

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

**COMMONWEALTH** : **No. 191-2008**  
 :  
**vs.** : **CRIMINAL**  
 :  
**WILLIAM BLACKWELL,** : **Omnibus Pre-trial Motion**  
**Defendant** :

**ORDER**

**AND NOW**, this \_\_\_\_ day of September 2008, after review of the motion and the testimony presented, the Court **DENIES** Count I and Count IV of Defendant's Omnibus pre-trial motion.

In Count I of the motion, Defendant claims the stop in this case was illegal. The Court cannot agree. 911 received a call that a home invasion robbery occurred at 818 Clark Street and a weapon was involved. The perpetrators, who were described as two black males - one wearing a camouflage coat and the other wearing a black jacket or hoody - had just fled the scene in a silver Dodge Intrepid. This information was dispatched over police radio frequencies. Officer David Pletz of the Penn College Police heard the dispatch and positioned himself in front of Fisher's Auto Parts in the 1300 block of Third Street, expecting the vehicle to travel that direction. This location was approximately 2 miles from 818 Clark Street. Within minutes, he observed a silver Dodge Intrepid being driven by a black male. He could tell there were other occupants in the vehicle, but could not see the features of these individuals because the vehicle had tinted windows. Officer Pletz radioed that the vehicle was on Third Street and provided the license plate number of the vehicle. Other units responded to the area. The police activated their lights. Before the vehicle came to a complete stop, a black male jumped out of the front passenger door and another black male

jumped out of the rear driver's side door and fled on foot. The driver had his door open, but Officer Pletz kept him there, took him into custody and placed him in his cruiser. Officer Pletz then went back to the Intrepid to close the car doors and observed a camouflage coat lying on the ground about twenty feet south of the car. The two individuals who fled on foot were caught, one of whom was Defendant. The Court finds the police had sufficient facts to support reasonable suspicion to believe the occupants of the silver Dodge Intrepid were involved in the home invasion robbery on Clark Street and stop the vehicle. The Court also finds that based on all the evidence presented one can infer that the 911 call was not an anonymous tip, but made by a citizen informant (a victim in this case).<sup>1</sup>

In Count IV of the motion Defendant asserts the witnesses' identifications of Defendant should be suppressed because the police subjected Defendant to unnecessarily suggestive identification procedures by showing his photograph to these individuals. At the hearing on the motion, defense counsel orally amended the motion to include a claim that Defendant's right to counsel was violated by the identification procedures used in this case. The Court does not find that the identification procedures were unduly suggestive. The witnesses were not shown a single photograph. Instead, the police created three separate photographic arrays, with each array containing 8 photographs.<sup>2</sup> Agent Sorage selected a photograph of Defendant that most looked like him on that day and then asked the computer for similar images. Defendant's position in the array also was determined by the computer.<sup>3</sup> The police did not show the arrays to the witnesses at the same time; rather, each witness

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1 The Court notes the Commonwealth intended to call the victim who telephoned 911, but he did not appear for the hearing. Rather than continue the entire hearing, the Court took the available testimony. After hearing that testimony, the Court did not believe a further hearing was necessary.

2 The driver was identified as Ishmil Harris and the other passenger was identified as Diandre Williams. A separate array was created for each individual taken into custody.

separately viewed the arrays. The officer also asked the witnesses not to discuss the incident among them. The officer who showed the array did not in any way suggest who the witnesses should select or otherwise single out the suspects in the arrays. He merely asked the witnesses if they knew anyone in the array or if anyone looked familiar to them. Four or five witnesses identified Defendant as one of the perpetrators. Each witness circled the individual in the array and signed their name. The police noted any comments the witnesses made when they identified Defendant. Some witnesses indicated Defendant was the individual in the camouflage coat and at least one witness indicated Defendant was the one with the gun.

The Court also does not believe showing the witnesses the photographic arrays violated Defendant's right to counsel. Although Defendant was in custody, based on the evidence presented at the hearing, the Court does not believe Defendant had been formally arrested at the time the witnesses were shown the photographic arrays. Under the United States Constitution, the Sixth Amendment right to counsel does not apply to photographic displays. *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568 (1973). Under Pennsylvania law, however, a defendant has the right to counsel at post-arrest identification procedures. The critical inquiry becomes at what point is an individual under arrest. The mere fact that an individual is in custody does not necessarily mean he or she is under arrest when it comes to the issue of the right to counsel for identification procedures. If custody alone were the lynchpin for such a determination, a defendant would have the right to counsel for a show-up

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<sup>3</sup> The same procedure was used for Mr. Harris and Mr. Williams.

or when he was arrested for another offense. This, however, clearly is not the law in Pennsylvania. See Commonwealth v. Ray, 455 Pa. 43, 315 A.2d 634 (Pa. 1974)(show-up); Commonwealth v. McKnight, 311 Pa. Super. 370, 375, 457 A.2d 931, 934 (1983)(in custody for a different offense); Commonwealth v. Aaron, 255 Pa.Super. 289, 292-297, 386 A.2d 1006, 1008-1010 (Pa.Super. 19780)(show-up at hospital); Commonwealth v. Santiago, 229 Pa.Super. 74, 78, 323 A.2d 826, 828 (1974)(on-scene confrontation); Commonwealth v. Jackson, 227 Pa.Super. 1, 323 A.2d 799 (1974)(in custody for a different offense). Based on Agent Sorage's testimony, the Court believes that if the witnesses had not identified Defendant as one of the perpetrators he would have been released. Agent Sorage testified that Defendant had not been processed when the arrays were conducted. N.T., June 6, 2008, at p. 58. He also indicated that Defendant was detained while he was determining if the witnesses were going to identify him as being involved in the robbery and it was only after there was a positive identification that Defendant was formally charged. N.T., June 6, 2008, at p. 75. The identifications occurred within the first few hours after the incident. The vehicle stop occurred shortly before 3:00 p.m. and Defendant was in custody shortly after 3:00 p.m. N.T., June 6, 2008, at pp. 73-74. Five witnesses were each shown three photo arrays (one for each suspect) between 5:25 p.m. and 6:16 p.m. N.T., June 6, 2008, at pp. 51-53.

In the alternative, if the Appellate Courts believe Defendant was arrested for purposes of the right to counsel at a photographic display, the Court would encourage the Courts to adopt the exception contained in Justice Pomeroy's concurring opinion in Commonwealth v. Richman, 458 Pa. 167 184-188, 320 A.2d 351, 355-358 (1974), which would exclude those confrontations which take place within a short period of time after

commission of a crime. The Court also notes that in its opinion a photographic display containing 8 photographs is much less suggestive than a show-up, where the witness is viewing a single suspect who is handcuffed and in police custody.<sup>4</sup>

By The Court,

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Kenneth D. Brown, President Judge

cc: Edward J. Rymysza, Esq.  
Paul Petcavage, Esq. (ADA)  
Work File

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<sup>4</sup> The Court further notes that if the right to counsel attaches at a photographic array like the one utilized in this case, the practical effect would be to require the police to do show-ups, which are more suggestive than photographic arrays. Public defenders are not readily available at night or on the weekends to appear for a photographic array. Moreover, a defendant would have to make written application for a public defender. Counsel would not be available for days. The police would have no way to promptly confirm the identity of the offender other than through a show-up if they could not use photographic arrays shortly after a crime is committed.