissibility of Identification Evidence General Rules and Principles**

When a defendant challenges the propriety of a pre-trial identification, the Commonwealth bears the burden of establishing "... that such an identification was not accomplished through an unduly suggestive procedure." *Commonwealth v. Williams*, 470 A.2d 1376, 1383 (Pa. Super. 1984). A pre-trial identification that has been obtained by an unduly suggestive procedure denies the defendant due process of law and will be suppressed. *Commonwealth v. Burton*, 770 A.2d

771, 782 (Pa. Super. 2001), *app. denied*, 868 A.2d 1197 (Pa. 2005). A procedure is unduly suggestive if, under the totality of the circumstances, the identification procedure creates a substantial likelihood of misidentification. *Commonwealth v. Harris*, 888 A.2d 862, 866 (Pa. Super. 2005).

When a pre-trial identification is the product of a courtroom confrontation, the fact that the confrontation was on a one-to-one basis in a courtroom setting is not in itself sufficient reason to exclude the identification. *Commonwealth v. Davis*, 439 A.2d 195, 198 (Pa. Super. 1981). Even so, the Pennsylvania Supreme Court is mindful of the suggestive nature of courtroom confrontations.

The suggestive quality arising from a courtroom confrontation is created by the fact that the accused is clearly designated by his role in the proceeding as the suspected perpetrator prior to the identification. The type of inherent suggestiveness present in all one-to-one confrontations is present, and to some extent magnified, where the identification is made in open court.

*Commonwealth v. Floyd*, 431 A.2d 984, 987 (Pa. 1981); *Commonwealth v. Sexton*, 400 A.2d 1289, 1291 (Pa. 1979). “Nevertheless, the key in determining the admissibility of such evidence is not simply the suggestiveness of the circumstances surrounding the identification but rather the likelihood of misidentification.” *Floyd*, 431 A.2d at 987; *Sexton*, 400 A.2d at 1291.

When reviewing the propriety of identification evidence, the central inquiry is whether, under the totality of the circumstances, the identification was reliable. *Commonwealth v. Moyer*, 836 A.2d 973, 976 (Pa. Super. 2003), *app. denied*, 851 A.2d 142 (Pa. 2004); *Commonwealth v. Bruce*, 717 A.2d 1033, 1036 (Pa. Super. 1988). This is because “reliability is the linchpin in assessing the admissibility of a challenged identification [.]” *Moyer*, 836 A.2d at 977 (quoting

*Commonwealth v. McElrath*, 592 A.2d 740, 743 (Pa. Super. 1991)). Thus, “[t]he question for the suppression court is whether the challenged identification has sufficient indicia of reliability to warrant admission, even though the confrontation procedure may have been suggestive.” *Bruce*, 717 A.2d at 1037.

When determining the admissibility of identification evidence, the suggestiveness of a courtroom identification is only one factor the court must consider in assessing the reliability of the identification. *Floyd*, 431 A.2d at 987; *Sexton*, 400 A.2d at 1292. In addition to suggestiveness, a court should consider the following factors:

- (1) the opportunity of the witness to view the perpetrator at the time of the crime;
- (2) the witness’s degree of attention;
- (3) the accuracy of the witness’s prior description of the perpetrator;
- (4) the level of certainty demonstrated by the witness at the confrontation;
- (5) the time between the crime and the identification.

*Moye*, 836 A.2d at 976; *Bruce*, 717 A.2d at 1037. ““The corrupting effect of the suggestive identification, if any, must be weighed against these factors.”” *Moye*, 836 A.2d at 976 (quoting *Commonwealth v. Meechum*, 711 A.2d 1029, 1034 (Pa. Super. 1998), *app. denied*, 727 A.2d 1119 (Pa. 1998)). Among these factors, the opportunity to view the perpetrator at the time of the crime is the key factor in the totality of the circumstances analysis. *Bruce*, 717 A.2d at 1037.



### **3. Butters's Preliminary Hearing Identification will not be Suppressed**

Butter's preliminary hearing identification of Gant as the robber will not be suppressed as the result of an unduly suggestive procedure. Under the totality of the circumstances, Butters's preliminary hearing identification was sufficiently reliable to meet the requirements of due process.

Butters had a good opportunity to view the perpetrator at the time of the July 15, 2006 robbery. The robber was standing at Butters's teller window. Butters and the robber were less than two feet from each other when the robber demanded the money. At that point, Butters and the robber were at about eye level, so Butters had a good view of the robber's face and facial characteristics. The robber was wearing a cap and large sunglasses, which covered his eyes. There was, however, nothing obscuring the rest of the robber's face. The encounter with the robber lasted several minutes, so Butters had time to study the robber. In addition to the several minute encounter at her teller window, Butters saw the robber earlier that morning outside the Bank. On three separate occasions, Butters saw the robber drive a metallic pink car to the rear area of the Bank and leave.

During the encounter at her teller station, Butters's attention would have been focused on the robber. The robber had walked up to her window, displayed a handgun, and demanded money. The display of the handgun accompanied by the robber's demand for money gave the impression that if his demand was not complied with, then he would use the handgun to gain compliance. As such, prudence would dictate that Butters focus her attention on the robber so that his orders were complied with and no one would get hurt. This awesome responsibility would likely have sufficiently focused Butters's attention on the robber so that she could identify him at a later date.

Significantly, the opportunity Butters had to view the robber and the degree of attention she paid him during the robbery allowed her to give an accurate description of the robber. Butters was able to provide the robber's general characteristics – a black male in his mid-twenties with a thin build, a medium complexion standing five feet seven inches tall. Butters was also able to provide a detailed description of what the suspect was wearing – white sneakers, dark cargo pants, a hooded long sleeve shirt, a black cap, and large sunglasses. Butters also knew he was the same person she had seen driving the metallic pink car up to the rear area of the Bank about two hours earlier.

At the preliminary hearing, Butters was able to identify Gant as the robber. Although there was a six month period between the occurrence of the robbery and the identification at the preliminary hearing, the lapse in time was not so lengthy as to erase the incident and the image of the robber from Butters's memory. On July 15, 2006, a black male walked up to Butter's teller station, displayed a handgun, and demanded money. Such an unusual and traumatic event would likely have left an indelible mark on Butter's memory. As noted by the Superior Court of Pennsylvania, "Whenever the victim of a crime has an opportunity to observe the criminal, the impression of the face of an assailant is etched upon the prey by the terror of the occasion." *Commonwealth v. Bradford*, 451 A.2d 1035, 1037 (Pa. Super. 1982). But, if the image of the robber had begun to retreat into the recesses of Butters's memory, it would have been jolted forward when Butters saw the robber using the ATM on October 7, 2006. It is understandable that the images and memories of July 15, 2006 would have come flooding back. These images and memories would have been fresh in Butter's mind when she testified at the preliminary hearing three months later.

In light of the foregoing factors, the court finds that Butters's preliminary hearing identification of Gant as the robber to be sufficiently reliable to meet the requirements of due process.

The fact that Gant was dressed in prison garb and was the only black male seated at the defense table when the preliminary hearing identification was made does not alter this conclusion. In a similar case, *Commonwealth v. Johnson*, the Superior Court of Pennsylvania held that the fact that a defendant was the only black male in the hearing room and was handcuffed did not render the witness's preliminary hearing identification of the defendant as the perpetrator unreliable. 451 A.2d 263, 265 (Pa. Super. 1982). In *Johnson*, the defendant had robbed the cashier at a pharmacy. The cashier was shown a photo array ten days after the robbery, and she picked out the defendant. *Id.* at 264. About a month after the robbery, a preliminary hearing was held. Before the preliminary hearing began, the cashier went to the room where the hearing was to be held and saw the defendant sitting inside. The defendant was the only black male in the room and he was noticeably handcuffed. *Ibid.* During her preliminary hearing testimony, the cashier identified the defendant as the individual who had robbed her. *Ibid.*

On appeal, the defendant, *inter alia*, asserted that the cashier's identification at the preliminary hearing should have been suppressed because it was the product of an unduly suggestive procedure. The Superior Court held that it was not. The Superior Court held that there were sufficient facts to demonstrate that the cashier's preliminary hearing identification was reliable. *Johnson*, 451 A.2d at 265. The Superior Court noted that the cashier had a good opportunity to view the defendant at the time of the robbery. The defendant had gone up to the

cash register area where the cashier was working and bought cigarettes. *Id.* at 264. He and the cashier exchanged a few words, then the defendant demanded money from the cashier. The cashier and the defendant were only two feet away from each other, and the pharmacy was well lit. *Id.* at 264, 265. The interaction between the cashier and the defendant lasted for about three to four minutes. *Id.* at 264. The Superior Court noted that the cashier's attention was focused on the defendant as he and she were the only two people in the pharmacy. *Ibid.* Finally, the Superior Court noted that the cashier was certain that the defendant was the individual who had robbed her. The cashier did not hesitate in picking the defendant out of the photo array nor did she hesitate in identifying the defendant during her preliminary hearing testimony. *Id.* at 265. The Superior Court concluded that any suggestiveness that was present at the preliminary hearing was outweighed by the factors indicating that the cashier's identification was reliable and not the product of the suggestive procedure. *Ibid.*

Just as in *Johnson*, the fact that Gant was dressed in prison garb and was the only black male seated at the defense table during the preliminary hearing does not render Butters's identification unreliable. Like the cashier in *Johnson*, Butters had a good opportunity to view the robber. Butters and the robber were face to face and in close proximity to each other for several minutes during the robbery. But, Butters's opportunity to view the robber was not limited to the robbery itself. She also saw the robber prior to the robbery when she saw him driving the metallic pink car in the rear area of the Bank, as well as at the ATM machine. As such, Butters had an even greater opportunity to view the perpetrator of the robbery than did the cashier in *Johnson*. Also like the cashier in *Johnson*, Butters's attention was focused on the robber. Although she and the

robber were not the only two individuals in the bank, Butters would have been focused on the man with a handgun standing less than two feet away from her and demanding money. The possible dire consequences of failing to comply with the robber's demands would have forced Butters to focus on him out of self preservation and/or a sense of duty to protect the others in the bank from harm. Accordingly, as in *Johnson*, any suggestiveness that was created by Gant being dressed in prison garb and being the only black male seated at the defense table during the preliminary hearing was outweighed by the factors indicating that Butters's identification was reliable.

The fact that Butters's could not definitely identify Gant during the October 7, 2006 photo array also does not alter the conclusion that Butters's preliminary hearing identification of Gant as the robber is sufficiently reliable to meet the requirements of due process. The failure of a witness to identify a suspect at a prior photo array is a factor to be considered in determining the reliability of a witness's identification testimony. *Commonwealth v. Ferguson*, 475 A.2d 810, 816 (Pa. Super. 1984). It alone is not determinative of whether the identification is admissible. *Ibid*. In *Commonwealth v. Ferguson*, the Superior Court of Pennsylvania held that a witness's inability to identify a defendant at an in-person lineup did not render the witness's identification of the defendant the following day at the preliminary hearing inadmissible. 475 A.2d at 816. The Superior Court held that the failure to identify the defendant at the lineup was one factor to be considered, and when weighed against the other factors, the Superior Court concluded the witness's preliminary hearing testimony was reliable. The Superior Court found that the witness's identification was reliable because he had a good opportunity to view the defendant. The witness was a cab driver who was robbed by the defendant and his co-conspirator. The defendant had

approached the cab while it was stopped at an intersection and was in close proximity to the victim when he pointed a gun at the victim's face and demanded money. *Id.* at 814. The robbery occurred at 1:00 a.m., but the intersection was well lit. *Id.* at 814, 815. Believing that there was a real possibility that the defendant was going to shoot him, the victim focused on the defendant's face so that he could remember it. *Id.* at 815. After concluding that the identification was reliable, the Superior Court went on to note that "... the ability of a witness to positively identify an accused will affect that witness's credibility; and, therefore, the failure or uncertainty of a witness in making an identification at a given confrontation procedure goes to the weight to be accorded that witness's identification testimony rather than its admissibility." *Id.* at 816.

Similarly, Butters's inability to positively identify Gant from the photo array does not automatically invalidate her subsequent preliminary hearing identification of Gant as the robber. Butters's failure to positively identify Gant from the photo array does not outweigh the other factors indicating that her preliminary hearing identification was reliable. In fact, she did select Gant's photo as likely being the robber. The fact that two other similar looking photos could also have been that of the robber does not make her identification at the preliminary hearing nor her present ability to identify Gant unreliable.

As stated earlier, Butter's identification was reliable because she had a good opportunity to view the robber and her attention was focused on him during that opportunity. Thus, while Butters's inability to positively identify Gant from the photo array does not preclude the admission of her preliminary hearing identification, it does go to the weight that identification may be given, and that issue is for the trier of fact to resolve.

Accordingly, the Motion to Suppress is to be denied.

**B. Motion in Limine**

Gant's Motion *in Limine* must be denied. If an out of court identification is determined not to be the product of an unduly suggestive procedures, then a subsequent in-court identification would not be tainted and would be permissible. *Commonwealth v. Martin*, 393 A.2d 23, 26 (Pa. 1978); *Harris*, 888 A.2d at 867-68 ; *Commonwealth v. James*, 461 A.2d 288, 292 n.3 (Pa. Super. 1983). Butters's pre-trial identification of Gant was not the product of an unduly suggestive procedure. Therefore, her pre-trial identification would not taint any in-court identification of Gant she would make at trial.

Accordingly, Gant's Motion *in Limine* is denied, and Butters will be permitted to make an in-court identification of Gant.

**IV. CONCLUSION**

Accordingly, Gant's Motion to Suppress Evidence and Motion *in Limine* are denied.

**ORDER**

It is hereby ORDERED that the Omnibus Pre-trial Motion filed by Defendant Terrance Gant on March 28, 2007 is DENIED. Specifically, the Motion to Suppress Evidence and Motion *in Liimine* are DENIED.

BY THE COURT,

William S. Kieser, Judge

cc: George Lepley, Esquire  
James Protasio, Esquire  
District Attorney  
Judges  
Gary L. Weber, Esquire (Lycoming Reporter)  
Christian J. Kalas, Esquire