

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000361-MR

KIBAMBE MWENDAPEKE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 13-CR-000588

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, D. LAMBERT AND NICKELL, JUDGES.

D. LAMBERT, JUDGE: Appellant, Kibambe Mwendapeke, appeals the judgment of conviction for first-degree robbery and the sentence of ten years imposed by the Jefferson Circuit Court. He argues on appeal that the circuit court erred in denying a motion to suppress the victim's identification because the identification, which was based on a suggestive show-up, was unreliable. Considering the totality of the

circumstances, the record supports the circuit court's finding that the victim's identification was reliable. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

At around midnight on the evening of January 8, 2013, an unknown assailant robbed Rashayla Burns at gunpoint in the parking lot of her Louisville apartment complex. Burns had left work at approximately 11:30 that night, picked her son up from his father's house and proceeded home. As she searched for a space in her apartment parking lot, she noticed another vehicle following hers. When Burns eventually found a space, the other car parked in a space nearby.

As Burns got out of her car, a man brandishing a handgun appeared from the passenger seat of the other vehicle and demanded that Burns give him everything she had, including her cell phone and purse. Burns had to remove her jacket in order to give the man her purse. When the man grabbed her cell phone, jacket, and purse, Burns, realizing that her keys were in her jacket pocket, asked the man if she could at least have her jacket back. The man threw Burns' jacket onto the hood of her car. Burns then watched the man return to the passenger seat of the car that had followed her. As the car drove away, she memorized the license plate number on the vehicle and took note of the vehicle's color.

Burns' son's father arrived at the scene shortly thereafter and Burns used his cell phone to call 911.¹ She explained to the 911 dispatcher that she had been

¹ Burns' son's father had been following her from his residence, but did not arrive in time to witness the robbery.

robbed. She told the dispatcher that the suspect was riding in a maroon vehicle and provided the license plate number. Officer Brent Jones arrived on the scene minutes later and interviewed Burns. As Burns detailed the events of the robbery to Officer Jones, she explained to him that the robber was a dark-skinned black man with distinctive eyes and spoke with an accent. She informed Jones that she knew the robber from somewhere, but could not place him.

Meanwhile, other officers ran the license plate number Burns had supplied and matched it to a maroon vehicle belonging to Mwendapeke. After Detective Chris Bruce obtained Mwendapeke's address, he went to a nearby Speedway gas station, waiting for Mwendapeke to pass by. A short time later, Bruce spotted the vehicle and followed it to Mwendapeke's apartment. When Mwendapeke exited the vehicle, Bruce detained him.

Mwendapeke consented to a search of his vehicle, which yielded none of the stolen items taken from the robbery. Nor did the search of the vehicle produce the gun used in the robbery. However, police did find a movie, rented using Burns' stolen debit card, in the front passenger's seat of the vehicle.

Bruce then contacted Jones and requested that he transport Burns to his location so that she could confirm Mwendapeke as her assailant. As Jones and Burns arrived on the scene, she immediately recognized him as the man who robbed her. The officers took Mwendapeke into custody for first-degree robbery.

Prior to trial, Mwendapeke filed a motion to suppress Burns' show-up identification. The trial court heard the motion on June 24, 2014, at which Burns,

Jones, and Bruce, each testified. Though the trial court expressed misgivings about the suggestive nature of the identification, the trial court ultimately denied the motion to suppress, finding that the identification resulting from the suggestive line-up procedures did not rise to the level of unreliable.

A jury convicted Mwendapeke following a trial on January 6, 2015. The trial court later imposed the jury's recommended ten-year sentence. This appeal followed, wherein Mwendapeke contends the trial court erred in denying his motion to suppress the identification.

II. ANALYSIS

A. STANDARD OF REVIEW

The standard of review for a trial court's ruling on a motion to suppress evidence involves a two-step review. First, the reviewing court must determine whether the trial court's factual findings were conclusive. If the findings are supported by substantial evidence, the factual findings are deemed conclusive for the purpose of appellate review. *Dixon v. Commonwealth*, 149 S.W.3d 426 (Ky. 2004). If the factual findings are conclusive, the application of the law to those findings is reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690 (1996); *Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2003). The ruling of the trial court should not be disturbed unless clearly erroneous. *Commonwealth v. Neal*, 84 S.W.3d 920 (Ky.App. 2002).

B. THE TRIAL COURT DID NOT COMMIT CLEAR ERROR IN DENYING MWENDEPEKE'S MOTION TO SUPPRESS

The law on the admissibility of identification evidence is well-established. The Supreme Court of the United States has recognized that “[d]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.” *Moore v. Illinois*, 434 U.S. 220, 227 (1977). In *Neil v. Biggers*, 409 U.S. 188 (1972), the Court noted that most identification procedures are suggestive to some extent, but an identification is still admissible where “no likelihood of misidentification” exists *Id.* at 201. The court held that an out-of-court statement would not violate due process if under the “totality of the circumstances’ the identification was reliable.” *Id.* at 199.

In his brief, Mwendapeke belabors a contested fact regarding who first supplied Mwendapeke’s name, whether it was Jones or Burns. At the suppression hearing, Jones testified that while on the way to make the identification, he asked Burns if she recognized Mwendapeke’s name. On the other hand, Burns testified that she first remembered Mwendapeke’s name and supplied it to Jones. The trial court, in its written findings, noted that “[u]ltimately, she recalled that his name was Kibambe.”

The Commonwealth argues that statement in the trial court’s written ruling amounts to a factual finding that Burns recognized Mwendapeke’s name on her own, and that that finding is conclusive. See CR 52.01. However, Mwendapeke replies that the written findings fail to include a finding that Burns told Jones Mwendapeke’s name prior to the identification. He insists that Jones told Burns

his name, and argues that telling the victim of a crime the name of the person they are about to see as a suspect in a crime is inherently suggestive, requiring the suppression of the in-court and out-of-court identifications. Despite the parties' focus on this disputed fact, this Court does not believe that a finding of fact regarding who first said Mwendapeke's name was essential to the trial court's ruling.

In *Neil, supra*, the Supreme Court noted that unnecessary suggestiveness alone does not require exclusion of the identification. *Id.* at 198–99. Instead, the inquiry is “whether, under the ‘totality of the circumstances,’ the identification was reliable even though the confrontation procedure was suggestive.” *Id.* at 199. “[T]he primary evil to be avoided is a very substantial likelihood of irreparable misidentification.” *Id.* at 198.

The Supreme Court of the United States crafted a two-pronged analysis for determining whether a substantial likelihood of an irreparable misidentification existed in *Manson v. Braithwaite*, 432 U.S. 98 (1977). The Supreme Court of Kentucky subsequently adopted this two-step process. *See Commonwealth v. Parker*, 409 S.W.3d 350, 352 (Ky. 2013) (quoting *King v. Commonwealth*, 142 S.W.3d 645, 649 (Ky. 2004)). First, we are to determine if the identification procedure was unduly suggestive. *Parker* at 353. If the first inquiry reveals an unduly suggestive identification procedure, the identification may still be admissible if we determine that “under the totality of the circumstances the identification was reliable[.]” *Id.*

In the instant case, we believe that the disputed fact is merely a factor to be considered in determining whether the identification procedure was unduly suggestive. Even assuming Jones asked Burns if she recognized Mwendapeke's name, the totality of the circumstances indicates no substantial likelihood that Burns misidentified Mwendapeke as her assailant.

The Kentucky Supreme Court has noted the suggestiveness inherent in single-person show-up identification situations. “[S]uch 'show-ups' are highly suggestive and must be viewed with caution.” *Rodriguez v. Commonwealth*, 107 S.W.3d 215, 218 (Ky. 2003); *Myers v. Commonwealth*, 499 S.W.2d 277, 279 (Ky. 1973). Nevertheless, single-person show-ups “may be necessary to ‘aid the police in either establishing probable cause or clearing a possible suspect.’” *Id.* (quoting *Savage v. Commonwealth*, 920 S.W.2d 512, 513 (Ky. 1995)) (citing *Stidham v. Commonwealth*, Ky., 444 S.W.2d 110, 111–112 (1969)).

Here, it was questionable whether the police initially had probable cause to arrest Mwendapeke. Although he was driving the vehicle that was identified by Burns, no items stolen in the robbery were located in the vehicle, nor was the handgun used in the robbery found. Thus, in order to establish probable cause to arrest Mwendapeke, Burns' identification of him as her assailant becomes crucial.

Although necessary, we agree with the trial court that the show-up identification procedure in this case was unduly suggestive owing to the pre-identification actions by the police. Notably, when Burns saw Mwendapeke, he was the only person in the area that was not a police officer; there were four to five

police cars in the area, both in uniform and in plain clothes; and, on the way to identify Mwendapeke, Jones may have asked Burns if she recognized Mwendapeke's name.

However, not all unduly suggestive identifications call for exclusion. Only those identifications deemed unreliable in the totality of the circumstances require suppression. *Neil* identified five factors to be considered when evaluating whether an unduly suggestive the identification remains reliable: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the criminal; 4) the level of certainty demonstrated by the witness at the confrontation; and 5) the time elapsed between the crime and the identification. *Neil*, 409 U.S. at 199-200.

Upon considering the five factors enunciated in *Neil*, Burns' identification of Mwendapeke, though suggestive, was otherwise reliable. The testimony at the evidentiary hearing established that Burns had an excellent opportunity to view Mwendapeke at the time of the crime. Even though the robbery occurred at night, the parking lot where it occurred was well lit. Burns observed her assailant over the course of a few minutes, from close enough to him to hand over her belongings. She also spoke with him face to face and while doing so.

With respect to Burns' degree of attention, Burns testified that she focused her entire attention on her assailant. After the incident, she described her assailant to law enforcement as a dark-skinned African-American male with distinctive eyes and an accent. She also informed officers her assailant seemed familiar to her.

Burns accurately memorized the license plate number as it fled and provided the same to officers. The evidence offered in the suppression hearing plainly demonstrated that, although somewhat vague, Burns' description of Mwendapeke matched his actual physical appearance.

With respect to Burns level of certainty, Burns testified that when she saw Mwendapeke, she knew with one-hundred percent certainty that he was her assailant. Additionally, Jones testified that Burns confidently identified Mwendapeke immediately upon seeing him.

Finally, the length of time between the crime and the confrontation was remarkably short. The robbery occurred at around midnight and the show-up identification occurred within the hour.

IV. Conclusion

“‘[R]eliability is the linchpin in determining admissibility’ of evidence under a standard of fairness that is required by the Due Process Clause of the Fourteenth Amendment.” *Brashars v. Commonwealth*, 25 S.W.3d 58, 64 (Ky. 2000), (quoting *Manson*, at 114). The *Neil* factors weigh in favor of admissibility. In addition to being identified by Burns as the assailant, Mwendapeke was found driving the vehicle with the license plate matching the number provided to police officers by Burns, and he was found in possession of a movie rented using a debit card stolen from Burns. Upon review of the totality of the circumstances, we do not believe that the suggestive show-up identification in this case resulted in a

substantial likelihood of irreparable misidentification. Accordingly, the trial court properly denied Mwendapeke's motion to suppress the challenged testimony.

For the above stated reasons, the opinion of the Jefferson Circuit Court is
AFFIRMED.

ALL CONCUR.

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