

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES A. MAYS,	§	No. 391, 2002
	§	
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr.A. Nos: IN00-07-0940
	§	IN00-07-0941
Plaintiff Below,	§	IN00-07-0942
Appellee.	§	IN00-07-2210
	§	IN00-07-2211

Submitted: December 12, 2002

Decided: January 31, 2003

Before **VEASEY**, Chief Justice, **WALSH** and **STEELE**, Justices.

ORDER

This 31st day of January 2003, upon consideration of the briefs of the parties it appears to the Court that:

(1) After a jury trial, appellant, James Mays, was convicted of Attempted Murder First Degree, Robbery First Degree, Possession of a Firearm During the Commission of a Felony (two counts), and Conspiracy Second Degree. The Superior Court sentenced Mays on June 14, 2002. Mays appeals his conviction of all of the charges.

(2) On June 21, 2000, a shooting occurred at the home of Christopher Williams. Williams was the victim. Although seriously injured, Williams survived the shooting.

(3) At the time the shooting occurred, Williams was at his mother's apartment with a friend, William Miller. Both Miller and Williams spent the prior evening, June 20, 2000, drinking alcohol and smoking marijuana. Around midnight Williams fell asleep on the living room sofa.

(4) Some time later, Williams awoke due to a commotion in the apartment. Upon awakening he saw two men in his living room with guns drawn. The two men were later identified as Gabriel Branch and the appellant, James Mays. A third person stood behind Branch and Mays.

(5) Williams discovered that his friend Miller and Mays were arguing over Miller's dog. When Williams noticed the men had their guns drawn he arose from the sofa and stood beside Miller with his hands in the air, instructing the men to take whatever they wanted. The next thing Williams remembers is Miller holding his hand over Williams' neck where a bullet had entered. One of the men, allegedly Mays, shot Williams and then took Miller's dog.

(6) The police conducted an investigation and interviewed several people who claimed to be at the scene or near the scene of the crime. The police developed Branch and Mays as suspects and brought Mays in for questioning.

(7) On July 31, 2000, the State indicted Mays on several charges including Attempted Murder First Degree, Robbery First Degree and Possession of a Firearm During the Commission of a Felony. Trial began on February 28, 2002, and ended March 11, 2002. On March 6, 2002, after commencement of the trial, Mays first raised the issue that his statement should have been suppressed. This motion was subsequently denied.

(8) The jury returned a verdict of guilt on the following charges: Attempted Murder First Degree,¹ Robbery First Degree,² Possession of a Firearm During the Commission of a Felony (two counts),³ and Conspiracy Second Degree.⁴ The court sentenced Mays on June 14, 2002. Mays now appeals his judgment.

(9) Mays raises two issues on appeal: (a) whether the trial court committed reversible error by admitting certain photo arrays and identifications during trial, and

¹11 *Del. C.* § 531.

²11 *Del. C.* § 832.

³11 *Del. C.* § 1447A.

⁴11 *Del. C.* § 512.

(b) whether the trial court erred by denying his motion to suppress his statement to the police. Each issue will be examined in turn.

(10) Mays first contends the trial court erred by admitting certain photo arrays and identifications. This Court reviews the trial court's admission of evidence for abuse of discretion.⁵ If the Court finds that the Superior Court abused its discretion, this Court will then determine whether the error constitutes such significant prejudice that it denied Mays a fair trial.⁶

(11) "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.'"⁷ To determine if an identification procedure passes constitutional muster the trial court must examine whether: (a) the procedure used was unnecessarily suggestive, and (b) there existed a likelihood of misidentification.⁸

(12) Mays argues that the trial court erred by admitting both suggestive photo arrays and suggestive identification procedures. We will review the merits of each argument separately.

⁵*Richardson v. State*, 673 A.2d 144, 147 (Del. 1996).

⁶*Barriocanal v. Gibbs*, 697 A.2d 1169, 1171 (Del. 1997).

⁷*Richardson*, 673 A.2d at 147, quoting *Younger v. State*, 496 A.2d 546, 550 (Del. 1985).

⁸*Id.* citing *Harris v. State*, 350 A.2d 768, 770 (Del. 1975).

(13) Mays argued at trial that the photo arrays were impermissibly suggestive because in them his face stands out more than any of the others and because his is the only rounded face and his beard is fuller than the others. Another array he argues was also impermissible because he was the most clean shaven and his head shot was the largest in the array.

(14) In ruling on Mays' objection the court found that his claim was without merit. Specifically the court found after analysis of the pictures that:

They are all black males apparently in their late teens or early twenties. All of them . . . have some amount of facial hair, but the bottom line is I think it's a remarkably fair listing of individuals. While it's true that photograph number two is a little bit bigger than the others, photograph five is just about the same in terms of enlargement of head and roundness of face as the other.⁹

The court then concluded, "I do not find that this document, a photograph of your client, the defendant, is impermissibly suggestive. . . ."¹⁰

(15) This Court has held, "The question of suggestiveness is invariably fact-driven."¹¹ An analysis of the photo arrays at issue draws the conclusion that the Superior Court did not err in its finding. The photos all appear to be about the same

⁹Trial Record at 56.

¹⁰*Id.*

¹¹*Richardson*, 673 A.2d at 147.

size, as do the men pictured in the photos. Furthermore, none of the men, including Mays, appear to be dramatically different looking from the other men pictured.

(16) Although suggestiveness is a fact-driven question, it does not appear that the trial court was arbitrary or capricious in finding the photo arrays were not suggestive. Therefore, the issue of likelihood of misidentification does not need to be addressed. Accordingly, we find that the court did not abuse its discretion by admitting the photo arrays.

(17) Mays also contends that the procedures used by the police officers in having the witnesses identify him were impermissibly suggestive. Specifically he argues that the procedures used with one witness, Matt Funk, were particularly suggestive.

(18) The State argues that because Mays failed to raise this argument at trial he cannot raise it now on appeal. “Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.”¹² This Court examines for plain error issues not presented to the trial court. Plain error exists

¹²SUP. CT. R. 8.

where the error was so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.¹³

(19) Although Mays did not raise this issue before the trial court, the interests of justice require addressing this issue because the trial court did err with respect to the admission of one of the identifications.

(20) Mays offers no proof that the procedures used with respect to all of the witnesses, except Funk, were suggestive. He merely states that the officer deviated from his normal procedures. The officer testified that he normally tries to obtain identifications in a neutral non-leading fashion. He also added that he likes to keep the witnesses separate to prevent them from talking. Mays argues that in his case, however, there was ample time for the witnesses to talk among themselves prior to the identification.

Mays provides no evidence that the witnesses talked with one another prior to their identifications. Furthermore he offers no proof that the process used with each witness was somehow non-neutral. Accordingly, with respect to each of the witnesses, except Funk, Mays has not proved the trial court committed plain error by admitting evidence of the identifications.

¹³*Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

(21) With respect to witness Funk, Mays did provide proof of impermissible suggestiveness. Funk was one of the last witnesses to identify Mays. He had only met Mays on one or two other occasions and even then for only a brief period. During the course of Funk's identification the officer stated to him:

I'm going to show you two line-ups and then I'm going to show you some pictures of a car. I'm sure you'll be able to pick the car out . . . I'll let you look at the pictures. . . . I know you know James, so that should be the easy one. We'll get it out of the way first. . . . You can tell me whenever you see him.

(22) The identification procedure in the case of Funk was unnecessarily suggestive. Particularly problematic is the statement, "I know you know James . . . You can tell me whenever you see him." The officer should have asked Funk to identify the person who shot Williams. Instead he asked Funk to merely identify Mays' picture. Furthermore, there existed a likelihood of misidentification because the officer asked for Funk to identify Mays and not the person who shot Williams. Although the State argues that the officer's statement was permissible because Funk had previously identified Mays as the shooter, this does not alleviate the fact that the procedures used in the identification were unnecessarily suggestive and increased the likelihood of a misidentification. It appears the trial court abused its discretion by admitting the identification of Mays by Funk into evidence. This, however, does not end the matter.

(23) For this Court to find plain error there must exist a substantial amount of prejudice to Mays.¹⁴ A substantial amount of prejudice does not exist here. Although Funk's identification should not have been admitted, his was one of several identifications made by witnesses. The identification of Funk alone was not enough to cause prejudice to Mays in light of all the other identifications properly admitted.

(24) Accordingly, although the trial court abused its discretion by admitting the identification of Mays by Funk no substantial prejudice resulted. Accordingly, no plain error exists.

(25) Mays next contends the trial court erred by not suppressing his statement to the police because he invoked his right to counsel but the police continued to question him. This Court reviews the trial court's admission of evidence for an abuse of discretion. If the Court finds that the Superior Court abused its discretion, this Court will then determine whether the mistakes constitute such significant prejudice that they denied the appellant a fair trial.¹⁵

(26) This Court has held that, "once an accused in custody expresses a desire to deal with police only through counsel, he 'is not subject to further interrogation by the authorities until counsel has been made available to him' unless there is a valid

¹⁴*Wainwright*, 504 A.2d at 1100; *Barriocanal*, 697 A.2d at 1171.

¹⁵*Barriocanal*, 697 A.2d at 1171.

waiver of his request for counsel.”¹⁶ In other words, where a suspect makes an explicit request for counsel, the police must refrain from further questioning until counsel is provided or the suspect himself initiates further conversation.¹⁷

(27) The trial court’s inquiry into a request for counsel consists of two parts. “First, the court must determine whether the defendant actually invoked his right to counsel. Once this determination is made, further statements by the defendant are admissible only if (a) the defendant initiated further discussion, and (b) the defendant knowingly and intelligently waived the right to have an attorney present.”¹⁸

If the court determines that the defendant did not unequivocally invoke his right to counsel the police are permitted to attempt to determine the suspect’s intentions by repeating the *Miranda* warnings as a means of emphasizing the suspect’s right to counsel.¹⁹ If the police do make additional inquiries, these questions cannot coerce or intimidate the suspect or otherwise discourage his efforts to obtain counsel.²⁰ Once

¹⁶*Wainwright*, 504 A.2d at 1101 quoting *Edwards v. Arizona*, 451 U.S. 477, 485-86 (1981).

¹⁷*Crawford v. State*, 580 A.2d 571, 574 (Del. 1990).

¹⁸*Id.*

¹⁹*Id.* at 577.

²⁰*Id.*

the clarifying questions are answered and the suspect indicates he does not wish to obtain counsel, the interrogation may proceed.²¹

(28) At the beginning of Mays' interrogation the officer began to read Mays his *Miranda* rights. After stating, "If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one," Mays responded, "Can I call my lawyer?" The officer then asked Mays, "Is that what you want to do?" Mays responded, "Yeah."

After Mays' response the police officer then asked Mays if he understood the rights explained to him. Mays responded that he understood. The police officer then asked, "OK, and having these rights in mind, do you want to talk to me now?" To which Mays responded, "Yeah we can talk all night."

(29) Mays gave an unequivocal request for counsel. After he told the officer "Yeah" he wanted an attorney, questioning should have ceased. Although the officer asked clarifying questions these questions are only necessary where a suspect's request is ambiguous. Mays' request was clear. Therefore questioning should have ceased and Mays should have received an attorney.

(30) Accordingly, the court's conclusion that the police acted appropriately was error. For reversible error to exist, however, Mays must show prejudice. In this

²¹*Id.*

instance no prejudice exists because the statement, although taken without the presence of counsel, was essentially exculpatory. Thus the court did not commit reversible error.

(31) Furthermore, there exists another problem with Mays' motion to suppress. Motions to suppress evidence must be raised prior to trial.²² Here Mays moved for suppression of his statement after the trial had commenced. Although the trial court heard the motion and ruled on the merits, it ruled, alternatively, that the motion was denied because it was untimely. Therefore, although the trial court abused its discretion by finding Mays did not request counsel the motion was properly denied as untimely.

(32) Accordingly the court's denial of Mays' motion to suppress does not constitute reversible error.

²²SUPER. CT. CRIM. R. 12(b)(3).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice