

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CP-41-CR-945-2019**
 v. :
 :
 :
 DARRYL MIDDLETON, : **OMNIBUS PRETRIAL**
 Defendant : **MOTION**
 :
 OPINION AND ORDER

Darryl Middleton (Defendant) was arrested on June 19, 2019 on five counts of Delivery of a Controlled Substance,¹ five counts of Possession of a Controlled Substance with the Intent to Deliver,² five counts of Possession of a Controlled Substance,³ and five counts of Criminal Use of a Communication Facility.⁴ The charges arose from a number of controlled purchases that occurred between Defendant and a confidential informant (CI) in Williamsport, Pennsylvania. Defendant filed this Supplemental Omnibus Pretrial Motion on November 4, 2019 and a hearing on the motion was held by this Court on January 6, 2020. In his Omnibus Pretrial Motion, Defendant raises one issue, whether the photo array used by police was unduly suggestive and therefore any in-court identification of Defendant should be precluded.⁵

Discussion

At the time of the hearing, the Commonwealth showed the Court the original photo array provided to the CI and a photocopy was entered as Commonwealth's Exhibit #1. Both the

¹ 35 P.S. § 780-113(a)(30).

² 35 P.S. § 780-113(a)(30).

³ 35 P.S. § 780-113(a)(16).

⁴ 18 Pa. C.S. § 7512.

⁵ Defendant also filed a Motion to Reinstate Intensive Supervised Bail, which will not be addressed in this Opinion and Order as a member of the Bail Office was not present to weigh in on the issue at the time of the hearing.

Commonwealth and Defendant then presented argument as to why it is believed or not believed that the photo array was suggestive in nature.⁶

When reviewing the reliability of an out of court identification, a court must examine the totality of the circumstances. *Commonwealth v. Johnson*, 139 A.3d 1257, 1278 (Pa. 2016). “A pre-trial identification violates due process only when the facts and circumstances demonstrate that the identification procedure was so impermissibly suggestive that it gave rise to a very substantial likelihood of irreparable misidentification.” *Id.* A photo array is not unduly suggestive if the suspect’s photo does not stand out more than the other photos and the individuals in the photos “all exhibit similar facial characteristics.” *Commonwealth v. Fulmore*, 25 A.3d 340, 346 (Pa. Super. 2011).

This Court finds that the photo array is not unduly suggestive. The photo array is in black and white. All of the individuals are wearing different attire and none of them are in prison uniform. The backgrounds of the photo are all different and vary in brightness. All of the individuals have similar shorter hair, as well as similar facial hair. Also, all of the individuals appear to be of similar complexion. This Court therefore finds that the photo array was not “so impermissibly suggestive that it gave rise to a very substantial likelihood of irreparable misidentification.” *Johnson*, 139 A.3d at 1278. The suspect did not stand out more than any other photo and all of the photos had similar characteristics. *Fulmore*, 25 A.3d at 346. Therefore any in-court identification shall not be precluded.⁷

⁶ As the factual background of Defendant’s underlying case is irrelevant to Defendant’s Motion and Defendant does not contend the procedures of creating or distributing the photo array to the CI were suggestive, this Court will not delve into the factual background in this Opinion and Order.

⁷ It should also be noted that in candor, Defendant’s attorney informed the Court that at least two of the controlled buys occurred after the CI identified Defendant in the photo array. With this information even if the Court found the photo array impermissibly suggestive, it would not

ORDER

AND NOW, this 8th day of January, 2020, based upon the foregoing Opinion, Defendant's Supplemental Omnibus Pretrial Motion is hereby **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA (DW)
Robert Hoffa, Esquire

NLB/kp

be inclined to preclude an in-court identification of Defendant as a valid independent source for the identification of Defendant would exist prior to and after the photo array was shown to the CI. *See Commonwealth v. Santiago*, 209 A.3d 912 (Pa. 2019).