

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICKY B. HICKMAN,	§	
	§	No. 455, 2003
Defendant Below,	§	
Appellant,	§	
	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for Sussex County
	§	
Plaintiff Below,	§	Cr. I.D. No. 0301005176
Appellee.	§	

Date Submitted: February 10, 2004

Date Decided: March 24, 2004

Before HOLLAND, STEELE and JACOBS, Justices.

**ORDER**

This 24<sup>th</sup> day of March 2004, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Ricky B Hickman, following a jury trial, appeals from his convictions of Delivery of Cocaine and Delivery of Cocaine within One Thousand Feet of a School. In this appeal, Hickman argues that the Superior Court: (i) erred in ruling the photo identification process employed by police was not impermissibly suggestive; (ii) abused its discretion by admitting still photographs taken from a videotape because the jury was left to speculate about their significance; and (iii) abused its

discretion by granting the State's motion to reopen its case after both parties had rested.

(2) On October 7, 2002, two undercover detectives, Marvin Mailey and Jeffrey Matthews, attached to the Drug Enforcement Administration Drug Task Force in Georgetown, Delaware, drove an unmarked vehicle into the Georgetown Apartment Complex. Their vehicle was equipped with a hidden surveillance camera and a listening device attached to the sun visor in the front of the car. The detectives stopped in front of a building, and Hickman, whom they recognized from an earlier incident, approached the vehicle and asked the detectives what they wanted. The detectives told Hickman they were looking for an "eight ball."<sup>1</sup>

(3) Hickman told the detectives he did not want to complete the deal on the street because of frequent police patrols, so Detective Mailey followed Hickman about 20 to 25 feet to the front of an apartment, where Hickman sold him 5 rocks of crack cocaine for one hundred dollars. Detective Matthews, still seated in the unmarked car, observed the transaction and described the subject into the hidden listening device. After the transaction was completed, Detective Mailey returned to the vehicle and the two detectives left. The crack cocaine weighed 1.99 grams.

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<sup>1</sup> An "eight ball" is the street name for approximately 3.5 grams of crack cocaine that is typically purchased for \$150.00 to \$200.00.

(4) Following the incident, Detective Matthews returned to the Georgetown Police Station where he was shown a single photograph of Hickman. Detective Matthews identified the man in the photograph as the person involved in the drug transaction. The following day, Detective Mailey also identified Hickman after being shown the same single photograph. At trial, both Detective Mailey and Detective Matthews positively identified Hickman as the person who sold the drugs to Mailey on October 7, 2002.

(5) On appeal, Hickman claims the Superior Court erred by ruling that the single photo identification process employed by the police was not impermissibly suggestive. On the first morning of trial, the defense objected to the police's use of the single photograph to identify Hickman. Despite the untimely objection, the Trial Court held a suppression hearing and ruled that the photograph and in-court identifications were admissible. After the conclusion of the suppression hearing, Hickman withdrew his objection. On appeal, the State argues that the express withdrawal of Hickman's objection renders this argument unreviewable except for plain error. This Court agrees.<sup>2</sup>

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<sup>2</sup> *MacDonald v. State*, 816 A.2d 750, 757 (Del. 2003).

(6) Even upon *de novo* review, however, Hickman's appeal is without merit. The fact that an identification process is suggestive, without more, does not create a due process violation. An identification process is unconstitutional "where it is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."<sup>3</sup> To determine whether there is a very substantial likelihood of irreparable misidentification, a trial court must examine the totality of the circumstances, including:

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [the witness'] prior description of the criminal, the level of certainty demonstrated [by the witness] at the confrontation, and the length of time between the crime and the confrontation.<sup>4</sup>

Despite finding the process inappropriate, the trial court found that the single photograph identification was not impermissibly suggestive in the circumstances of this case. Additionally, the trial court found no likelihood of misidentification. Before viewing the single photograph to identify Hickman, both detectives recognized the defendant from an earlier incident. Moreover both detectives had a reasonably long period to observe the defendant during the drug transaction. Accordingly, there was a minimal

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<sup>3</sup> *Younger v. State*, 496 A.2d 546, 550 (Del. 1985), quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)(internal quotation omitted).

<sup>4</sup> *Richardson v. State*, 673 A.2d 144 (Del. 1996), quoting *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

likelihood of misidentification by the detectives. Hickman's assertion of error is, therefore, rejected.

(7) Hickman's related argument, that the single photograph identification tainted the identifications made at trial, is also without merit. At trial, Hickman failed to object to the detectives' in-court identification. Thus, Hickman's claim is waived due to his failure to object at trial. Nonetheless, Hickman is unable to demonstrate plain error, because the detectives' descriptions of Hickman before and after the drug transaction described a man with a missing front tooth, and the single-photo used for identification involved a closed mouth photo of Hickman. The in-court identifications were corroborated by the admission of a different photograph at trial showing a gap in Hickman's front teeth. Accordingly, there is no plain error.

(8) Hickman also contends that the trial court abused its discretion in admitting two still photographs which showed a suspect with a missing fingertip. Specifically, Hickman argues that the trial court admitted the still photographs taken from the surveillance video of the detectives' unmarked car without evaluating their relevancy, cumulativeness, and limitations during the trial.

(9) The record reveals, however, that the trial court properly analyzed the issue of admissibility and ruled that the still photographs were not cumulative or prejudicial. Moreover, the court found that the still photos were freeze frames of the surveillance video that would allow the jury to focus on the suspect's finger to determine whether Hickman was the alleged suspect seen in the video. Finally, the court instructed the jury to examine the evidence and make independent conclusions about what the evidence did or did not show. Accordingly, the trial court did not abuse its broad discretion by admitting the two still photographs.

(10) Lastly, Hickman contends that the trial court abused its discretion by allowing the prosecution to reopen its case after both parties had rested. Hickman claims that he was prejudiced by the ruling because it precluded the possibility of a favorable ruling on a motion for a judgment of acquittal. The record, however, reveals Hickman failed to avail himself of the opportunity to move for a judgment of acquittal when the State rested its case the first time. Only after the State rested its case for the second time did Hickman move for a judgment of acquittal.<sup>5</sup> Furthermore, the trial court concluded that Hickman's substantial rights would not be prejudiced if one of the State's witnesses was called back to the witness stand to testify for the

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<sup>5</sup> Hickman's Motion for a Judgment of Acquittal after the State rested their case for the second time was denied.

limited purpose of establishing Hickman's age at the time of the offense. In light of these circumstances, the trial court acted within its discretion by granting the State's motion to reopen.

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

BY THE COURT

/s/ Jack B. Jacobs  
Justice