

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
vs. : **No. CR-1115-2009**
 :
TROY PURNELL, :
Defendant :

OPINION AND ORDER

Before the Court is Defendant's Omnibus Pretrial Motion filed on December 31, 2009. The Omnibus Motion includes a Motion to Suppress Identification, Motion to Compel Discovery, Motion to Disclose Existence of and Substance of Promises of Immunity, Leniency or Preferential Treatment, Etc., Motion for Disclosure of other Crimes, Wrongs or Acts pursuant to Pa. Rule of Evidence 404 (b) and Motion to Reserve Right. A hearing was held before the undersigned on February 5, 2010. On the record, the Court disposed of all of Defendant's Motions except the Motion to Suppress Identification.

Defendant's Motion to Suppress Identification is the subject of this Opinion and Order. Defendant alleges that the July 3, 2009 out-of-court identification of the Defendant at a photo array was impermissibly suggestive and as a result, the identification should be suppressed along with any in-court identification of the Defendant.

On June 21, 2009, the Williamsport Police responded to 700 West Edwin Street, Apartment 6F for an alleged home invasion robbery. The alleged victim, Ashton Andrews, told police that she was on her telephone when there was a knock at the door. She opened the door and two black males wearing dark clothing pushed their way into the house. The first suspect had a hooded sweatshirt on with the hood up. The second black male had a black mask on and possessed a silver handgun.

After being dispatched to the scene, Ms. Andrews described to Officer Jodi Miller of the Williamsport Bureau of Police the physical characteristics of the assailant. Actor 1 was described as a black male, six feet tall, thin with little or no facial hair. He was described as wearing a brown hooded sweatshirt over a black sweatshirt.

The following day, Officer Miller contacted Ms. Andrews and asked if she could come down to the police station to look at a series of photos to see if she recognized anybody. Officer Miller had assembled a photo array consisting of eight photographs. Through a computer program, Officer Miller inserted a photograph of a suspect fitting the general description as given by the alleged victim and through other information obtained in the investigation. The computer then generated a series of photographs fitting the general physical characteristics of the alleged suspect. Officer Miller then hand selected seven photos of individuals who in his opinion matched the description of the alleged suspect. The eight individuals were then randomly placed on an array sheet which was then shown to the victim.

The photographic array that was shown to the victim on June 22, 2009, included a notation on top that read as follows: "Pennsylvania Justice Network JNET". The alleged victim circled an individual within a few seconds. The Defendant was not included in this array. The individual who was circled was the only individual wearing a hooded sweatshirt.

On July 3, 2009, Officer Miller composed a second photographic array. This too was a computer-generated compilation which included the photographs of seven individuals and one of the Defendant.

Officer Miller asked the alleged victim to come down again to the station because he had some additional photos to look at. After briefly looking at the photographic

array, the victim circled the photograph of the Defendant. She noted for the officer that she knew who this individual was because he came from next door, was hitting on her and that his baby's mama drives a greenish-blue vehicle. According to Officer Miller, the victim informed him of these facts prior to Officer Miller telling her that he thought her first identification was incorrect.

The second photographic array also included the notation: "Pennsylvania Justice Network JNET" on the top left portion of the array. Of greater significance is the fact that in both photographic arrays, the individuals who the victim circled were the only individuals in the photographic array who were wearing hooded sweatshirts.

A photographic identification is unduly suggestive if, under the totality of the circumstances, the identification procedure creates a substantial likelihood of misidentification. Commonwealth v. DeJesus, 580 Pa. 303, 860 A.2d 102 (2004). Under the circumstances, the Court concludes that the photographic array was unduly suggestive and that the out-of-court identification was unreliable and therefore not admissible.

A photographic identification is unduly suggestive when the procedure creates a substantial likelihood of misidentification. Commonwealth v. Johnson, 542 Pa. 384, 668 A.2d 97 (1995). The totality of the circumstances present in this case indicates that the photographic identification was, in fact, unduly suggestive and created a substantial likelihood of misidentification.

First, there was clear discrepancy between the actual description of the Defendant and the description supplied by the victim prior to the photographic identification.

Specifically, the victim indicated that the Defendant had little or no facial hair when in fact the Defendant clearly had a beard and mustache.

Further, the Defendant was the only individual included in the array who was wearing a hooded sweatshirt thus drawing attention clearly to him.

Finally, only one day following the incident, the victim clearly and unequivocally identified the wrong individual. Indeed, during the first photographic identification, the victim indicated to Officer Miller that she was 100% sure the individual she identified was one of the assailants. Determinatively, this individual as well, was the only individual in the array wearing a hooded sweatshirt.

Also to be considered, in conjunction with the above, is the fact that the photographic identification was conducted in a less than ideal manner. It was not conducted in a blind fashion; rather it was conducted by the affiant investigator. Second, the affiant did not tell the victim that the perpetrator may or may not have been present. Further, the photographic array was conducted with pictures all on the same page and not individual photographs.

A consideration of all of the circumstances in this case taken together, leads this Court to conclude that the identification procedure utilized in this case was unduly suggestive and, accordingly, the identification is ruled to be inadmissible.

Defendant further argues that because the photographic identification was unduly suggestive, the victim's in-court identification of the Defendant must necessarily be suppressed. Defendant, however, misinterprets the law with respect to this issue. Specifically, it does not necessarily follow that a suggestive pretrial identification procedure renders a trial

identification inadmissible. Commonwealth v. Bradford, 305 Pa. Super. 593, 451 A.2d 1035 (1982).

Following a suggestive pretrial identification procedure, a witness should not be permitted to make an in-court identification unless the prosecution establishes by clear and convincing evidence that the totality of the circumstances affecting the witness's identification did not involve a substantial likelihood of misidentification. Bradford, supra., citing Commonwealth v. Fowler, 466 Pa. 198, 352 A.2d 17 (1976).

Accordingly, the Court Administrator is directed to schedule a further hearing in this matter in order that the Court can determine whether the victim lacked an independent basis for her in-court identification of the Defendant. The burden at said hearing shall be on the Commonwealth to establish by clear and convincing evidence that the totality of the circumstances affecting the victim's identification did not involve a substantial likelihood of misidentification.

The Court notes that a consideration of the totality of the circumstances requires a close examination of:

- (1) The suggestive factors involved in the identification process; and
- (2) Whether or not, despite the suggestive factors involved in the process, other factors are present which clearly and convincingly establish that the witness's identification has an "independent origin" in the witness's observations at the time of the crime.

Bradford, supra.; Fowler, supra.

ORDER

AND NOW, this ____ day of March, 2010, following a hearing on Defendant's Motion to Suppress, the victim's out-of-court identification of the Defendant via a photo array, is Suppressed. The Commonwealth is precluded from utilizing at trial, the victim's identification of the Defendant through the photographic array.

The Court Administrator is directed to schedule a one hour hearing before this Court for the purpose of presenting testimony in connection with Defendant's Motion to Suppress any in-court identification of the Defendant by the victim.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: Edward J. Rymsza, Esquire
DA
Deb Smith, Court Scheduling Technician
Gary Weber, Esquire (Lycoming Reporter)
Work File