

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP922-CR

Cir. Ct. No. 2008CT552

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHAN J. ALBRECHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Reversed and cause remanded with directions.*

¶1 SNYDER, J.¹ Nathan J. Albrecht appeals from a judgment convicting him of operating a motor vehicle without carrying a valid license contrary to WIS. STAT. § 343.18(1), and of causing a hit-and-run accident involving injury contrary to WIS. STAT. § 346.67(1). He contends that the circuit court improperly denied his motion to suppress identification evidence obtained by the investigating officer and to suppress a subsequent in-court identification. We agree that the out-of-court identification should have been suppressed. We further conclude that the record is insufficient to resolve whether there was an independent basis for the subsequent identification. Accordingly, we reverse the judgment and we remand for further proceedings.

BACKGROUND

¶2 Wisconsin State Patrol Trooper Luke Newman testified that on May 8, 2008, he was dispatched to the scene of an accident. Once there, he observed two badly damaged cars and one injured driver. Witnesses informed Newman that the driver of the second vehicle had left the scene. One witness, Josh Repovsch, had stopped at the scene of the accident and had spoken with both drivers. Repovsch provided a description of the missing driver as a white male with dark hair, just over six feet tall, wearing a black leather jacket. He stated that even though it was dark out, car headlights allowed him to see the driver's face.

¶3 Four days later, Newman contacted Repovsch's stepfather to set up a meeting with Repovsch. Newman stated that he had obtained a photo that he "believe[d] was the driver of the other vehicle" and wanted to meet with Repovsch

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

to “possibly identify the person that [Repovsch] had talked to that night.” At the motion hearing, Newman explained that Albrecht had become a suspect in the investigation and that Newman had obtained an “old jail photo” of him. Newman took the photograph to Repovsch and asked if he would be able to identify the other driver. Newman showed Repovsch the photograph and Repovsch stated that the photo was of the person he had spoken with at the accident scene.²

¶4 The State brought charges against Albrecht. Albrecht moved to suppress Repovsch’s eyewitness identification by way of the jail photograph and any subsequent identification. During the motion hearing, the State conceded that the out-of-court identification should be suppressed; however, the State argued that Repovsch made a permissible in-court identification that was free of any taint. The circuit court denied Albrecht’s motion in its entirety. Albrecht subsequently pled no contest to both charges and he now appeals.

DISCUSSION

¶5 In reviewing a motion to suppress, we defer to the circuit court’s fact findings and will not overturn those findings unless they are clearly erroneous. *State v. Dull*, 211 Wis. 2d 652, 655, 565 N.W.2d 575 (Ct. App. 1997). Whether the facts warrant suppression of the evidence, however, is reviewed de novo. *Id.*

¶6 Albrecht first contends that the out-of-court eyewitness identification procedures used by Newman were inherently suggestive and the resulting identification should have been suppressed. The test for determining whether an

² Newman testified that he had not received any training in the identification procedures set forth in the “Attorney General’s Model Policy and Procedures for Eyewitness Identification.”

out-of-court photographic identification is admissible has two facets. *Powell v. State*, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978).³ First, the court must determine whether the identification procedure was impermissibly suggestive. *Id.* Second, it must decide whether, under the totality of the circumstances, the out-of-court identification was reliable, despite the suggestiveness of the procedures. *Id.* The State concedes this issue on appeal, as it did in the circuit court, recognizing that Newman took no steps to ensure the reliability of the identification.⁴ The circuit court held that “instead of splitting hairs on how many photographs [Newman] had and whether or not it passed muster with the Attorney General’s office or the Supreme Court of the State of Wisconsin, the question rightfully should ... fall on credibility.”

¶7 Measured against the test set forth in *Powell*, the circuit court applied the wrong legal standard and reached the wrong conclusion. Given the State’s concession and the record facts, we agree that the out-of-court identification was inherently suggestive, that reliability cannot be established, and that the identification should be suppressed.

¶8 The remaining issue is whether the State has established an independent basis for Repovsch’s in-court identification of Albrecht. Once a

³ The State relies on the admissibility test set forth in *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. Albrecht directs us to *State v. McMorris*, 213 Wis. 2d 156, 570 N.W.2d 384 (1997), for the proper test. However, The standard for the admissibility of eyewitness identification based on photographs was articulated in *Powell v. State*, 86 Wis. 2d 51, 63-66, 271 N.W.2d 610 (1978), and recently employed in *State v. Drew*, 2007 WI App 213, ¶13, 305 Wis. 2d 641, 740 N.W.2d 404.

⁴ “The police authorities are required to make every effort reasonable under the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification.” *Wright v. State*, 46 Wis. 2d 75, 86, 175 N.W.2d 646 (1970).

defendant shows that an out-of-court identification was improper, the State has the burden of showing that a subsequent in-court identification derived from an independent source and was thus free of taint. *Id.* at 65-66; *see also Holmes v. State*, 59 Wis. 2d 488, 496, 208 N.W.2d 815 (1973). If Repovsch’s in-court identification of Albrecht was tainted by the original identification procedure, it should have been suppressed. *See Powell*, 86 Wis. 2d at 65-66.

¶19 On this question, we conclude that the record before us is insufficient. The circuit court, contrary to the State’s concession otherwise, held that the out-of-court identification need not be suppressed. It then denied suppression of the in-court identification in part because Repovsch confirmed that Albrecht, who was sitting at the defense table, was the same person in the photograph:

THE COURT: One more question ... is the person that you identified coming out of that vehicle [on the night of the accident] and going face to face with and the one that you then identified in that photo the same as the individual sitting next to counsel?

[REPOVSCH]: Yes.

The court, in its rationale, stated that Repovsch “was very insightful, very candid, very direct[], very accurate, didn’t vacillate, recognized the individual that extracted himself from this vehicle.” The court observed that Repovsch had “some period of time” to observe Albrecht at the scene and that Repovsch spoke face-to-face with Albrecht. The court stated:

If you really want to get to the truth-seeking device ... you cannot ignore certainly the assessment that [Repovsch] made at the scene, the efforts made by the trooper in order to ascertain at least some name and identity of this particular defendant, and then certainly corroborate that with the witness.

So if that photograph is going to be the fly [in the] ointment in the furtherance of this particular case, the Court certainly finds that [it] should not.... This ... witness I find certainly was very forthright, very candid.

[I]n a perfect world it would have been maybe more acceptable and proper and less subject to criticism and concern if in fact this [witness] was provided with a variety of different photographs.

The court went on to compare Repovsch's description of Albrecht to Albrecht's actual appearance, finding the discrepancy in height to be insignificant and also finding that the use of the jail photograph was not significant because the "facial features from the neck up" were what "an individual typically will identify ... or certainly concentrate on when trying to identify and remember someone."

¶10 The circuit court's rationale for admitting the in-court identification relies heavily on the credibility of Repovsch and his out-of-court identification of Albrecht from the jail photograph. It fails to address the underlying concerns about suggestive police procedures, specifically that "a witness's recollection of [a] stranger can be distorted easily by the circumstances or by later actions of the police." *State v. Hibel*, 2006 WI 52, ¶38, 290 Wis. 2d 595, 714 N.W.2d 194 (citing *Manson v. Brathwaite*, 432 U.S. 98 (1977)). Furthermore, although the reliability of eyewitness identification has been the subject of frequent debate, "[o]ne thing not subject to debate is that even *unintentional* suggestiveness can become a key factor in identification errors." *Hibel*, 290 Wis. 2d 595, ¶41. Thus, courts have placed the burden on the State to demonstrate that an in-court identification, which follows an improper out-of-court identification, is nonetheless reliable. *See Powell*, 86 Wis. 2d at 65-66.

¶11 Here, Repovsch's out-of-court identification of Albrecht should have been suppressed. The only remaining question for the circuit court is whether the

State has met its burden to show an *independent basis* for the in-court identification. See *Powell*, 86 Wis. 2d at 62, 65-66. We therefore remand the matter to the circuit court for further analysis, employing the proper legal standard, to ensure that Repovsch's in-court identification was not tainted.

CONCLUSION

¶12 The circuit court's analysis of the in-court identification was incomplete because the court improperly denied Albrecht's motion to suppress the out-of-court identification and relied on that out-of-court identification in its rationale. The circuit court failed to address whether there was an independent basis for admitting the subsequent in-court identification. Accordingly, we reverse the judgment of conviction and remand the matter for further proceedings to ascertain whether the in-court identification should be suppressed.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

