

NO. 2013-1819

ORIGINAL

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 98388

STATE OF OHIO

Plaintiff-Appellee

-vs-

ERIC WELLS

Defendant-Appellant

MEMORANDUM IN RESPONSE OF APPELLEE, STATE OF OHIO

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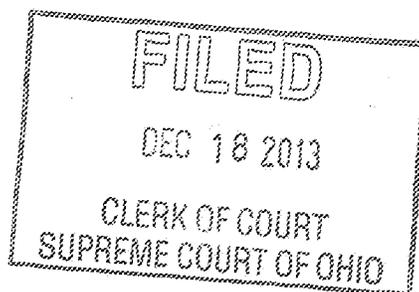
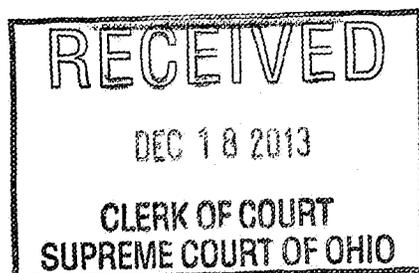


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WHY THIS FELONY CASE IS NOT A CASE OF GREAT PUBLIC OR GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Wells does not present this Court with either a substantial constitutional question or a matter of great public or general interest. Wells seeks review of two issues: the first was not properly raised below and the second requests a bright line rule that is inconsistent with principles of law that have been well-established since 1972. The State respectfully submits that neither proposition is worthy of review and asks this Court to decline to accept jurisdiction.

Wells was convicted for the 2006 homicide of Devin Webb. Before trial, Wells argued that his case should be dismissed because the state failed to try him within his statutory speedy trial rights. Wells again raised this issue on direct appeal. The Eighth District Court of Appeals unanimously rejected Wells claim. *State v. Wells*, 8th Dist. Cuyahoga App. No. 98388, 2013-Ohio-3722. The court found that the triple count provision of R.C. 2945.71(E) did not apply because Wells was also incarcerated for a probation violation. While the lower court had *sua sponte* asked for briefing about the probation violation, the court ultimately concluded that they could not consider any issues related to the violation because Wells had failed to appeal the probation case. *Id.* at ¶42. Wells now seeks review of an issue that was not properly raised, and was not considered, by the lower court. This Court should deny Well's request for jurisdiction.

In his second proposition of law, Wells seeks this Court's review over the denial of his motion to suppress the identifications made by two witnesses. Wells argues that using his picture in multiple photo arrays was unduly suggestive and he asks this Court to adopt a proposition of law which would hold that anytime a defendant's picture is used in multiple photo arrays, that array was unduly suggestive and must be suppressed. Wells's proposition is

contrary to clearly established precedent which requires that a defendant show that the identification was “unnecessarily suggestive of the suspect's guilt *and* the identification was unreliable under all the circumstances.” *State v. Waddy*, 63 Ohio St.3d 424, 438, 588 N.E.2d 819(1992) citing *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) and *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

The photo arrays used in this case were not unduly suggestive and the identifications were not unreliable. Wells was placed in multiple arrays to show how he looked at the time of the offense and in 2010 when he was declared a suspect. The identifications were made by two witnesses who knew Wells and were confident in their identifications. Their identifications were also corroborated by other multiple sources.

The State of Ohio respectfully submits that Wells’s arguments do not warrant the jurisdiction of this Court. No aspect of this case presents this Honorable Court with either a substantial constitutional question or a matter of general or great public interest. As such, the State of Ohio respectfully requests this Court decline to accept jurisdiction in this case.

STATEMENT OF THE CASE

On May 19, 2010, the Cuyahoga County Grand Jury indicted Appellant Eric Wells with one count of Aggravated Murder and one count of Having Weapons While Under Disability for causing the death of Devin Webb.

Wells was arrested for murder on April 21, 2010, after an extended investigation into the homicide. On May 24, 2010, Wells was arraigned, found indigent, and assigned two highly qualified attorneys to represent him this matter. Wells filed various motions, including motions for discovery and a motion to suppress witness identification. Wells also filed a motion to

disqualify his trial counsel, which the trial court granted. Additional motions and continuances were granted, the vast majority of which were attributable to Wells.

The jury trial commenced on April 23, 2012, and Wells was found guilty of Aggravated Murder with firearm specifications. The trial court found Wells guilty of Having a Weapon While Under Disability. On April 30, 2012, Wells was sentenced to life with the possibility of parole after 25 years.

Wells appealed his convictions and the Eighth District Court of Appeals unanimously affirmed. *State v. Wells*, 8th Dist. Cuyahoga App. No. 98388, 2013-Ohio-3722. On direct appeal, Wells argued that his speedy trial rights were violated and that the trial court erred by denying his motion to suppress eyewitness identification. The Eighth District *sua sponte* had the parties brief whether Wells's probation violation could be used to calculate speedy trial when Wells was incarcerated longer than the period of time he faced for the violation. The court ultimately correctly found that the issue was "not before this court because, again, Wells did not appeal his probation case. Therefore, any challenge concerning the legality of the probation hold or capias, or whether Crim. R. 32.3 or R.C. 2951.08 were followed, cannot be considered by this court." *Id.* at ¶42. Wells now seeks jurisdiction on this undecided issue and, additionally, seeks a third review of his motion to suppress identification. The State respectfully submits that neither of these issues warrant this Court's jurisdiction.

STATEMENT OF THE FACTS

On August 14, 2006, Devin Webb was killed as a result of multiple gunshot wounds. Officers were able to obtain video surveillance of the homicide. The video depicted the suspect as a black male, with a white do-rag, a long, black t-shirt, blue jeans, white tennis shoes, and a

distinct walk. Officers were unable to obtain a view of the suspects face from the video. The video also showed a female witness, identified as Gwendolyn Wiley, speaking with the suspect just before the shooting. Officers spoke with Wiley and other witnesses at the crime scene. After speaking with the witnesses on scene, the Detectives had obtained a description of the suspect and the name Eric. The case went cold for some time and, in an attempt to obtain new leads, officers aired an episode of Crime Stoppers for assistance. The episode produced an anonymous tip which identified Wells as the murderer. Armed with this information, Det. Smith went to a location where the Wells would be and observed his walk and mannerisms, confirming Wells's status as a suspect.

Wells's photograph was placed into two separate photo arrays and shown to witnesses Wiley and Diaz. Both women positively identified Wells as the shooter. David Morgan, another witness, knew Webb, Wells, and Wiley. Wells occasionally stayed with Morgan and the two used drugs together. Morgan described Wells in 2006 as scruffy, slight build, nappy hair, and goatee, with salt and pepper color hair and goatee, with a "gimped" walk. Mr. Morgan also indicated that Wells always wore either a black or white wave cap. Morgan testified that Wells was having problems with the victim and that on the evening of August 14, 2006, he got upset with the Wells for having a 357 revolver. After the confrontation, the Wells left his apartment wearing a white wave cap with his fro sticking out, a black t-shirt, probably a dark flannel, and jeans. Wells left towards the direction of the homicide and, a short time later, Morgan heard three pops and saw Wells run down Detroit Ave.

Witness Jasmine Diaz also provided a similar description of Wells, whom she knew from using drugs. She observed the surveillance video and immediately identified Wells, Webb, and

Wiley. Witness Joanne Flores provided a similar description of Wells and testified that she saw him put a long, black gun into his pants as he ran away from the crime scene. Witness Helen Washtock, a resident of the area, provided a similar description of Wells. Witness Leah Johnson, who was familiar with Webb and Wiley, also provided a similar description of Wells.

In addition to the witnesses, Stacey Jarrell, a deputy sheriff for Cuyahoga County and Wells's cousin, identified Wells as the suspect in the Crime Stoppers video. An inmate, Shakim Allah, also identified Wells. Mr. Allah, who knew Wells since childhood, testified that Wells approached him about contacting some of the witnesses and telling them not to come to court. Based on all of this evidence Wells was convicted of Aggravated Murder.

LAW AND ARGUMENT

PROPOSITION OF LAW I (AS STATED BY APPELLANT): WHEN A DEFENDANT IS ARRESTED FOR A PROBATION VIOLATION AND A PENDING CHARGE, AND HE OR SHE IS NOT BROUGHT BEFORE A COURT FOR RESOLUTION OF THE PROBATION VIOLATION PURSUANT TO R.C. 2951.08(B), THE PROBATION HOLDER IS NOT VALID AND THE THREE-COUNT PROVISION IN R.C. 2945.71(E) APPLIES TO EACH DAY THAT THE DEFENDANT SPENDS IN JAIL IN LIEU OF BAIL FOR PURPOSES OF CALCULATING THE DEFENDANT'S SPEEDY TRIAL TIME.

i. Summary of Argument

In his first proposition of law, Wells asks this Court to review his speedy trial claim. Wells argues that flaws in his probation violation matter rendered it inapplicable to the speedy trial calculation of the aggravated murder case. This issue, which was *sua sponte* raised by the lower court, was not decided below. Rather, the Eighth District held that because Wells failed to challenge his probation case, the argument could not be considered. This was an appropriate and restrained decision. Wells now seeks to disregard procedure and have this Court accept

jurisdiction over an issue that was not considered below. This Court should deny Wells's request.

ii. Law and Analysis

Wells' speedy trial rights were not violated; the State only used 226 of a possible 270 days of speedy trial time. On March 22, 2010, Wells was sentenced to one year of community control sanctions for drug trafficking (F5). Wells was told that, if he violated probation, he faced up to twelve months in prison. On April 19, 2010, Wells was arrested when he failed a drug test. On April 21, 2010, Wells was arrested for killing Devin Webb. The triple count provision of R.C. 2945.71 did not apply because Webb was not being held solely on the pending aggravated murder charge. *State v. Brown*, 64 Ohio St.3d 476, 479, 597 N.E.2d 97 (1992).

Wells did not appeal his probation case, so any issues related to the propriety of his violation were not before the court. In pretrial arguments on his aggravated murder charge, Wells claimed that he could not have been violated in his 2010 drug case because the homicide that he was on trial for occurred in 2006. This argument missed the point. Wells was initially arrested for violating probation because of a positive urine test for drugs. Wells now also claims that his probation violation should not have impacted speedy trial in this case because his probation matter was not heard within 33 days of his arrest for the violation. This issue first arose when *sua sponte* raised by the Eighth District. Critically, Wells failed to appeal his probation case. The court ultimately correctly found that the issue was "not before this court because, again, Wells did not appeal his probation case. Therefore, any challenge concerning the legality of the probation hold or *capias*, or whether Crim. R. 32.3 or R.C. 2951.08 were

followed, cannot be considered by this court.” *State v. Wells*, 8th Dist. Cuyahoga App. No. 98388, 2013-Ohio-3722 at ¶42.

The Eighth District conducted a time calculation and determined that Wells’s speedy trial rights were not violated. There was extensive motion practice and a substitution of counsel that tolled a significant amount of time. The Court properly reviewed this issue and applied both controlling and persuasive authority in reaching its decision. Wells was brought to trial consistent with his statutory and constitutional rights and his claim to the contrary lacks merit.

iii. Conclusion

Wells asks this Court to accept jurisdiction over an issue was not properly raised in the court below. While Wells is correct that there are thousands of individuals on probation, this is not the appropriate case to consider the impact of the nuances of a probation violation on a defendant’s other pending cases. This issue should not be considered now when not considered on direct appeal. Therefore, the State respectfully requests this Court decline to accept jurisdiction.

PROPOSITION OF LAW II (AS STATED BY APPELLANT): IF THE POLICE PRESENT AN EYEWITNESS WITH MULTIPLE PHOTO ARRAYS AND INCLUDE A PHOTOGRAPH OF THE DEFENDANT IN EACH ARRAY, THE RESULTING IDENTIFICATION IS NOT RELIABLE BECAUSE IT WAS CAUSED BY UNDULY SUGGESTIVE POLICE PROCEDURES.

i. Summary of Argument

Wells next asks this Court to review whether or not his motion to suppress identification should have been granted. Wells proposes this Court adopt a bright line rule that would require suppression anytime an eyewitness is shown multiple photo arrays that each include a picture

of the suspect. Such a rule would be inconsistent with the well-established law on this topic. This Court should decline to accept jurisdiction over this meritless issue.

ii. Law and Analysis

Wells was not the casualty of an improper identification. He was identified as the shooter by eyewitness Wiley and by witness Jasmine Diaz who spoke with Wells 45 minutes before the homicide and noted that Wells was wearing the same clothing captured on surveillance video. Wiley and Diaz were, prior to the effective date of R.C. 2933.83, each shown to sets of photo arrays. Both sets contained a picture of Wells-one as he appeared in 2006 at the time of the homicide and a recent picture. Wiley and Diaz both picked Wells in each array. Wells claims that this procedure was unduly suggestive and warranted suppression.

Wells asks this Court for a rule that would require suppression if an identification procedure is unduly suggestive. This is not the law. Due process requires suppression of an out-of-court identification if the confrontation procedure was “unnecessarily suggestive of the suspect's guilt *and* the identification was unreliable under all the circumstances.” *State v. Waddy*, 63 Ohio St.3d 424, 438, 588 N.E.2d 819(1992) citing *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) and *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Wells was required to satisfy both prongs of the test and he failed to prove either.

Suggestiveness depends on several factors, including the size of the array, its manner of presentation, and its contents. *Reese v. Fulcomer* (C.A.3, 1991), 946 F.2d 247, 260. Stated differently, the test is “whether the picture of the accused, matching descriptions given by the witness, so stood out from all of the photographs as to suggest to an identifying witness that

[that person] was more likely to be the culprit.” *Jarrett v. Headley* (C.A.2, 1986), 802 F.2d 34, 41. The fact that Wells was in multiple arrays in this case were not unduly suggestive. Officers showed the witnesses multiple arrays to accurately depict Wells in 2006 and in 2010. The Tenth District Court of Appeals has also recently addressed this issue and found that the array was not unduly suggestive. See *State v. Sealy*, 10th Dist. Franklin App. No. 09AP-1128, 2010-Ohio-6294, ¶29; *State v. Griffin*, 10th Dist. Franklin App. No. 10AP-902, 2011-Ohio-4250.

Not only does Wells fail the first prong, but he also was unable to show that the identifications were unreliable. In “examining the totality of the circumstances, a number of factors are to be weighed against ‘the corrupting effect of the suggestive identification.’” *State v. Neal*, 6th Dist. Lucas App. No. L-07-1141, 2009-Ohio-1743, ¶19-20 citing *Manson*, supra, 114. These factors include “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.” *Id.*, citing *Neil v. Biggers*, 409 U.S. at 199-200.

The photo arrays shown to Ms. Wiley and Ms. Diaz, prior to July 7, 2010, were properly admitted at trial. The court correctly ruled that these photo arrays were not unduly suggestive. Both witnesses readily identified each picture and both witnesses knew Wells before the homicide and provided accurate descriptions consistent with the surveillance video and descriptions from other witnesses. Just like the photos in *Sealy* and *Griffin*, the multiple pictures in this case had depicted Wells with different weight and facial features. Despite these differences, the witnesses were confident in their decision. The arrays in this case were constitutional and appropriate for use at trial.

iii. **Conclusion**

This Court should decline to accept jurisdiction over Wells's second proposition of law. Wells failed to show that the identification by two witnesses were either unduly suggestive or unreliable, as required by well-established law. The identification of Wells by witnesses that knew him, which was corroborated by other multiple sources, does not warrant review by this Court.

CONCLUSION

The State of Ohio respectfully requests that this Honorable Court decline to accept jurisdiction in this case, and dismiss Appellant's appeal. Supreme Court review is not warranted as no aspect of Appellant's case presents this Honorable Court with either a substantial constitutional question or a matter of general or great public interest.

Respectfully submitted,

TIMOTHY J. MCGINTY
Cuyahoga County Prosecutor

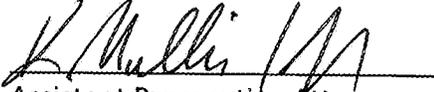


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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response was sent by regular U.S. mail this
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