

IN THE SUPREME COURT OF OHIO
2012

STATE OF OHIO,

Case No. 2012-0149

Plaintiff-Appellee,

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

ANTHONY SULLIVAN,

Court of Appeals
Case No. 10AP-997

Defendant-Appellant.

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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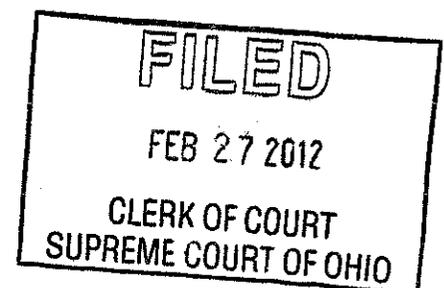


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

The instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. Defendant misrepresents both the issues raised in the appellate court and the facts of the case in his attempt to obtain further review.

Defendant's first proposition relates to Ohio's repeat violent offender statute. In his direct appeal defendant included an assignment of error about the statute but made no argument whatsoever in the body of his brief. Moreover, this Court has previously determined that the repeat violent offender specification is constitutional. *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, 915 N.E.2d 292.

Defendant's argument about the search issue is premised on a misrepresentation of the facts. It is well-settled that in review of a motion to suppress, the reviewing court accepts the facts as found by the lower court. The trial court specifically found that the state's witness was more credible than the defendant's girlfriend but defendant continues to base his argument on the girlfriend's testimony.

Defendant's final claim about the photo array was decided on the specific facts of this case. Defendant complained that three of the men had some hair while three of the men were bald. Both the trial court and the appellate court applied the well-settled law on identifications and made a factual determination. Defendant does not challenge the legal determinations here, only the factual ones, making this case one that will not result in law that can be applied across Ohio or in any other case.

It is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

On November 6, 2009 and November 11, 2009, the Cooper State Bank located at the corner of Como and High Street was robbed. On the first date Laurie Rupp was working as a teller and was alone at the counter when a man approached after entering through the High Street door. The man slid a note toward her on the counter that read, "Bank Robbery! All big bills 30 seconds or die no bank bags". Ms. Rupp complied with the demand, giving him all the large bills from her drawer. The man then left through the Como Avenue door and Ms. Rupp used the alarm system to alert police and then alerted her boss to the robbery.

Ms. Rupp described the robber as wearing a blue hat with a little bill on it, a light-colored zip-up sweater and blue Dockers. She thought he had a little bit of a mustache, strong build and was six foot five inches or six foot one inch tall, and weighed about 200 pounds. She could not recall the exact amount of money taken but thought it was around \$3000 which included bait money. She identified Defendant as the robber in a photo array shortly after the robbery and again identified him in court. She also identified the sweater he was wearing during the robbery. She further indicated that photographs from the bank security system were an accurate record of the events that day.

Laura Hanna was also working at the bank on November 6th and greeted what she thought was customer, then turned to get her coat and purse from a closet because her shift was over. When she turned back around she knew that something was wrong by looking at Ms. Rupp and knew they had been robbed. She described the robber as a black male with a goatee, late 20s-30s, blue hat, bigger build, six foot to six foot two inches, wearing a tan top.

Defendant's right palm print was lifted from the interior northwest door (the door the robber entered through) after the November 6th robbery.

Melissa Vondram was the branch manager of the bank and was working during both robberies. On November 6th she was in the lobby of the bank and greeted defendant when he entered the building. She noticed a distraught look on the teller's face and realized that something was wrong. After defendant left she confirmed that they had been robbed, then followed their robbery procedure by locking the doors and calling police. Ms. Vondram was able to contact her corporate supervisor and have immediate access to the surveillance system, including still photos of the robber.

On November 11, 2009, the bank was again robbed. Ms. Hanna was working a teller again and after helping someone at the drive-thru, noticed the teller next to her, Abby Sanker, scooping money out of her drawer and passing it over to the robber. Just prior to that, Ms. Hanna had been showing Ms. Sanker a picture from the previous week's robbery. Ms. Hanna described the robber as a black male in his early thirties, with a mustache, wearing a stocking cap and a tan jacket. After she realized they were being robbed again she looked closely at the robber and realized it was the same robber as the week before. After the man left the building through the same door as the previous week, Ms. Hanna called 911 and talked to Ms. Sanker. Ms. Hanna described Ms. Sanker as very shaken up, shaking, crying and in shock.

Ms. Vondram was in a meeting with other management staff during the second robbery but could see the tellers and saw Ms. Sanker with a distraught look on her face, scooping up money and handing it over. Ms. Vondram pressed the alarm call button located in her office and the man left the building. Ms. Vondram talked to Ms. Sanker and noted that she was very, very shaken. Ms. Sanker indicated that she had just been robbed and that she believed the robber looked like the picture of the person from the robbery the week before. Ms. Vondram also felt that it was the same person who committed both robberies based on his appearance, including his

height and weight and the sweater the robber was wearing on both occasions. Ms. Vondram ran an accounting of Ms. Sander's drawer after the robbery and the drawer was short \$1912.

On November 22, 2009 Detective Billups received a call from a person who wanted to know if they were looking for Tony Sullivan for a couple of bank robberies. Det. Billups was not assigned to the case but the caller provided some information that allowed him to determine what they were talking about. The caller indicated that it was two robberies of a Cooper State bank and indicated that defendant was staying at the Super 8 Motel on Brice Road with a female named Rachel Moore and that the caller had just left the motel. Patrol officers went to the motel and placed both defendant and Ms. Moore in cruisers before Det. Billups arrived. The room was registered to Ms. Moore and she signed a consent to search form for Det. Billups and entered the room with him. Det. Billups noted a tan colored sweater that was visible in an open suitcase, later identified by the witnesses at the bank as the sweater worn by the robber on both dates.

The defendant was charged with two counts of second degree felony robbery and was found guilty by a jury on both counts. The jury additionally found that in both offenses he had threatened to commit serious physical harm. The trial court determined that defendant was a repeat violent offender and imposed eight years on both counts to be served consecutively and an additional five years on each count for the repeat violent offender specifications for a total of twenty-six years incarceration.

RESPONSE TO PROPOSITION OF LAW NO. ONE:

**ISSUES NOT PROPERLY RAISED IN THE COURT OF
APPEALS ARE NOT PROPERLY BEFORE THIS COURT.**

In his appeal defendant made no specific arguments about the repeat violent offender specification, but simply stated that the enhanced penalty imposed for the repeat violent offender specification violated defendant's rights and is unconstitutional. No legal argument was made.

The Tenth District overruled the assignments of error regarding the repeat violent offender specification on the basis of App.R. 12(A)(2) which allows the court to disregard an assignment of error if the party fails to argue the assignment of error in the brief. Defendant made no legal argument in the his appeal and cannot now, for the first time, attempt to raise legal arguments on the issue.

Therefore, this proposition of law merits no further review.

RESPONSE TO PROPOSITION OF LAW NO. TWO:

ON REVIEW OF A MOTION TO SUPPRESS, THE
REVIEWING COURT ACCEPTS THE FINDINGS OF FACT OF
THE LOWER COURT.

Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long*, 127 Ohio App.3d 328, 713 N.E.2d 1 (4th Dist., 1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks*, 75 Ohio St.3d 148, 661 N.E.2d 1030 (1996). A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Metcalf*, 111 Ohio App.3d 142, 675 N.E.2d 1268 (4th Dist., 1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State v. Williams*, 86 Ohio App.3d 37, 619 N.E.2d 1141 (4th Dist., 1993).

Defendant's basis for his argument here is that his suitcase was closed when Det. Billups entered the motel room. Though this was defendant's position at trial, the trial court specifically stated that it found Detective Billups to be a credible witness, more credible than defendant's witness who testified that the suitcase was closed when Detective Billups entered the room. The

trial court indicated that any doubt about the location of the sweater was resolved in favor of Detective Billups, whose testimony was that the suitcase was open and the sweater was partially visible, as shown in the photographs he took.

Because the trial court found that the suitcase was open and the sweater was thus in plain view, no additional consent or search warrant was necessary and the trial court properly admitted the sweater as evidence.

Therefore, this proposition of law merits no further review.

RESPONSE TO PROPOSITION OF LAW NO. THREE:

**A RELIABLE OUT OF COURT IDENTIFICATION IS
ADMISSIBLE.**

When the police have conducted an out-of-court identification procedure, such as a lineup or photographic array, the witness' out-of-court identification will be suppressed if two findings are made: (1) that the identification procedure was so impermissibly suggestive that it gave rise to (2) a very substantial likelihood of misidentification. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). The same standard applies when the defendant is challenging the admissibility of an in-court identification following such an impermissibly suggestive out-of-court procedure, except that the very substantial likelihood of misidentification must be a very substantial likelihood of *irreparable* misidentification. *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

In assessing the likelihood of misidentification, courts are instructed to review the totality of the circumstances, including: (1) the witness' opportunity to view the defendant at the time of the incident; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the witness' level of certainty in making the identification; and (5) the length of

time between the crime and the identification. *State v. Davis*, 76 Ohio St.3d 107, 113, 666 N.E.2d 1099 (1996).

“[R]eliability is the linchpin in determining admissibility of identification testimony * * *.” *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Even if the identification procedure itself was impermissibly suggestive, so long as the challenged identification itself is reliable under the totality of the circumstances, it is admissible. *Id.* A defendant bears the burden to show that an identification procedure was both impermissibly suggestive and unreliable. *State v. Sims*, 13 Ohio App.3d 287, 288, 469 N.E.2d 554 (1st Dist., 1984).

Suppression of identification evidence is the exception rather than the rule:

We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

Brathwaite at 116.

It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness – an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart – the “integrity” – of the adversary process.

Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification – including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.

Id., at 113-14 n. 14 (quoting another case). “The standard, after all, is that of fairness as required by the Due Process Clause * * *.” *Id.* at 113. The Due Process Clause is not an evidentiary codebook. *Estelle v. McGuire*, 502 U.S. 62, 70, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

Defendant here complains that three of the men in the photo array had hair on their heads and three were bald. The trial court viewed the photo arrays and found that they were not unduly suggestive or influential because the variations were within reason. As courts have found in similar arguments, variations in apparent skin tone and/or lighting were acceptable, since photographs need not be identical and can have substantial dissimilarities. As stated in *Davis*, 76 Ohio St.3d at 112, 666 N.E.2d 1099:

A defendant in a lineup need not be surrounded by people nearly identical in appearance. *New York v. Chipp* (1990), 75 N.Y.2d 327, 336, 553 N.Y.S.2d 72, 77, 552 N.E.2d 608, 613. "Even* * * significant dissimilarities of appearance or dress" will not necessarily deny due process. 1 LaFave & Israel, *Criminal Procedure* (1984) 587, Section 7.4.

Because the identification procedure here was not unduly suggestive, the trial court properly admitted the testimony.

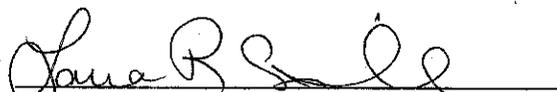
Therefore, this proposition of law merits no further review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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Prosecuting Attorney

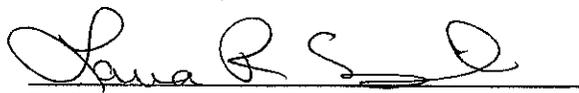


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, February 27, 2012, to TOKI M. CLARK, 233 South High Street, 3rd Floor, Columbus, Ohio 43215; Counsel for Defendant-Appellant.



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