IN THE SUPREME COURT OF THE STATE OF DELAWARE

GREGORY HUBBARD,	§	
	§	
Defendant Below-Appellant,	§	No. 248/364, 2000
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr.A. Nos. VN94-12-1414-01
Plaintiff Below-Appellee.	§	and IN99-06-0418 through -0420
	§	

Submitted: June 28, 2001
Decided: September 5, 2001

Before **VEASEY**, Chief Justice, **WALSH**, and **HOLLAND**, Justices

ORDER

This 5th day of September 2001, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Gregory Hubbard, filed these consolidated appeals from his convictions for first degree robbery, second degree robbery, and possession of drug paraphernalia and from his conviction for a violation of probation (VOP). Hubbard had been serving a probationary sentence associated with a 1995 robbery conviction when he was charged with violation of probation as a result of the new criminal charges. Although Hubbard was represented by counsel at both his criminal trial and the VOP proceedings below, he was

permitted following a hearing to waive his right to counsel and to represent himself on appeal. After careful consideration of the parties' briefs, including Hubbard's amended opening brief, we find no merit to these consolidated appeals. Accordingly, we affirm Hubbard's convictions and sentences as well as his VOP adjudication and sentence.

(2) The evidence presented at trial established the following: Two robberies occurred in New Castle County, Delaware–the first on May 24, 1999 at the Sun National Bank on Market Street in Wilmington and the second on May 26, 1999 at the Sun National Bank at the Crossroads Shopping Center on New Castle Avenue. John McMillan, a teller at the Market Street Sun National Bank, testified that he placed a "teller closed, next teller" sign at his station at about 9:00 a.m. on May 24th so he could count the money contained in a number of church deposit bags. He noticed an African-American man wearing a blue sweat suit standing in front of his station. The man handed McMillan a note telling him to remain calm and place all of his money into four envelopes. The note also stated that the man had a gun. McMillan placed the money in four envelopes and handed them to the man, who then left the bank. At trial, McMillan was not able to identify Hubbard as the robber.

(3) Claudia Pennington, another teller at the Market Street Sun National Bank, testified that she was in the station next to McMillan's on May 24th when she saw a man approach McMillan's station. She asked the man if she could help him, but he did not respond. As the man left the bank, McMillan told Pennington that he had been robbed. As Pennington looked over at the man, he looked at her and ran out of the bank. Several days after the robbery, Pennington testified that she was shown a photographic array. She testified that she did not recall specifically identifying the photo of Hubbard. She stated that she may have identified one or two possible perpetrators. At trial, however, Pennington unequivocally identified Hubbard as the man who robbed the bank.

(4) Kimberly Novello, a teller at the New Castle Avenue Sun National Bank, testified that she was processing night deposit bags on May 26, 1999 when a man approached her station. The man handed Novello a note stating this was a robbery, he wanted the money placed in four separate envelopes, and he had a gun. Novello placed the money in the envelopes and handed them to the man, who left the bank. Novello testified she had a good view of the man who robbed her. She identified Hubbard both in a photo array and in court as the man who robbed her.

(5) Special Agent Scott Duffey of the FBI testified that he provided assistance to the local authorities in their investigation of the May 24th robbery. On June 8, 1999, he went to the Sun National Bank on Market Street and spoke to Claudia Pennington. He showed her an array of six photographs, one of which was of Hubbard. According to Duffey, Pennington specifically identified Hubbard's photograph as that of the perpetrator of the robbery.

(6) Detective Mark Hawk of the Delaware State Police testified that he was assigned to the investigation of the May 26th robbery. He obtained the surveillance tapes taken during the robbery and found an identifiable image of the perpetrator. Detective Hawk had a print made of the image and had the print placed in the Wilmington News Journal on May 27, 1999.

(7) Detective David Simmons of the Wilmington Police Department was the detective assigned to the May 24th robbery. He testified that all leads in the case had been exhausted when he received a phone call from Special Agent Duffey about the May 26th robbery. There were obvious similarities between the two robberies and the images on the bank surveillance photos. In addition, the photos from the May 26th robbery showed the perpetrator wearing a shirt with what appeared to be the words "City of Wilmington" on the front.

(8) Detective Simmons further testified that Detective Liam Sullivan

of the Wilmington Police Department phoned him on May 27, 1999 and told him that Angela Benson, a friend of Hubbard, might have information on the robberies. The connection to Benson was made by a confidential informant whose identity the State declined to reveal. Detective Simmons contacted Benson, who identified Hubbard as the possible perpetrator. The police then obtained a search warrant to obtain a current photograph of Hubbard and went looking for him. Hubbard was found in Wilmington, he was taken to the police station and his photograph was taken. The photograph was used in the photo array shown to the witnesses. The police also obtained a warrant to search Hubbard's residence, where they located a shirt with the words "City of Wilmington" on it.

(9) Detective Liam Sullivan of the Wilmington Police Department testified that during the course of his duties with an FBI joint task force he came across some information which led him to Angela Benson as someone with knowledge of the robberies. He gave Benson's name to Detective Simmons and Detective Hawk. Detective Sullivan testified that he was also involved in locating Hubbard in order to take his photograph. He spotted Hubbard at 24th and Heald Streets in the City of Wilmington and told him to stop. He then saw Hubbard reach for something in his pocket. Detective Sullivan testified that he

grabbed Hubbard's hand and, in so doing, was able to identify the object in Hubbard's pocket as a crack pipe.

(10) Angela Benson, a former friend of Hubbard's, testified that, at the time of the robberies, she lived in Hubbard's neighborhood. At the end of May, during a period when she was socializing often with Hubbard, she saw a surveillance photograph of the bank robber in the Wilmington News Journal. She was aware of gossip in the neighborhood that Hubbard had committed the robberies. Later that day, when they were smoking crack cocaine together, Hubbard told her he was the robber and that it was his photograph in the newspaper. Benson then told Hubbard she was no longer interested in associating with him and did not see him again until his trial.

(11) Eric Hubbard, the defendant's brother, also testified as a reluctant prosecution witness. He stated that he drove with his brother to a shopping center on May 26, 1999 and that he had given a statement to the police about that. On cross-examination by the defense, Eric Hubbard testified that he was not aware a robbery had occurred at the shopping center on May 26th until he was so informed by the police.

(12) Detective Hawk testified that he interviewed Eric Hubbard at the Wilmington Police Station when his brother was taken into custody, but that the

interview was not recorded. He testified that a second interview with Eric Hubbard took place in Agent Duffey's vehicle while they were transporting him home. That interview was recorded, but Hubbard's voice was inaudible. Detective Hawk further testified that Eric Hubbard told him he drove with his brother to the location of the Crossroads Shopping Center on May 26, 1999 and waited in the car until his brother returned. While Eric Hubbard initially had a strong reaction to a bank surveillance photo of the robber that was shown to him in Agent Duffey's vehicle, suggesting he recognized his brother, he then equivocated and refused to positively identify the man in the photo as his brother.

(13) Hubbard did not testify at trial and presented no witnesses in his defense. The jury convicted him of first degree robbery, second degree robbery, and possession of drug paraphernalia.

(14) On appeal, Hubbard has raised nine claims--seven claims in his opening brief and two additional claims in his amended opening brief.[1] In the order presented by him in his briefing and not in the order in which we discuss

[1] Although Hubbard's "supplemental" opening brief was not requested by the Court, and therefore could be stricken as a nonconforming document, we consider the issues raised therein, in the interests of justice, because Hubbard is acting as his own counsel in this direct appeal.

them, Hubbard's claims are: (a) his arrest for possession of drug paraphernalia was illegal; (b) there was no probable cause for the warrant permitting his photograph to be taken and shown in a photo array; (c) the warrant permitting a nighttime search of his residence was based on demonstrably false information; (d) the prosecution failed to disclose information in discovery that could have been used to impeach one of its witnesses at trial; (e) he was denied the right to counsel at a critical stage of the proceedings when his attorney was not present during a photographic lineup; (f) two of the three photographic lineups were lacking the required procedural safeguards; (g) his VOP adjudication and sentence were improper because he never received adequate notice; (h) the trial court abused its discretion by admitting into evidence the prior out of court statements of Eric Hubbard; and (i) the prosecutor engaged in misconduct. We will address the claims relating to Hubbard's robbery and possession convictions first and then address the probation violation issues.

(15) The first two issues we consider are Hubbard's challenges to the two search warrants police obtained in this case. The purpose of the first warrant was to secure a recent photograph of Hubbard in order to conduct a photographic lineup. The second warrant allowed police to conduct a nighttime search of Hubbard's residence. Prior to trial, Hubbard filed a motion to suppress

evidence seized as a result of the execution of the warrants. The Superior Court denied the motion to suppress. We review that ruling for abuse of discretion.[2]

(16) The record reflects that the probable cause to obtain the warrant to secure Hubbard's photograph was established through the use of information provided by a confidential informant. In reviewing whether probable cause to obtain a search warrant existed, this Court has adopted a "totality of the circumstances" test.[3] This Court has "eschewed a hypertechnical approach to the evaluation of the search warrant affidavit in favor of a common-sense interpretation, bearing in mind that the court reviewing the search warrant owes a certain degree of deference to the issuing magistrate."[4] In measuring the totality of the circumstances when an informant's tip is involved, this Court has considered such issues as the reliability of the informant, the details contained in the informant's tip and the degree to which the tip is corroborated by independent police surveillance and information.[5] If the informant's tip is

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[2]*Woody v. State*, Del. Supr., 765 A.2d 1257, 1261 (2001).

[3]*Tatman v. State*, 494 A.2d 1249, 1251 (1985) (citing *Illinois v. Gates*, 462 U.S. 213, 233 (1983)); *Thompson v. State*, Del. Supr., 539 A.2d 1052, 1059 (1988).

[4]*Gardner v. State*, Del. Supr., 567 A.2d 404, 409 (1989), *cert. denied*, 494 U.S. 1067 (1990).

[5]*Tatman v. State*, 494 A.2d at 1251-52.

sufficiently corroborated, the tip may form the basis for probable cause even though "nothing is known about the informant's credibility."[6]

(17) In this case, Detective Sullivan had received information from an informant he identified as "past proven reliable." The informant told Sullivan on the basis of personal knowledge that Hubbard had been bragging about "doing some bank jobs, and apparently buying some new clothes and flashing some cash around." The informant also provided a physical description of Hubbard and told Sullivan that Hubbard was from New Jersey but now resided in the Riverside area of Wilmington. Police ran a computer check and were able to corroborate this background information. Applying a totality of the circumstances test, we find that the information supplied by the informant, some of which the police were able to corroborate, was detailed and specific enough, within the four corners of the affidavit, to support a finding of probable cause to seize Hubbard to obtain his photograph . Accordingly, we find Hubbard's challenge to the first warrant to be without merit.

(18) As for the second search warrant, which authorized a nighttime search of Hubbard's residence, Hubbard contends that the warrant was based on false information, and if the false information were excluded from the search

[6] *Id*. at 1251.

warrant affidavit, probable cause to search did not exist within the four corners of the affidavit. The allegedly false information in the affidavit was a statement that Hubbard had confirmed his address to Detective Simmons. Hubbard alleges that he did not speak with Detective Simmons. Even assuming that Hubbard is correct, he does not challenge the accuracy of the address set forth in the affidavit. We find the source of the address to be irrelevant. Therefore, even assuming that Hubbard did not confirm his address for Detective Simmons and excluding the source of the information from the search warrant, we nonetheless find that probable cause to search was established within the four corners of the affidavit.[7] Accordingly, Hubbard's challenge to this warrant also is without merit.

(19) We next consider Hubbard's claim that his arrest for possession of drug paraphernalia was illegal. Hubbard asserts that his Fourth Amendment rights were violated when Detective Sullivan illegally searched his person and seized a crack pipe from his pocket. According to Hubbard, police lacked reasonable suspicion, under *Terry v. Ohio*[8], to stop and frisk him. We find,

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[7] *See Franks v. State*, Del. Supr., 398 A.2d 783, 785-86 (1979).

[8] 392 U.S. 1 (1968).

however, that the reasonable suspicion standard of *Terry v. Ohio* does not apply under the circumstances of this case.

(20) The record reflects that the basis for Detective Sullivan's stop of Hubbard was the warrant that police had obtained to secure a recent photograph of Hubbard for purposes of conducting a photographic lineup. We already have concluded that the warrant was valid. Based on the valid warrant, police clearly had probable cause to stop Hubbard. Detective Sullivan testified that when officers tried to stop Hubbard he immediately shoved his hand into his pants pockets. Detective Sullivan, fearing for his own safety, conducted a pat down search of Hubbard's person for weapons. In conducting the pat down, Detective Sullivan felt an object in Hubbard's pocket. He testified that, based on his many years of experience in narcotics investigations, he was able to identify the object based on his touch as an illegal pipe for smoking crack. This Court has recognized that a police officer may seize non-threatening contraband detected during a pat down search if the identity of that contraband is immediately apparent from plain sight or plain touch.[9] Accordingly, Detective Sullivan's

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[9] *See Mosley v. State*, Del. Supr., No. 451, 1998, Veasey, C.J. (Feb. 29, 2000) (ORDER) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 376-77 (1993) (noting that the identity of contraband can be determined by an object's contour or mass)).

(continued...)

seizure of the crack pipe in this case was entirely proper under the plain touch doctrine.

(21) Hubbard next alleges that the State violated discovery rules by failing to provide him with important impeachment evidence concerning Angela Benson, a key prosecution witness. Hubbard contends that the State failed to disclose that Angela Benson "had been forced to cooperate with the police or be charged with possession of drug paraphernalia which would have caused her to lose her home and children." Hubbard points to no credible evidence to substantiate this conclusory assertion. Furthermore, the record reflects that defense counsel had the opportunity to cross-examine Angela Benson fully on the issue of her cooperation with police and on any other aspect of potential bias.[10] Accordingly, we find no merit to this claim.

(22) Hubbard's next two claims challenge two photographic lineups that resulted in two of the three eyewitnesses, Claudia Pennington and Kimberly Novello, identifying Hubbard as the perpetrator in each of the respective robberies. First, Hubbard contends that he was denied his sixth amendment right

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[9](...continued)

[10]*See Van Arsdall v. State*, Del. Supr., 524 A.2d 3, 6-7 (1987).

to counsel when FBI Agent Duffey presented a photographic array to Claudia Pennington on the day following Hubbard's preliminary hearing without Hubbard's counsel present. Second, Hubbard contends that his due process rights were violated because the State failed to employ appropriate safeguards at the photographic lineups presented to Pennington and Novello.

(23) Hubbard's claim that he was entitled to counsel at the photographic lineup presented to Pennington is without merit. The Sixth Amendment does not grant the right to counsel at photographic displays conducted by the prosecution for the purpose of allowing a witness to attempt an identification of the offender.[11] Hubbard's attempt to recast his argument as a denial of the right to counsel at "a critical stage of the prosecution" simply fails. The United States Supreme Court has flatly rejected the argument that a pretrial photographic display constitutes a "critical stage" of the prosecution.[12] Accordingly, Hubbard's claim is without merit.

(24) As for Hubbard's due process claim, Hubbard filed a pretrial motion to suppress the photographic array on the ground that the array was

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[11] *Snowden v. State*, Del. Supr., No. 416, 1994, Walsh, J. (Aug. 10, 1995) (ORDER) (citing *United States v. Ash*, 413 U.S. 300, 321 (1973)).

[12] *United States v. Ash*, 413 U.S. at 311-17.

unduly suggestive. After reviewing the array and the procedures used during the displays presented to the witnesses, the Superior Court concluded that the photographic array was not unnecessarily suggestive, and there was no likelihood of misidentification. Hubbard does not challenge that ruling on appeal. Instead, Hubbard points to testimony presented at trial to support his claim that the procedures utilized in the photographic arrays presented to both Pennington and Novello were unduly suggestive. As to Pennington, Hubbard contends that the conflicting testimony presented by Agent Duffey and Pennington about what occurred at the display supports the inference that the photographic array was unduly suggestive. As to Novello, Hubbard asserts that police officers improperly told Novello that she had "made the right choice," thereby tainting Novello's pretrial and in-court identification of Hubbard.

(25) Neither of Hubbard's assertions have merit. First, the conflicting testimony presented by Agent Duffey and Claudia Pennington at trial about what occurred when Agent Duffey presented the photographic array to Pennington was explored fully and challenged by defense counsel at trial. Pennington's in-court identification of Hubbard was unequivocal. If Pennington was uncertain as

to her pretrial identification, that lack of certainty goes to the weight of the evidence not to its admissibility.[13]

(26) Similarly, Novello's statement at trial that police officers informed her some time after the photographic lineup that she had successfully identified the perpetrator does not, as Hubbard argues, support an inference that the procedures used during the photographic array itself were impermissibly suggestive. The Superior Court reviewed the pretrial identification procedures and concluded that the procedures utilized did not "suggest" the outcome. We find no abuse of discretion in the Superior Court's ruling.[14] Any alleged statements made by police after the photographic array did not undermine the validity of Novello's pretrial identification. Accordingly, because we find nothing improper about Novello's pretrial identification, we reject Hubbard's argument that Novello's in-court identification, which was unequivocal, was impermissibly tainted by the suggestive pretrial identification.

(27) Hubbard's next two claims relate to the testimony of his brother, Eric. First, Hubbard asserts that the trial court erred by allowing Detective Hawk

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[13] *Gillis v. State*, Del. Supr., Nos. 278, 279, and 280, 1986, Walsh, J. (July 9, 1987) (ORDER); *see also Vouras v. State*, Del. Supr., 452 A.2d 1165, 1168 (1982).

[14] *Richardson v. State*, Del. Supr., 673 A.2d 144, 147 (1996).

to testify to out of court statements made by Eric without first determining that those out of court statements had been made voluntarily. Second, Hubbard asserts that the prosecutor engaged in misconduct by improperly referring in her opening statement to Eric Hubbard's out of court statements when those statements had not yet been deemed admissible. Hubbard did not raise a pretrial challenge to the voluntariness, and thus the admissibility, of his brother's out of court statements. Nor did Hubbard object to the prosecutor's reference in her opening statement to Eric's out of court statements. Accordingly, we review these claims for plain error.[15] Under a plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial.[16]

(28) The record reflects that the State called Eric as a prosecution witness. During the course of direct examination, the prosecutor questioned Eric about what happened on May 26, 1999. Although Eric offered vague details of the events of May 26, 1999, he stated that he did not specifically recall going with his brother to Crossroads Shopping Center. Moreover, Eric denied that he ever told police that he had gone to Crossroads Shopping Center with his brother

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[15] *Probst v. State*, Del. Supr., 547 A.2d 114, 119 (1988); Supr. Ct. R. 8.

[16] *Dutton v. State*, Del. Supr., 452 A.2d 127, 146 (1982).

on May 26, 1999. Immediately after this testimony, the prosecutor requested a sidebar conference to discuss Eric's prior criminal record. During the course of that sidebar, the trial judge, *sua sponte*, questioned whether the State intended to introduced Eric's prior out of court statements pursuant to 11 Del. C. § 3507.[17]

(29) In continuing with direct examination, the prosecutor questioned Eric about whether his two conversations with police were voluntary, to which Eric responded, "Somewhat...[w]ell, they threatened me with incarceration." Following this exchange, another sidebar conference was held. Although defense counsel raised a generalized concern about whether Eric's prior out of court statements might have become involuntary at some point during the second interrogation, defense counsel did not at that time raise a formal objection to the admission of Eric's prior of court statements or request voir dire on the issue of voluntariness under Section 3507. Immediately thereafter, the prosecution, through the testimony of Detective Hawk, presented Eric's prior statements concerning accompanying his brother on May 26, 1999 to the Crossroads Shopping Center at or near the time of the bank robbery. During cross-

[17] 11 Del. C. § 3507(a) provides, "In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value."

examination of Detective Hawk, defense counsel for the first time raised an objection concerning the voluntariness of Eric's prior statements. The Superior Court, applying a totality of the circumstances test, explicitly ruled that Eric's prior out of court statements were voluntarily made.

(30) On this record, we find no merit to Hubbard's claim that the Superior Court erred by failing to rule on the voluntariness of Eric's prior statements before admitting them into evidence. Hubbard is correct that this Court has held that a party who properly contests the voluntariness of a Section 3507 statement is entitled to a clear cut determination that the statement was voluntarily given prior to its admission.[18] In this case, however, the State laid the foundation for the admission of Eric's statements and Hubbard did not raise an objection. Only after Eric's statements were admitted into evidence through the testimony of Detective Hawk did defense counsel question the voluntariness of Eric's statements. At that time, the Superior Court explicitly ruled that Eric's prior statements were made voluntarily. Because Hubbard did not properly challenge the voluntariness of Eric's statements prior to their admission, we find no plain error in the procedure employed by the Superior Court. Moreover, we

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[18] *Hatcher v. State*, Del. Supr., 337 A.2d 30, 32 (1975).

find the Superior Court's ruling on the issue of voluntariness to be supported by the record.

(31) Consequently, because we find that Eric's prior out of court statements were properly admitted into evidence, we find no merit to Hubbard's contention that the prosecutor engaged in misconduct by referring to Eric's prior out of court statements in her opening statement.

(32) Finally, we address Hubbard's claim that he was not provided with adequate notice of the violation of probation (VOP) proceedings. Hubbard did not raise this claim below; therefore, we review it for plain error.[19] The record reflects that Hubbard pled guilty to first degree robbery in 1995 and was serving out the probationary portion of that sentence when he was arrested in 1999 for two robberies and possession of drug paraphernalia. It is clear from the transcript of the suppression hearing on the 1999 charges, which was held on March 31, 2000, that Hubbard and his counsel had notice of the contested VOP hearing and discussed the scheduling of the hearing on the record following the suppression hearing. The record further reflects that a subpoena for the VOP hearing scheduled on April 24, 2000 was issued to Hubbard on April 17, 2000. Defense counsel appeared on Hubbard's behalf at the April 27, 2000 VOP

[19] *Probst v. State*, 547 A.2d at 119.

hearing and raised no objection to hearing on the ground of improper notice. Accordingly, we find Hubbard's claim of inadequate notice to be unsupported by the record.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are hereby AFFIRMED.

BY THE COURT:

s/Joseph T. Walsh
Justice