

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1744-2010
vs. :
SHALAMAR K. BROWN, : Opinion and Order re
Defendant : Defendant's Motion to Suppress
: Identification

OPINION AND ORDER

This matter came before the Court on March 22, 2011 for a hearing on the Defendant's motion to suppress identification. The relevant facts follow.

On or about November 15, 2010, at approximately 2:00 a.m., Kelsey Witmer and Rebecca Lawell, students in Penn College's dental hygiene program, were getting ready for bed after a long night of studying for an exam and their door bell rang. Ms. Witmer went to the door and pulled back the curtain. Ms. Lawell stood behind her. The Defendant was at their door asking for an individual named Chris. Ms. Witmer told the Defendant that the individual did not live there. She spoke with the Defendant through the door for a minute or two. At some point she opened the door. The Defendant asked if he could use one of their cell phones, claiming his cell phone was dead. Ms. Lawell said no because she was concerned the Defendant would run off with her phone, but Ms. Witmer eventually handed the Defendant her phone and stood at the open door while he was talking. After using Ms. Witmer's phone, the Defendant asked for a ride and asked to use the bathroom. Ms. Witmer said fine. She got her keys while the Defendant went into the bathroom. Then everyone left the apartment and got into Ms. Witmer's car.

Ms. Witmer was seated in the driver's seat, the Defendant was seated in the front passenger seat and Ms. Lawell was in the back seat. Ms. Witmer spoke to the

Defendant while she was driving. The Defendant asked the girls if they had change for a one hundred dollar bill. Both girls told him they did not. Ms. Witmer said maybe Uni-Mart would, so they stopped at the Uni-Mart on West Fourth Street. The Defendant went inside while the girls waited outside in the car. The girls watched the Defendant speak to the clerk in the Uni-Mart as if he was asking for change. The Defendant returned to the vehicle and told them that the Uni-Mart did not have change for a \$100 bill.

The Defendant kept asking about change for the \$100 bill. He claimed he needed to get milk for his baby. Ms. Witmer suggested that they try Sheetz. Ms. Witmer drove to the Sheetz on Maynard Street. The Defendant went into the Sheetz, but returned and said they did not have change. At some point Ms. Witmer realized she had her ATM card on her and she said she'd get \$100 from the ATM machine in Sheetz to give the Defendant change. The Defendant smoked a cigarette outside the car with the passenger door open while Ms. Witmer went inside and got money.

When Ms. Witmer returned to the car, the Defendant was standing outside the car talking on his cell phone. The Defendant finished his conversation then got into the car. Ms. Witmer gave the Defendant \$100. Defendant then told the girls that he had to get \$100 from his wife, but had to see a few other relatives first.

Defendant had Ms. Witmer drive him to about three other locations. The first was supposedly his cousin's residence. He went inside while the girls waited outside in the car for about a half an hour. Another place was purportedly an uncle's residence. The Defendant asked the girls for another \$200 for a total of \$300 and told them that he would

pay them \$400 in return. At the last stop in Newberry, the Defendant went inside while the girls waited outside in the car for him to return with the \$400. The girls waited for two hours, but the Defendant did not return.

The girls subsequently went to the Williamsport Bureau of Police station to report what had happened. As they were speaking with Corporal Moore, Agent Eric Delker walked in. What the girls were describing sounded like a case he was involved in sometime during the last year or so. Agent Delker peppered the girls with a few questions. Based on what they described and how the suspect introduced himself to them, Agent Delker thought the suspect sounded like a suspect from another case named Andre Franklin. Agent Delker then showed the girls a picture of Andre Franklin, but they immediately said he was not the individual.

Later that morning, a teacher recommended that Ms. Witmer and Ms. Lawell speak to their school's Dean. The Dean recommended that they also talk to the Penn College police.

At approximately 9:00 a.m. on November 15, 2010, Ms. Witmer and Ms. Lawell spoke to Sergeant David Pletz of the Penn College Police Department. Ms. Witmer and Ms. Lawell told Sgt. Pletz about the incident that had taken place overnight. They described the suspect as a black male in his forties with bad teeth. At that time, Sgt. Pletz knew of two individuals who had used that type of method to obtain money. Sgt. Pletz showed them a photograph of Andre Franklin. They said that definitely he was not the guy and told Sgt. Pletz that the Williamsport police had shown them that photo earlier.

Sgt. Pletz then asked them to look at another photograph. He pulled up the most recent CPIN photo of the Defendant on his computer screen. At the same time, both girls said “that’s the guy.”

Williamsport police received a report from a male who also was deceived out of \$300. This male’s report was very similar to the report made by Ms. Witmer and Ms. Lawell. In investigating that incident, the Williamsport police developed the Defendant as a suspect.

Agent Delker created a photo array through the web CPIN system that contained the photograph of the Defendant and then took it to Ms. Witmer’s and Ms. Lawell’s apartment on November 17th. Agent Delker was not aware that Ms. Witmer and Ms. Lawell had already identified the Defendant’s photo as the suspect with Sgt. Pletz.

Agent Delker showed the photo array to Ms. Witmer first. The photo array contained eight photographs. Agent Delker asked Ms. Witmer to carefully look at the photographs and if she recognized anyone she should tell him. Ms. Witmer immediately either verbally said photo #2 or pointed to photo #2, which was the photograph of the Defendant. Agent Delker asked her how she knew that individual and she said, “That’s the guy.” Ms. Witmer then circled her selection, and signed and dated it. The Commonwealth introduced a black and white photocopy of this photo array as Commonwealth’s Exhibit 1.

Agent Delker then called to Ms. Lawell. Ms. Witmer left the room and Ms. Lawell entered it. Although the girls passed in the hallway, they did not speak to each other. Agent Delker then went through the same procedure with Ms. Lawell. He showed her a

separate copy of the photo array, asked her to carefully look at the photographs and let him know if she recognized anybody. Ms. Lawell immediately selected the photo in position #2 as the individual from the early morning hours of November 15. She also circled, signed and dated her selection. The Commonwealth introduced a black and white photocopy of this photo array as Commonwealth Exhibit 2.

The Defendant filed a motion to suppress these identifications and any in-court identification, claiming that Sgt. Pletz' showing a single photograph of the Defendant to Ms. Witmer and Ms. Lawell simultaneously was unduly suggestive and conducive to irreparable mistaken misidentification as to deny him due process of law and that any subsequent identification is tainted from the initial suggestive identification of him as the perpetrator.

If a pretrial photographic identification is so unnecessarily suggestive and conducive to irreparable mistaken identification, the accused is denied due process of law. Commonwealth v. Chmiel, 585 Pa. 547, 889 A.2d 501, 523 (2005), citing Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967 (1967). "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, 112 (2004)(citations omitted).

Although the Court does not condone Sgt. Pletz' actions of showing a single photograph of the Defendant to both witnesses at the same time, the Court finds under the totality of the circumstances that it did not create a substantial likelihood of misidentification

in this case. See Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243 (1977)(although identifications arising from single-photograph displays may be in general viewed with suspicion, totality of circumstances showed reliability of identification); Commonwealth v. Buehl, 510 Pa. 363, 508 A.2d 1167 (1986)(although witness shown a single photo, application of the totality of the circumstances test to the facts of this case assured the Court that the pre-trial identification was proper).

Before viewing the Defendant's photograph, the witnesses were shown a photograph of another individual, Andre Franklin. The witnesses indicated that the Williamsport police had also shown them that photo and it was not the individual. When Sgt. Pletz then showed them a photograph of the Defendant, within seconds both witnesses simultaneously said "that's the guy." This identification occurred within hours of the incident. Moreover, both witnesses had ample opportunity to view the Defendant's face. The witnesses spent hours with the Defendant driving him to various locations in Williamsport. The witnesses observed the Defendant at their back door, when he entered their apartment to use the bathroom, when he stood inside Uni-Mart speaking to the clerk, when he stood outside the vehicle at Sheetz smoking a cigarette and talking on the telephone and each time he entered and exited Ms. Witmer's vehicle.

While the Court does not believe the initial identification created a substantial likelihood of misidentification, even if the Court agreed with the Defendant regarding the initial identification procedure, the witnesses' subsequent identification through the use of an eight-photo array and any in-court identification would be admissible under the facts and

circumstances of this case.

Despite a suggestive pre-trial identification procedure, the Commonwealth may utilize a subsequent identification by a witness if it shows by clear and convincing evidence that the witness' subsequent identification has a sufficiently independent origin in the witness' observations at the time of the crime. Commonwealth v. Bradford, 305 Pa.

Super. 593, 451 A.2d 1035, 1037 (1982). The Court considers the following factors:

(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the degree of attention of the witness; (3) the existence of any discrepancies between the actual description of the defendant and the description supplied by the witness prior to the confrontation or photographic identification; (4) the manner in which the pre-trial identification was conducted; (5) any previous identification by the witness of some other person; (6) any previous identification of the defendant himself; (7) the level of certainty, including any failure, demonstrated by the witness at the time of the identification; and (8) the lapse of time between the crime and the pre-trial identification.

Id.

As previously discussed, the witnesses had ample opportunity to view the Defendant during the incident. The witnesses' degree of attention also was good. They testified that when the Defendant entered and exited the vehicle, the interior light would be on and they would turn to look at him and speak with him. There is nothing in the record in to indicate any discrepancies in the witnesses' descriptions of the Defendant. The witnesses did not identify anyone else as the perpetrator. In fact, a similar procedure was utilized with respect to Mr. Franklin's picture by both the Williamsport police and Sgt. Pletz before the witnesses ever saw the Defendant's photograph and the witnesses immediately said he was not the individual. Each time the witnesses identified the Defendant, their identifications

were immediate and certain. The time between the crime and the initial identification with Sgt Pletz was a matter of hours. The second identification made utilizing Agent Delker's eight-photograph array was two days after the crime.

Based on all of these factors, the Court finds the witnesses' identification of the Defendant is sufficiently reliable, despite the fact that Agent Delker unknowingly used the same photograph of the Defendant in his photo array that Sgt. Pletz had shown the witnesses two days earlier.

While the Court does not find the procedure utilized created a substantial likelihood of misidentification sufficient to justify suppression in this case, defense counsel may challenge the credibility or weight of the witnesses' identifications with the facts and circumstances surrounding the initial identification procedure utilized by Sgt. Pletz.

ORDER

AND NOW, this ____ day of April 2011, for the reasons set forth above, the Court DENIES the Defendant's motion to suppress identification

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney

Nicole Spring, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file