

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

**COMMONWEALTH OF PA**

**vs.**

**EMIL COOPER,  
Defendant**

**:**

**: No. CR-1464-2009**

**:**

**:**

**: Motion to Suppress**

**OPINION AND ORDER**

Before the Court is Defendant's Motion to Suppress filed on February 14, 2011.

This case has an unusually disjointed history. By Information filed on October 7, 2009, Defendant was charged with Criminal Attempt to Commit Homicide, two counts of Aggravated Assault, two counts of Simple Assault and one count of Possessing Instruments of a Crime. The Commonwealth alleges that on or about August 1, 2009, the Defendant and another individual were arguing in the 600 Block of Second Street in Williamsport. During the argument, the Commonwealth alleges that the Defendant stabbed the other individual in the chest-torso area resulting in serious injuries to the victim.

On August 4, 2010, the Defendant pled guilty to Count 3, Aggravated Assault with a Deadly Weapon, a felony of the second degree, and Count 6, Possessing Instruments of a Crime, a misdemeanor of the first degree. Sentencing was scheduled for September 8, 2010. At Defendant's scheduled sentencing on September 8, 2010, the Defendant expressed a possible desire to withdraw his plea and requested additional time to discuss the matters further with his attorney. The sentencing was continued to September 28, 2010.

On September 27, 2010, Defendant filed a written Motion to Withdraw his Guilty Plea. The initial hearing on Defendant's Motion to Withdraw his Guilty Plea was scheduled for October 29, 2010. At said hearing, Defendant initially testified that he "had to

say” that he was guilty “to get that deal.” He testified further that if he “wanted the plea,” he “had to say” that he “had a knife.”

The Court entered an Order noting that following some very brief testimony by the Defendant and it appearing to the Court that the Public Defender’s office had a conflict in connection with the continued representation of Mr. Cooper, Don Martino, Esquire would be appointed to represent the Defendant further in the matter and that the hearing would be continued further. The continued hearing was scheduled for November 23, 2010.

That hearing was continued at the request of the Defendant. Another hearing was scheduled for December 17, 2010 but that hearing was continued at the request of the Commonwealth.

The hearing on Defendant’s Motion to Withdraw his Guilty Plea was eventually held on January 6, 2011.

By Order of Court dated February 8, 2011, the Court granted the Defendant’s Motion to Withdraw his Guilty Plea and placed the case on the trial list. On February 14, 2011, Defendant filed a Motion to Suppress requesting that the Court suppress the identifications of the Defendant made at different photo arrays, as well as all subsequent identifications of the Defendant made by witnesses at in-court proceedings.

The Commonwealth filed a Motion to Reconsider the Granting of the Motion to Withdraw the Guilty Plea in light of the filed Motion to Suppress. Argument was held and by Order of Court dated March 7, 2011, the Court denied the Commonwealth’s Motion to Reconsider.

The hearing on Defendant's Motion to Suppress was held on March 22, 2011. The Commonwealth first presented the testimony of Agent Leonard Dincher of the Williamsport Bureau of Police. While Agent Dincher testified in exacting detail regarding his investigation and the procedures utilized in connection with the photo array, the pertinent aspects of his testimony will follow.

Agent Dincher's initial investigation revealed that the Defendant may have been involved in the stabbing incident. Utilizing Defendant's biographical information, he obtained a photograph of the Defendant from JNET. He then utilized a computer program known as CPIN which identified numerous individuals whose facial characteristics matched those of the Defendant. These individuals were randomly selected by the computer and then selectively viewed by Agent Dincher. Agent Dincher eventually selected seven individuals who matched the Defendant and utilizing the computer program prepared a photo array which included those seven individuals and the Defendant.

The original photo array was marked and introduced into evidence as Commonwealth Exhibit 1. On August 1, 2009, Agent Dincher met with Nadia Baker who was a witness to the incident. She indicated to Agent Dincher that she saw the victim and Defendant "tussling." She originally thought that they were simply fooling around but as they got closer she noticed that the victim was bleeding.

Agent Dincher showed her the photo array and asked her if any of the individuals involved in the incident were in the array. She immediately recognized the Defendant, circled his picture and printed her name under the picture that she circled.

She had known the Defendant for at least a few weeks because she was residing with Gwen Smith who was the Defendant's girlfriend.

Shortly thereafter on August 1, 2009, Agent Dincher also visited with a Mr. Dyson who resided on Second Street. He related that he too witnessed the incident indicating that he saw the Defendant and a young boy engaged in an argument.

Agent Dincher showed Mr. Dyson the photo array and asked him if anybody in the array was involved in the incident that morning. Within a matter of a few seconds, Mr. Dyson identified the Defendant, circled his picture and either initialed or signed his name under the photograph that he circled.

Agent Dincher subsequently interviewed the victim in the ICU unit of the Williamsport Hospital. This interview occurred at approximately 6:00 p.m. on August 1, 2009. During the interview, Agent Dincher asked the victim if he knew who stabbed him and the victim indicated that he did. As Agent Dincher was pulling the photo array out of the file folder, the victim immediately pointed to the Defendant. He too circled the photograph of the Defendant and initialed it.

Through cross-examination of Agent Dincher, it was confirmed that the background of the photograph involving the Defendant was a different shade than the background of the other photographs. It was also evident, however, that the background color of some of the other photographs was also different than the remaining six.

Nadia Baker next testified on behalf of the Commonwealth. She had known the Defendant by the name Saleem for approximately two to three weeks. She saw him when he visited with her roommate, saw him around on occasion and talked to him "once in a while."

She knew the victim by the first name of Dakota and on the night in question saw the Defendant and Dakota with a group of other people. She was approximately two houses away and saw the Defendant and Dakota engaging in what she believed was horseplay. She then saw everyone separate and walk away at which time she saw Dakota bleeding.

She was shown the photo array by Agent Dincher and immediately recognized the Defendant as Saleem. She picked the Defendant out of the photo array because she knew him before and knew him to be the individual involved in the incident with Dakota. The different colored background made absolutely no difference to her in connection with the identification.

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).

There is absolutely no evidence whatsoever that the photographic array or the procedures utilized in presenting it to the witnesses was unduly suggestive. The array was comprised by the random selection of photographs from a computer. While Agent Dincher selected what photographs would be actually utilized in the array, all of the utilized photographs were similar to the Defendant’s appearance in terms of skin color, facial hair,

hairstyle, nose and eyes. The Court's view of the entirety of the facial characteristics of the individuals taken together does not lead the Court to believe that there is any suggestiveness whatsoever.

The difference in the coloring of the background is a difference without a distinction. Indeed, the argument can be made with respect to any of the backgrounds that were different than the other backgrounds. There is nothing whatsoever in the background that would suggest undue influence on the viewer.

Moreover, there was nothing whatsoever about how Agent Dincher presented the array which was unduly suggestive. He did not point to a particular individual, he did not say anything that would point to a particular individual and he did not suggest that the individual involved was in fact in the photograph. Moreover, all of the individuals who identified the Defendant did so immediately leading the Court to conclude that they were not pressured or influenced by Agent Dincher in any manner whatsoever.

Because the Court has deemed the photo arrays not to be unduly suggestive, the Court need not address the in-court identifications of the Defendant.

The Court would note, however, that for any in-court identification to be admissible, the Commonwealth must prove by clear and convincing evidence that the in-court identification has an origin independent of any suggestive pretrial identification.

Commonwealth v. Fisher, 564 Pa. 505, 769 A.2d 1116, 1127 (Pa. 2001). The factors the Court considers in determining whether a witness has an independent basis include: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the individual; (4) the level of

certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Fisher, supra (citation omitted); Commonwealth v. Douglass, 701 A.2d 1376, 1379 (Pa. Super. 1997)(citation omitted).

Even assuming that there may have been some suggestive pretrial identification which is not the case, the Court concludes that any in-court identification of the Defendant clearly had an origin independent of any suggestive pretrial identification.

**ORDER**

**AND NOW**, this \_\_\_\_ day of April 2011, following a hearing and argument, the Court **DENIES** the Defendant's Motion to Suppress any identification of the Defendant through the photo array utilized by the Commonwealth or any in-court identification.

BY THE COURT,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
Don Martino, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work File