

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	No. 349-2006; 551-2006;
v.	:	552-2006
	:	CRIMINAL DIVISION
DARNELL JOHNSON,	:	
Defendant	:	PCRA

OPINION AND ORDER

Following the filing of the Defendant's Amended Post Conviction Relief Act (PCRA) Petition and Supplement thereto, the Court issued an Order on September 1, 2011 addressing three of the four issues raised in the Petition. For purposes of this Opinion, the Court will rely on the September 1, 2011 Order for the allegations raised including ineffectiveness of trial counsel for: 1) failure to object to and/or challenge the trial court's *sua sponte* consolidation of three cases on the eve of trial; 2) failure to object to the late disclosure of hand-written criminal histories of the Commonwealth witnesses; and 3) failure to object to the highly prejudicial closing arguments of the prosecutor.

As to the fourth and final issue raised in the Petition, the Court determined that an evidentiary hearing was needed to examine the Defendant's claim that trial counsel was ineffective for failure to file a pre-trial motion challenging the identification procedures utilized by the police in his cases. After several continuances, a hearing on this matter was held on January 6, 2012.

Factual background

The three cases which are a part of this Petition involve robberies which occurred on separate dates. In CR: 349-2006, the robbery involving Matthew Jackson (Jackson) as the victim occurred on January 9, 2006 and the Defendant was detained on that case on February 2, 2006.

N.T., 12/14/06, p. 276-279. Jackson was shown the photo array relevant to the case, which was provided by Officer Raymond Kontz of the Williamsport Bureau of Police, after the Defendant was detained, but prior to the Defendant's arrest on that case. N.T., 12/14/06, p. 278-279. The two additional witnesses for that case, Crystal McQuade (McQuade) and Andrea Wheeler (Wheeler), were shown the photo array after the Defendant was arrested. N.T., 12/14/06, p. 285-291. The information received from the witnesses in CR: 349-2006 as to the suspects involved in the robbery coincided with additional information the police had previously received on two earlier robberies, allowing the police to also develop suspects on those earlier cases. N.T. 12/14/06, p. 277. In addition to the testimony of these witnesses, Antwon Murphy (Murphy), the Defendant's co-defendant in the robberies, testified at trial and implicated the Defendant as his accomplice. N.T., 12/11/06, p. 144-151. In CR: 551-2006, the robbery involving Richard Picozzi (Picozzi) as the victim was reported on October 26, 2005, but Picozzi was not shown a photo array until February 9, 2006 and at that time the Defendant was only in custody under CR: 349-2006. N.T., 12/14/06, p. 300-303. In CR: 552-2006, the robbery involving Shane Eichinger as a victim occurred on December 1, 2005, but the witnesses were not shown a photo array until February 8 and 9, 2006 at which time the Defendant was also only in custody under CR: 349-2006. N.T., 12/14/06, p. 302-303.

Discussion

Photo array given absent the presence of defense counsel

The Defendant contends that trial counsel was ineffective for failing to file a pre-trial motion challenging the identification procedures utilized by the police since in one of these cases the Defendant had been arrested and the photo array was presented to witnesses without counsel present. In order to establish ineffective assistance of counsel, a defendant must demonstrate 1)

an underlying claim of arguable merit; 2) no reasonable basis for counsel's act or omission; and 3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. Commonwealth v. Cooper, 941 A.2d 655, 664 (2007). (See Commonwealth v. Carpenter, 725 A.2d 154, 161 (1999)).

A defendant's right to have counsel present during a photo array attaches once a defendant has been placed under arrest for the charges for which the photo array is given. See Commonwealth v. Sanders, 551 A.2d 239 (Pa. 1988). Where a defendant has not yet been arrested for the offense in question but is instead in custody pursuant to a different offense, the right to counsel at a photo array does not attach. Commonwealth v. McKnight, 457 A.2d 931 (Pa. 1983). In both CR: 551-2006 and 552-2006, at the time the photo arrays were given the Defendant was not under arrest for the charges for which the arrays were given; therefore, the Defendant's right to have counsel present would not have attached at that time. However, in CR: 349-2006 the Defendant was under arrest for charges under that case at the time witnesses were shown the photo array; therefore, the Court finds that the Defendant did have the right to have counsel present at that time.

Although the Court believes the Defendant has met the first prong needed to establish that his right to the presence of counsel was violated under CR: 349-2006, to prevail on his ineffectiveness of trial counsel claim he must also establish that any in-court identification of the Defendant made by the witnesses who viewed the un-counseled photo array was not the product of an independent recollection of the Defendant, but was based solely on the witnesses' memory of the Defendant's identity through exposure to the un-counseled photo array. If the Defendant can establish this, he must also establish that had the testimony of these witnesses been precluded at trial, there is a reasonable probability that the outcome of the trial would have been different.

When evaluating the photo arrays in question, the court in Commonwealth v. Abdul-Salaam, 678 A.2d 342 (Pa. 1996) noted that “[e]ven assuming the illegality of an arrest or a suggestive out-of-court identification, the eyewitness identifications of Appellant are not necessarily required to be suppressed.” (quoting Commonwealth v. Garvin, 293 A.2d 33 (Pa. 1972)). An in-court identification will be allowed if, considering the totality of the circumstances, “[t]he in-court identification ‘had an origin sufficiently distinguishable to be purged of the primary taint.’” Abdul-Salaam at 349 (quoting Commonwealth v. Carter, 643 A.2d 61 (Pa. 1994)). When determining whether an independent basis exists, the factors to consider 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 criminal; 4) the level of certainty demonstrated by the witness at the confrontation; and 5) the length of time between the crime and the confrontation.

Abdul-Salaam at 349 (quoting Carter at 71).

As discussed above, CR: 349-2006 involved the testimony of three witnesses, Jackson, who was the victim of the robbery, and McQuade and Wheeler. McQuade viewed the photo array after the Defendant was arrested for charges under CR 349-2006; however, McQuade made an in-court identification of the Defendant and her testimony revealed that she not only recognized the Defendant from the events surrounding the robbery of Jackson, but that she met the Defendant two days prior to the robbery. N.T., 12/11/06, p. 85. At the time of the robbery, McQuade viewed the Defendant walking up the sidewalk, saw him get into the front seat of Jackson’s car along with another individual man who sat in the back seat and pointed a gun at Jackson. N.T., 12/11/06, p. 86. Wheeler also viewed the photo array after the Defendant was under arrest for charges under CR: 349-2006 N.T., 12/11/06, p. 113-115. However, like McQuade, Wheeler made an in-court identification of the Defendant and her testimony was that

she did not see the robbery take place nor did she see the Defendant on the day of the robbery, but that she knew the Defendant prior to the date of the robbery as she picked him up in her cab on several occasions at a Timberland apartment, which was the location where the Defendant was arrested. N.T., 12/11/06, p. 94-211. Furthermore, although the Defendant was simply detained at the time Jackson viewed the photo array per Kontz' testimony, Jackson made an in-court identification of the Defendant as one of two people who had robbed him. N.T., 12/11/06, p. 49-50, N.T., 12/14/06, p. 278-279. The trial took place less than one year following the January 9, 2006 robbery of Jackson, and Kontz testified that prior to the administration of the photo array Jackson gave "[a] very good description along with the tattoo that was on the back of his [Defendant] right hand, height, weight, other descriptors like that." N.T., 12/14/06, p. 277-279. Notwithstanding the fact that the Court finds the in-court identification of the Defendant by all three witnesses for CR: 349-2006 had an independent basis from the questioned photo array, the Defendant's co-defendant also testified at trial and confirmed the account of the robbery as described by the witnesses and confirmed that the Defendant acted as his co-defendant in the robbery. N.T., 12/11/06, p. 144-151. Based on these findings, the Court concludes that the Defendant's claim of trial counsel's ineffectiveness relating to the photo arrays being given absent the presence of defense counsel to be without merit.

Unduly suggestive photo array

The Defendant also contends that trial counsel was ineffective for failing to file a pre-trial motion challenging the identification procedures utilized by the police in these cases as the circumstances of the photo array were unduly suggestive. The Defendant believes that the procedures surrounding the photo array were unduly suggestive because: 1) suggestive comments by Kontz that the purpose of the identification was to identify the person in the

photograph who conducted the robbery; 2) the photographic array for each witness prominently displayed the hearing “Pennsylvania Justice Network JNET”; 3) the photographs were not individual photographs, but rather eight pictures on the same page; 4) the photographs were suggestive in that several of the witnesses identified the Defendant as having a scar and/or tattoo on his face and neck area and the other individuals failed to have any such distinguishing marks; and 5) the photographic identification procedures were not administered in a blind manner.

In order to prove his claim, the Defendant must establish for the Court that the array was unduly suggestive, that any in-court identification of the Defendant made by the witnesses of the unduly suggestive array was not based on an independent recollection of the Defendant, but was based solely on the witnesses’ acquaintance with the Defendant through the array, and that had the testimony of the witnesses’ of the unduly suggestive array been excluded at trial, the result of the trial would have been different.

As to the Defendant’s claim that Kontz made suggestive comments to the witnesses indicating that the purpose of the photo array was to identify the person in the photographs who conducted the robbery, Kontz’ testimony at the PCRA hearing refutes this claim. Kontz testified that he would have asked the witnesses if they knew anyone in the array and how they knew that person, that he would not have used the word “suspect” nor would he have mentioned a “robbery.”

As to the remainder of the Defendant’s contentions, the Court notes that “generally, a pre-trial identification may be inadmissible at trial if it was obtained by a procedure so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the accused due process.” Commonwealth v. Messina, Pa. Dist. & Cnty. Dec. LEXIS. 301 (Pa. Dist. & Cnty. 2008) (See Commonwealth v. Voss, 482 A.2d 593 (Pa. Super. 1984)). “A photographic

identification is unduly suggestive if, under the totality of the circumstances, the identification procedure creates a substantial likelihood of misidentification.” Id. at 7. (Citing Commonwealth v. Harris, 888 A.2d 862, 866 (Pa. Super. 2005)). “Photographs utilized in lineups will not be deemed unduly suggestive if the suspect's picture does not stand out more than those of the other individuals included in the array and the people depicted in it all exhibit similar facial characteristics.” Id. (citing Commonwealth v. Fisher, 769 A.2d 1116, 1127 (Pa. 2001)). The photo array used in Messina consisted of eight photographs generated using the CPIN system. As the photos used in the array all depicted “black men that appeared to be of similar facial features, build, age, and skin complexion” and as the defendant’s photo did not stand out from the others, the Court in Messina found that the photo array was not unduly suggestive.

In the cases involved in this Petition, Kontz prepared the photo array using the JNET system. The JNET system selected seven photographs of individuals close in appearance to that of the Defendant. After a review of the photo array, the Court believes that all of the photographs depict individuals of similar race, age, and skin complexion. Although the Defendant argues that his photo is the only photo to depict an individual with a scar on his face, the Court finds that the scar is barely visible in the photograph. Furthermore, Kontz testified at the PCRA hearing that McQuade was the only witness who knew that the Defendant had a marking on his face, and as the Court discussed above, McQuade’s in-court identification of the Defendant was based on an independent recollection of the Defendant separate and apart from the photo array. Based on this analysis, the Court finds that the photo array was not unduly suggestive and finds the Defendant’s otherwise to be without merit. Furthermore, notwithstanding this determination, the Court again notes that the co-defendant, involved in the robberies, Murphy, testified against the Defendant at trial. The Court believes that the outcome

of the trial would have been the same considering Murphy's testimony alone, even absent that of the witnesses.

Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907 (1), the parties are hereby notified of this Court's intention to deny the Defendant's PCRA Petition. The Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an Order dismissing the Petition.

ORDER

AND NOW, this 7th day of March, 2012, the Defendant is notified that it is the intention of the Court to dismiss the Defendant's PCRA petition unless he files an objection to that dismissal within twenty days (20) of today's date. This decision will be served on the Defendant as set forth in Pa.R.Crim.P. 907(1).

By the Court,

Nancy L. Butts, President Judge

xc: Ken Osokow, Esq.
E.J. Rymysza, Esq.