

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000423-MR

ALVIN C. GIST

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARTIN MCDONALD, JUDGE  
ACTION NO. 08-CR-001140

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL, MOORE AND WINE, JUDGES.

NICKELL, JUDGE: Following entry of a conditional guilty plea under RCr<sup>1</sup> 8.09, Alvin C. Gist appeals from a judgment sentencing him to serve a total term of imprisonment of twelve years for the crimes of robbery in the first degree<sup>2</sup> and

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

<sup>2</sup> Kentucky Revised Statutes (KRS) 515.020, a Class B felony.

tampering with physical evidence.<sup>3</sup> Gist argues the Jefferson Circuit Court erred in denying a motion to suppress a show-up identification procedure that was unduly suggestive and unreliable. Upon review of the record, the briefs and the law, we affirm.

On April 1, 2008, the First American Cash Advance on New Cut Road in Louisville, Kentucky, was robbed by a black man wielding a butcher knife and wearing jeans, a black sweatshirt, a black knit cap and a black panty-hose mask that partially obscured his face. Even though the robbery lasted just a couple of minutes, the clerk, Katrina Marshall, recognized the robber as Alvin Gist, a recent customer whom she had chatted with several times on the parking lot in the previous ten to twelve days. Each day, Gist was wearing the same clothes. Despite the partial mask, Marshall clearly saw the robber's nose and mouth, and the robber's voice sounded distinctive to her and identical to that of Gist. Once Gist had fled the scene of the robbery, Marshall located a receipt bearing his name and identifying information and gave it to police.

While one team of officers was at the scene of the robbery, another team of officers began canvassing the neighborhood for leads. Without the benefit of Gist's name and address, Officer Manning was told by a maintenance man that a person matching the description of the robbery suspect had entered a particular apartment within the complex. Officer Manning went to that apartment, Gist opened the door, allowed Officer Manning to enter, and produced identification.

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<sup>3</sup> KRS 524.100, a Class D. felony.

Upon verifying Gist's role in the crime, officers escorted Gist, in custody at that time but not in handcuffs, outside the apartment complex so Marshall could view him. Marshall, sitting in a truck some twenty to thirty feet away from Gist, immediately and positively identified him as the robber, even noting that Gist had changed clothes since committing the crime.

Gist was taken to the police station where he was given, and waived, his Miranda rights before giving a statement to police admitting he committed the robbery and saying he had hidden a portion of the proceeds under a mat in front of the toilet in the apartment where he was found. The apartment in which Gist was found was leased by his wife.

Although eligible to be charged as a persistent felon, in April of 2008, Gist was indicted only for robbery in the first degree and tampering with physical evidence. In August of 2008, he moved to suppress three items—the statement he gave to police, items seized during the search of the apartment, and Marshall's eyewitness identification. In November of 2008, the trial court held a suppression hearing after which it denied Gist's motion to suppress on all three grounds.

In February of 2009, Gist entered a conditional guilty plea to both charges, reserving for appeal the issues argued during the suppression hearing. This appeal followed challenging only the trial court's ruling that the show-up identification procedure was not unduly suggestive since Marshall had already provided Gist's name and address to officers and had identified him as a prior

customer with whom she had chatted several times before positively identifying him as the robber during the show-up procedure.

“When reviewing a trial court's denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law.” *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006) (citing *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004)). The trial court’s statement of the facts is borne out by the record and therefore supported by substantial evidence. RCr 9.78; *Canler v. Commonwealth*, 870 S.W.2d 219, 221 (Ky. 1994). Discerning no error, and therefore no clear error, the facts, as stated by the trial court, are deemed conclusive.

We owe no deference to a trial court’s application of the law to the facts. *Roberson v. Commonwealth*, 185 S.W.3d 634, 637 (Ky. 2006). We apply a two-step process in analyzing whether identification testimony violates a defendant’s due process rights. *Dillingham v. Commonwealth*, 995 S.W.2d 377, 383 (Ky. 1999). “First, the court examines the pre-identification encounters to determine whether they were unduly suggestive.” *Id.* If they were not, the analysis ends and the identification testimony is admitted. If the pretrial identification procedure is suggestive, “the identification may still be admissible if ‘under the totality of the circumstances the identification was reliable even though the [identification] procedure was suggestive.’” *Id.* (quoting *Stewart v. Duckworth*, 93 F.3d 262, 265 (7th Cir. 1996) and *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). Determining whether, under the

totality of the circumstances, the identification was reliable requires consideration of five factors enumerated by the United States Supreme Court in *Biggers*. Those factors are: (1) the witness's opportunity to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and confrontation. The Supreme Court of Kentucky adopted these factors in *Savage v. Commonwealth*, 920 S.W.2d 512 (Ky. 1995).

A one-person show-up identification procedure, like the one used in this case, has been deemed inherently suggestive. *Merriweather v. Commonwealth*, 99 S.W.3d 448, 451 (Ky. 2003). Therefore, the court must assess the totality of the circumstances and the *Biggers* factors surrounding the identification to consider the likelihood of an "irreparable misidentification" by the witness. *Id.* Applying these factors to the case at bar, we conclude that Marshall's identification of Gist was sufficiently reliable.

Marshall had adequate opportunity to see Gist during the robbery. While the crime happened "very quick," Marshall had seen Gist repeatedly during the ten to twelve days preceding the robbery and had spoken with him on several of these occasions. Each time Marshall was wearing the same clothing. Clearly, Marshall had developed a familiarity with Gist over a period of nearly two weeks before the robbery which occurred at knifepoint. As a result, she recognized his voice, facial features and clothing to the extent that she was able to quickly locate

his customer file and provide identifying information to police. The actual show-up procedure followed quickly on the heels of the robbery and immediately upon seeing Gist, Marshall positively identified him as the robber even though he had changed clothes since committing the crime. All five *Biggers* factors demonstrate the reliability of Marshall's positive identification of Gist. Therefore, we hold the trial court did not err in denying Gist's motion to suppress Marshall's identification of him as the robber.

For the foregoing reasons, we affirm both the order denying the motion to suppress and the judgment of guilty entered by the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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