

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE                    )  
  )  
  ) v. ID No. 1011010571  
  )  
DANE JONES,                                )  
  )  
  ) Defendant.                                )

Submitted: August 11, 2011  
Decided: August 18, 2011

On Defendant Dane Jones' Motion to Suppress  
**DENIED**

**OPINION**

Kevin Carroll, Esquire, Deputy Attorney General, Department of Justice,  
Attorneys for the State

Peter W. Veith, Esquire, Wilmington, Delaware, Attorney for Defendant

JOHNSTON, J.

On August 31, 2010, Justin Heath was shot several times while seated in his vehicle. Within minutes, the police arrived as Heath was being treated by emergency personnel. Heath identified "Scrap" as one of the shooters.

Heath was severely injured, having been shot approximately 18 times. On October 28, 2010, a police detective visited Heath in the hospital. Heath was on a ventilator and unable to communicate verbally. Heath was taking medication.

The detective showed Heath two photo arrays. Each array consisted of six photographs. The first included a photograph of a suspect other than defendant. The second contained the photograph of defendant Jones. All other photographs in both arrays were different.

Upon viewing the first array, Heath did not identify anyone. When the detective showed Jones the second array ("October Array"), Heath, by physical gesture, identified Jones as a shooter.

Heath's physical condition improved. On November 16, 2010, the detective again visited him in the hospital. Heath was off the ventilator and able to communicate verbally. The detective showed Jones a third array ("November Array"), which contained Jones' photo, but all other photos were different from either of the other two arrays. Jones' photo also was in a different position in the third array.

Both hospital interviews were recorded by audio tape.

Defendant moved to suppress Heath's out-of-court and in-court identifications of Jones. A suppression hearing was held on July 13, 2011. The Court heard the testimony of two police detectives. Counsel requested permission to submit post-hearing legal memoranda.

### **STANDARD OF REVIEW**

The Delaware Supreme Court has established the constitutional parameters of identification through a photographic line-up or array.

An identification procedure will not pass constitutional muster where it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. That a confrontation is suggestive, without more, however, cannot amount to a due process violation; the unnecessarily suggestive identification procedure must also carry with it the increased danger of an irreparable misidentification. In other words, if the Court determines under the totality of circumstances that a line-up is impermissibly suggestive, but nonetheless reliable, evidence of the confrontation will not be excluded at trial.<sup>1</sup>

The analysis requires the Court to determine: "first, whether the procedure was unnecessarily suggestive; and second, whether there was a likelihood of a

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<sup>1</sup>*Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (citing *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Anderson v. State*, 452 A.2d 955 (Del. 1982); *Harris v. State*, 350 A.2d 768 (Del. 1975)).

misidentification.”<sup>2</sup> The factors relevant to likelihood of misidentification are: the opportunity of the witness to view the subject at the time of the crime; the witness’ degree of attention; the accuracy of the witness’ prior description of the subject; the level of certainty of the witness’ identification; and the length of time between the crime and the identification.<sup>3</sup>

### ANALYSIS

The Court finds, and defendant concedes, that there was nothing inherently suggestive about each individual photo array. Each array consisted of six photographs of subjects the same gender and race; and similar age, hairstyle, and facial characteristics.

Defendant contends that the October Array is impermissibly suggestive because of the procedure used by the detective in presenting the array. The second issue appears to be one of first impression in Delaware. Defendant argues that while the October Array was not inherently suggestive, the November Array, on its face, is impermissibly suggestive because it singled-out defendant as a suspect.

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<sup>2</sup>*Clayton v. State*, 2006 WL 141027, at \*1-2. (Del.).

<sup>3</sup>*Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)

***Whether the Nature of Presenting the October Photo Array  
was Inherently Suggestive***

The detective visited the hospital in October when the victim was on a ventilator, non-verbal and medicated. The detective testified that the victim was aware and could respond by nodding “yes” and “no,” and could communicate by use of a letter board. The victim indicated that he remembered the shooting. When shown the first photo array, he did not recognize anyone. The victim physically pointed to defendant on the second array.

For purposes of this motion, it is not disputed that the victim had met defendant approximately four times prior to the shooting. The victim knew defendant by his nickname “Scrap.” The shooter repeatedly fired at the victim from the passenger side of the front seat. The victim did not get a good look at the person in the back seat.

Defendant argues that the detective “candidly admitted during his testimony he had doubts about the reliability of the victim’s identification of Jones on October 20, 2010...so concerning to him that he elected to show the victim another Array on November 16, 2010.” Defendant further contends that the detective felt so confident in the victim’s failure to identify the other suspect that the suspect was released from custody. “This fact gives great weight to the defense position

that [the detective's] decision to re-present a second array depicting Jones and not [the other suspect] indicates that the procedure utilized in presenting the October Array to the medicated victim was impermissibly suggestive.”

The Court finds defendant's argument to be without merit. Whether or not the October Array was impermissibly suggestive must be evaluated as of the time the victim viewed the array, considering all relevant circumstances. Subsequent events are not relevant. The first and second arrays were in no way visually suggestive. There is no evidence that the detective conducted the interview in a manner that would taint the victim's identification of defendant on the October Array.

The fact that the victim was in critical condition and under medication may be relevant to the weight to be given to the October identification. In the absence of the detective taking advantage of the victim's weakened condition to influence the identification, medication or difficulty communicating do not make an otherwise appropriate photo array suggestive.

***Whether the November Photo Array  
was Inherently Suggestive***

The detective testified that the purpose of showing the victim the November Array was “to make sure” that the first identification was correct, and to interview

the victim to obtain additional information. The detective stated that he used a different photo array to avoid being suggestive.

The recorded November hospital interview contains the victim's statement that "Scrap" shot him after being in the car for 20 minutes with the victim. Both defendant and the other person in the car shot the victim. The victim viewed the November Array and without hesitation identified defendant as "Scrap." The victim stated that he was not influenced by the October Array. He remembered that defendant was in a different position on the October Array.

Defendant argues that the November Array was impermissibly suggestive because the only person depicted in both the October and November Arrays was defendant. Defendant contends that by "singling out Jones in the November Array, this placed undue emphasis on Jones as being the suspect who shot the victim. Conversely, by removing the individuals from the October Array from the November Array impermissibly suggested that those individuals were not suspects; however, Jones remained suggesting he was the shooter."

The Court must view the November identification in the context of the totality of the circumstances. The victim stated that he knew the shooter from prior meetings. Neither identification was tenuous; both were without hesitation and certain. The arrays themselves were not in any way suggestive. The actions

of the detective during the interviews were not calculated to influence the identifications. It must be asked: “What *should* the detective have done differently?” Arguably, showing the victim the same first two October arrays in November would have been suggestive, because the victim simply could have recalled the position of the photograph he initially identified, instead of actually recognizing a person. The detective could have re-arranged the same photos used in the October Array. Instead, the detective elected to present an entirely different photo array.

The Court finds that the November Array, and the procedure used in presenting that array, are not suggestive simply because defendant’s photo is the only one included in both arrays. Considering the totality of the circumstances - the passage of time between identifications; the clearly non-suggestive nature of the arrays themselves; the victim’s prior familiarity with defendant; the procedure used by the detective in presenting the arrays; and the victim’s certainty in immediately identifying defendant - the November Array is not unduly suggestive.



## CONCLUSION

The Court finds that the nature of presenting the October 28, 2010 Photo Array was not inherently or impermissibly suggestive; and that the identification of defendant based on the November 16, 2010 Photo Array is not impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

**THEREFORE**, Defendant's Motion to Suppress is hereby **DENIED**. The October 28, 2010 and November 16, 2010 out-of-court identifications will be admitted at trial. Any in-court identification will not be deemed inadmissible because of the prior out-of-court identifications of defendant.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston