

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOSEPH ROSEBOROUGH,

Defendant-Appellee.

UNPUBLISHED

June 3, 2004

No. 246527

Mecosta Circuit Court

LC No. 01-014895-AR

Before: Markey, and Wilder and Meter, JJ.

PER CURIAM.

The prosecution appeals by leave granted the trial court's order affirming the district court's refusal to bind over defendant for trial on a charge of second-degree home invasion, MCL 750.110a(3). We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The prosecution argues that the district court abused its discretion by refusing to bind over defendant for trial based on its concerns about the identification testimony of witness Donald Preston at the preliminary examination. See *People v Yost*, 468 Mich 122, 126-127; 659 NW2d 604 (2003). We agree.

The purpose of a preliminary examination is to determine (1) whether a felony was committed, and (2) whether there was probable cause to believe the defendant committed the crime. *Yost, supra*, 468 Mich at 125-126.

While not cited by the parties, resolution of this appeal is controlled by this Court's decision in *People v Lockett (On Rehearing)*, 253 Mich App 651; 659 NW2d 681 (2002). In *Lockett*, the district court dismissed a charge of failing to comply with the Sex Offenders Registration Act. *Id.*, at 652. In pertinent part, the district court discounted critical testimony from a probation officer because it "had reservations about the completeness and the accuracy of his recollections." *Id.*, at 656. In concluding that the district court improperly refused to bind over the defendant for trial on that basis, this Court stated:

[T]he evidence created a situation in which "the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt," and therefore, "the magistrate must let the factfinder at trial resolve those questions of fact." *People v Hudson*, 241 Mich App 268, 278; 615

NW2d 784 (2000). Therefore, the district court's conclusion – that there was no evidence to support a finding of willfulness – was incorrect and the district court was required to bind defendant over for trial. [*Lockett, supra*, 253 Mich App at 656.]

Thus, a district court's reservations about the accuracy of a witness' recollections do not provide a basis under legal principles generally applicable to bindover decisions to decline to find probable cause to bind over a defendant for trial. The district court's remarks following the remand indicated that it had no doubt that Preston was attempting to tell the truth. Rather, its "credibility" concerns were based entirely on doubts regarding the *accuracy* of Preston's recollection. The district court could not decline to bind over defendant for trial merely based on concerns about the accuracy of Preston's recollection. If one accepts the accuracy of Preston's identification testimony, there was probable cause to support a conclusion that defendant was involved in committing the alleged home invasion.

The district court's remarks at the preliminary examination also present the distinct question of whether Preston's testimony identifying defendant should have been disregarded as constituting an "unduly suggestive" identification. In *People v Barclay*, 208 Mich App 670, 675-676; 528 NW2d 842 (1995), this Court rejected the defendant's argument that the trial court erred by failing to suppress an in-court identification of the defendant at a preliminary examination. Quite similarly to the present case, the pertinent witness in *Barclay* did not identify the defendant at a pretrial corporeal lineup,¹ but identified him in court at a preliminary examination as the man who committed the pertinent act in that case. *Id.* at 676. This Court noted that the need to show "an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive." *Id.* at 675. In this case there is no indication that the photographic lineup was tainted by improper procedure or was unduly suggestive.

The trial court's remarks reflected a concern that the in-court identification of defendant by Preston was unduly suggestive and subject to suspicion because of Preston's failure to identify defendant at the photographic lineup. The fact that the witness did not identify a defendant at a lineup did not render his subsequent in-court identification of the defendant inadmissible but rather involved "a credibility issue that was properly before the jury to determine." *Id.* at 676. An identification of a defendant by a witness at a preliminary examination cannot be considered legally improper merely because the defendant is necessarily singled out as a suspect by the very nature of such a proceeding. Thus, the district court's remarks indicating that Preston's identification of defendant at the preliminary examination was improper on that basis were incorrect. Further, the district court's indication at the motion hearing after remand that the police told Preston before the preliminary examination that they were "sure" they had the "right guy" was simply unsupported by any evidence in the record.²

¹ Here, Preston tentatively identified defendant as well as several other men in a photographic lineup conducted before the preliminary examination, although Preston conceded on cross-examination that he was not sure of his identification.

² Preston testified that the police did not tell him they "had the person who jumped out the
(continued...)

Accordingly, there was no reasonable basis on which to conclude that Preston's in-court identification of defendant could properly be suppressed as unduly suggestive.

Because the trial court's concerns about the reliability of Preston's identification of defendant did not provide a basis for it to dismiss this case, the district court abused its discretion by refusing to bind over defendant for trial.

We reverse the circuit court's order affirming the district court's dismissal. We remand this case to the district court with instructions to bind over defendant to the circuit court for trial. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter

(...continued)

window." Preston then elaborated, stating that he was told that the police had suspects whom they believed "did it." We conclude that this statement was no more suggestive than the indication of the prosecutor's belief in the defendant's guilt that is inherent in any preliminary examination.