

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :  
 :  
 vs. : No. CR-2063-2017  
 :  
 MATTHEW SMITH, : Omnibus Pretrial Motion  
 Defendant :

**OPINION AND ORDER**

By Information filed on January 5, 2018, Defendant is charged with delivery of crack cocaine, possession with intent to deliver crack cocaine, criminal use of a communication facility and possession of a controlled substance.

On June 8, 2018, the Commonwealth filed a Petition to Amend the Information. A hearing was held on June 18, 2018 at which time, upon stipulation of the parties, the court entered an Order amending the Information to as follows:

Count 1 – Delivery of a Non-Controlled Substance;

Count 2 – Possession with Intent to Deliver a Non-Controlled Substance; and

Count 3 – Criminal Use of a Communication Facility.

Count 4 was withdrawn.

On April 24, 2018, Defendant filed an Omnibus Pretrial Motion. The hearing on Defendant’s Omnibus Pretrial Motion was also held on June 18, 2018. While the Omnibus Pretrial Motion contained different motions and requests for relief, the only issue Defendant pursued was a Motion to Suppress Defendant’s Line-Up Identification.

Defendant contends that his pretrial identification by the confidential

informant at a photo array was so suggestive that it gives rise to a substantial likelihood of irreparable misidentification, and accordingly should be suppressed.

In assessing the propriety of identification evidence, the inquiry focuses on whether, under the totality of the circumstances, the identification was reliable.

*Commonwealth v. Millburn*, 2018 PA Super 178, 2018 WL 3078669, \*5 (June 22, 2018). If a pretrial photographic identification is so unduly suggestive and conducive to irreparable mistaken identification, the accused is denied due process of law. *Commonwealth v. Chimiel*, 585 Pa. 547, 585, 889 A.2d 501, 523 (2005). “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, 319, 860 A.2d 102, 112 (2004) (citations omitted).

At the June 18, 2018 hearing, the Commonwealth first presented the testimony of Ashley Cohick. In December of 2017, she was working with Pennsylvania State Police Trooper Tyler Morse as a confidential informant participating in controlled purchases of narcotics.

On December 6, 2016, she arranged for the purchase of heroin from an individual she knew as “Mike.” While arranging a location for the purchase, walking down an alleyway near Fink’s paint store in Williamsport, Ms. Cohick recognized Defendant. In fact, it was Defendant who was conducting the transaction presumably on behalf of “Mike.”

Ms. Cohick had met Defendant in the summer of 2007 through her boyfriend, who previously knew him. She had previously purchased controlled substances from

Defendant at least 20 to 30 times. She did not know him by name.

In the alleyway on December 6, 2017, Ms. Cohick gave Defendant \$180.00 and he gave her the suspected heroin. She returned to Trooper Morse and informed him that it wasn't the individual she knew as "Mike" but another individual who she had known.

She described the individual as light-skin or mixed, in his mid-20's with short hair and a beard weighing approximately 150 to 160 lbs. and approximately 5 feet 10 inches tall. She indicated that he was wearing a blue Gap sweatshirt.

The next day Trooper Morse went to Ms. Cohick's home and showed her a photo array line-up. He asked her if she saw the person in the line-up who sold her the drugs. In a few seconds, she identified Defendant as the individual in the top left photo, circled the photo, and initialed next to the circle. She immediately recognized Defendant as she had seen him many times in the past.

Trooper Morse also testified. Following the transaction, Defendant was apprehended. He was processed at which time a photograph was taken of him. Through observations and discussions with Defendant, Trooper Morse determined that Defendant was 25 years old, his eyes were brown in color, he had a beard without a mustache, his hair color was brown, his hair length was above his ears, and he was a male. Defendant stated that he was white.

Later that day, Trooper Morse inputted Defendant's facial characteristics into the Pennsylvania identification database. The program was designed to locate similar individuals with similar characteristics. The computer would produce groups of eight

different photographs of different individuals and Trooper Morse would select from those groups different photographs until he came up with an array of eight. The computer then randomly selected the position of those eight individuals.

The photo array was then brought to Ms. Cohick at her home. When Trooper Morse went to Ms. Cohick's house, he sat down with her and the array was turned over so the pictures could not be seen. He indicated to her that he was going to show her the array and that the person who sold her the drugs may or may not be in the line-up. He turned it over and asked if she recognized any of the individuals. She immediately selected Defendant, circled his picture, initialed it, dated it, and set forth the time of her identification.

Despite Defendant's argument to the contrary, there is no evidence that the photographs in the array or the procedures utilized in presenting it to Ms. Cohick were unduly suggestive.

"A photographic array is unduly suggestive when the procedure creates a substantial likelihood of misidentification. Photographs used in line-ups are not unduly suggestive if the suspect's picture does not stand out more than those of the others, and the people depicted all exhibit similar facial characteristics." *Commonwealth v. Fisher*, 564 Pa. 505, 769 A.2d 1116, 1126 (2001)(citation omitted).

The totality of the circumstances do not demonstrate that the procedure was so impermissibly suggestive as to give rise to any likelihood of misidentification, let alone a substantial likelihood of such. *Millburn, id.* The array was comprised by the random selection of photographs from a computer. While Trooper Morse selected what photographs

would be actually utilized in the array, all of the utilized photographs were similar to 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 was any suggestiveness whatsoever. While Defendant argues that he is the only mixed individual in the array, such claim belies his statement to Trooper Morse that he was white. Moreover, his picture is substantially similar in skin tone to the other individuals in the photo array. He does not, as Defendant claims, appear to be the only mixed individual in the array.

As well, there is nothing whatsoever suggestive about how Trooper Morse presented the array. He did not point to any particular individuals, 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, Ms. Cohick identified Defendant immediately, leading the court to conclude that she was not pressured or influenced by Trooper Morse in any manner whatsoever.

Because the court deems the photo array not to be unduly suggestive, the court need not address the in-court identification of Defendant.

Even if the court assumed for the sake of argument that the photo array was unduly suggestive, such would not require the suppression of any in-court identification in this case. Following a suggestive pre-trial identification, 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.

*Fisher, id.* The factors the court considers in determining whether a witness has an independent basis include:

- (1) The opportunity for 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.

*Id.*(citation omitted); *see also Millburn, supra; 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 Defendant by Ms. Cohick clearly had an origin independent of any suggestive pretrial investigation. Ms. Cohick was easily able to identify Defendant, who she had purchased controlled substances from in the recent past twenty to thirty times. She knew who Defendant was and she immediately recognized him once the photo array was presented to her. Furthermore, during the hearing in this matter, she clearly identified Defendant and indicated that her basis for identifying Defendant was that he was the one who sold her the drugs (non-controlled substances) on the date in question and he was the one who had sold her drugs countless times in the prior months.

**ORDER**

**AND NOW**, this \_\_\_\_ day of June 2018, following a hearing, argument and the submission of briefs, the court **DENIES** Defendant's motion to suppress both the photo array identification of Defendant and the in-court identification of Defendant.

By The Court,

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Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)  
Andrea Pulizzi, Esquire, (APD)  
Work file  
Gary Weber, Esquire, Lycoming Reporter