

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)
)
v.) Case Nos. 0305015270
) 0305015352
)
KENNETH DRYDEN,)
)
Defendant.)

Submitted: April 2, 2004
Decided: June 18, 2004

Michelle L. Pard, Esquire
Assistant Public Defender
900 N. King Street, 2nd Fl.
P.O. Box 911
Wilmington, DE 19801
Attorney for Defendant

Richard Zemble, Esquire
Deputy Attorney General
Department of Justice
820 North French Street
Wilmington, DE 19801
Attorney for the State

DEFENDANT'S MOTION TO SUPPRESS
OUT-OF-COURT IDENTIFICATION

Defendant moves in these proceedings to suppress his out-of-court identification on the basis it was unduly suggestive.

Nature and Stage of Proceedings

On June 6, 2003, the defendant Kenneth Dryden was arrested for two counts of Reckless Endangerment in the Second Degree in violation of 11

Del. C. § 603. The Information alleges that the offenses occurred on May 8, 2003 and May 12, 2003 respectively. Defendant filed a motion suppress his out-of-court identification on October 16, 2003 on the basis it was unduly suggestive. The Court conducted a hearing on the motion January 5, 2004 where the State presented the testimony of Corporal Hale of the Delaware State Police. Following his testimony, the Court ordered written submissions by the defense and the state. This is the Court's decision following briefing.

Facts

Corporal Hale of the Delaware State Police testified he was informed on May 8, 2003 that an individual operating a tan or gold Nissan automobile in the William Penn High School parking lot drove it in a reckless manner. He first discussed the May 8, 2003 incident with Mr. Menzer, a school employee. Mr. Menzer described the operator as a black male in his late teens or early 20's operating a tan or gold Nissan Maxima wearing glasses. He also spoke to Ms. Shield-Russell who also works at William Penn High School where the incident took place. Corporal Hale testified he was informed by Ms. Russell that while she was performing her duties in the parking lot, monitoring students boarding the school bus, she observed the vehicle described herein drive in the parking lot in a reckless manner and was almost struck by the vehicle. This witness identified the operator as a black male in his late teens or early 20's.

On May 12, 2003, when the alleged second incident occurred, Ms. Russell and Mr. Menzer were also present in the parking lot. Menzer told Trooper Hale that the same car with the same operator was in the parking lot. Menzer also stated to Corporal Hale that he had a brief conversation and was looking directly at the operator before he drove away. He did not indicate that he knew the operator, but was able to provide Corporal Hale with a partial vehicle tag number. Menzer indicated that the first three digits were 313, and the last three digits had a combination of 632.

During the May 12th incident, Menzer stated to Corporal Hale that he told the driver of the vehicle to wait until all the buses left the parking lot. After having this brief discussion, the driver sped off weaving through the buses and when the victim or Menzer attempted to redirect the automobile, the driver swerved around Russell nearly striking her.

With this information, Corporal Hale ran the vehicle registration number which, according to the records of the Division of Motor Vehicles, it was registered to Octavia Dryden. Hale then cross-referenced the name of Dryden with the student directory of William Penn and discovered that a student by the name of Lance Dryden was registered at the school. With additional research, Hale was able to discover Lance Dryden had a brother by the name of Kenneth Dryden which matched the description given by both witnesses. With this information, Hale printed out a picture of Kenneth Dryden's driver's license and showed it to Menzer. Menzer identified defendant as the operator of the Nissan

Maxima on both May 8, 2003 and May 12, 2003. The description which Officer Hale was able to obtain for Kenneth Dryden fit the description given to him by Menzer, except for the fact that Dryden did not wear glasses.

The picture which Hale printed out from the Division of Motor Vehicle records and showed to Menzer on May 13, 2003 was a single photograph. After the photograph identification, Corporal Hale asked Dryden to come to the school for an interview, which he voluntarily did on May 13, 2004. While at the school, Hale paged Menzer and Russell to come to his office. When Menzer arrived at his office, he identified the defendant as the person he observed driving in the parking lot on May 8, 2003 and May 12, 2003. At this time, Dryden was the only person other than Corporal Hale in the office. Russell was next asked to enter Corporal Hale's office where she identified Dryden as the operator of the motor vehicle on both May 8th and May 12, 2003. The defendant now challenges these identifications as being unduly suggestive and in violation of his constitutional rights.

Discussion

The issue of pretrial identification and whether such identification should be suppressed as unduly suggestive, was considered by the Court in Richardson v. State, Del. Supr., 673 A.2d 144 (1996). The Court in that decision stated that when the admissibility of an out-of-court identification is challenged

under the Due Process clause as unduly suggestive, the analysis involves the following:

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 the circumstances that a line-up is impermissibly suggestive, but nonetheless reliable, evidence of the confrontation will not be excluded at trial. Harris v. State, Del. Supr., 3350 A.2d 768, 770 (1975).

The Court then goes on to indicate that when confronted with this issue, the trial court must make two inquiries. First, the Court must determine if the confrontation was unnecessarily suggestive; and secondly, the Court must determine whether there exists a likelihood of misidentification.

The first inquiry is whether the confrontation was unnecessarily suggestive. In these proceedings, Corporal Hale after conducting an investigation, summoned Menzer and Russell to his office and presented them with a single photograph inquiring whether it depicted the individual they had observed. Following the initial identification, Officer Hale had the defendant appear in his office and summoned Menzer and Russell to his office individually and requested whether this was this was the individual whom they had observed in the parking

lot on May 8, 2003 and May 12, 2003. These identifications occurred on May 13, 2003, the day following the last incident.

It is clear from the facts in the record that the single photographic line up is suggestive, but there is nothing in the record that Corporal Hale stated to or suggested to either of the persons this was the individual he believed was responsible. Having concluded that the identification was suggestive does not end the inquiry. Assuming the identification was unduly suggestive, the question becomes whether the identification is reliable. That is, did the witness who made the identification have sufficient opportunity to view the criminal activity and identify the individual which is later identified to the police officer.

In this instant, on May 8, 2003, the defendant was observed by both Russell and Menzer in the parking lot operating the motor vehicle, and they claimed they came in close proximity to the defendant. On May 12, 2003, Trooper Hale testified Menzer spoke to the operator of the vehicle and told him not to move the vehicle until the buses left the area. At the time of this conversation, Menzer was face to face with the defendant. Therefore, it appears that the witness Menzer had a clear opportunity to view not only the alleged criminal activity of the defendant, but his physical description. Thereafter, Menzer was able to give a description of the person who was operating the motor vehicle. That description was consistent with Russell's description. In reviewing facts which were related to Corporal Hale, I find that the identification provided by both school officials to be credible and reliable.

Turning to the second inquiry set forth in Richardson, which involve whether there exists a likelihood of missed identification. The defense argues that there are several hundred black males attending William Penn High School and the probability of misidentification is very high. However, the persons who made these identifications are officials at the William Penn High School who would be familiar with the students attending the school. Moreover, they came in close contact with this defendant on two occasions, May 8th and May 12th. At the time of the contact, it was during daylight hours, and on one occasion they had a conversation with the defendant. In determining whether there is a danger of misidentification, under the totality of circumstances, I do not find that the facts in this case would lead me to conclude that such is very likely. Conversely, it leaves me to conclude that the identification given to the police officer was reliable and credible because it was based on an opportunity of the witness to observe the defendant on both occasions when the acts are alleged to have been committed. Further, the witnesses were in the parking lot for safety of the school students, so their time and attention was given to this individual. They gave a detailed description of the vehicle, they were able to get the vehicle tag number and provided a physical description of the driver on both May 8th and May 12th.

Accordingly, while I find the initial show up of the photograph suggestive, the totality of the circumstances in this proceeding does lead me to conclude the identification is credible and reliable. Accordingly, the defense's

motion is hereby Denied. The Clerk shall schedule this case for trial either July 8, 14, or August 5, 2004.

SO ORDERED this 18th day of June 2004

Alex J. Smalls
Chief Judge

Dryden-OP Jun04