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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001691-MR

VONTEZ KING

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 01-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Vontez King has appealed from a judgment of conviction and sentence entered by the Knox Circuit Court on July 18, 2001, which convicted him of three counts of fraudulent use of a credit card in excess of \$100.00¹ and one count of being a persistent felony offender in the first-degree (PFO I)² and sentenced him to 15 years in prison. Having concluded that the

¹Kentucky Revised Statutes (KRS) 434.650.

²KRS 532.080(3).

trial court did not abuse its discretion in admitting evidence of witness identifications and that King received a fair trial, we affirm.

The evidence presented at the hearing on King's motion to suppress witness identification showed that on December 5, 2000, King entered a Wal-Mart store in Barbourville, Knox County, Kentucky, at various times during the day, and that he completed three separate transactions with a stolen credit card, belonging to Deborah Day. To accomplish these frauds, King signed the names "Al Wilson" and "Mike King" on the receipts. Although the three clerks that handled the transactions later testified to being suspicious of the purchases, King assured each of them that he had permission to use the card.

Day was alerted to the unauthorized charges on her account by her credit card company on the same day of the transactions. In turn, Day alerted the Wal-Mart loss-prevention team to the alleged thefts. A loss-prevention officer for Wal-Mart then collected video recordings of the transactions and showed them to Officer Mike Broughton of the Barbourville Police Department. Upon viewing the tapes, Officer Broughton recognized King, with whom he had previously been acquainted, as the individual making the credit card purchases. Coincidentally, while Officer Broughton was driving from the Wal-Mart to the police station, he spotted King walking along the street near the store and apprehended him.

Shortly after King had been transported to the police station for questioning, Reba Wilson, one of the Wal-Mart clerks who had processed King's purchases that day, was contacted. After a brief interview, Wilson was able to correctly identify the clothes King was wearing that day. However, she was not able to identify with certainty a digital photograph of King taken from the surveillance video. At this point, Officer Broughton took Wilson into a small room where King was sitting. When Wilson entered, King jumped up and exclaimed, "you can't do that! I'm the only black person here. She'll know it's me." Wilson was then quickly taken out of the room. After leaving the room, Wilson, predictably, verified King as the man who had made the transaction.

On December 8, 2000, the two remaining cashiers who had assisted King on December 5, Devonda Carnes and Karen Ross, were brought to the police station. Both witnesses gave statements concerning King's identification. Carnes's statement was detailed, correctly describing the clothes and eyeglasses that King had worn on December 5. Carnes also accurately described King's approximate height and weight. Ross's statement was less specific. Other than correctly identifying King's race, she could remember few other details. However, she was able to recall several specific details about the transaction, including a Winnie the Pooh doll that King had purchased using Day's credit card.

After providing their descriptive statements, Carnes and Ross were shown a photo arrayal containing King's picture along with the pictures of five other African-American men. King argues that the photo lineup was riddled with constitutional infirmities. King notes that he was much older than the other men depicted and that he and only one other man were under 6 feet tall. King also notes that he was pictured wearing the same eyeglasses and jacket he had worn the day of the transactions. Both Carnes and Ross identified King from the photo spread.

Prior to trial, King filed a motion to suppress all evidence of the above witness identifications. King also argued that Wilson, Carnes and Ross should be precluded from identifying him at trial due to the taint from the unduly suggestive nature of the pretrial identifications. On March 2, 2001, the Knox Circuit Court granted King's motion as to Wilson's pretrial identification, but denied King's motion as to Carnes and Ross. The trial court further ruled that Wilson would be permitted to identify King at trial.

At a jury trial on May 10, 2001, King was found guilty of three counts of credit card fraud and one count of being a PFO I. The jury recommended a 15-year sentence for each conviction, to run consecutively for a total sentence of 45 years. In post-trial proceedings, King filed a motion to set his sentence at 15 years, arguing that the trial court could not impose a sentence in violation of KRS 532.080, which provided for a maximum sentence for these convictions of 20 years. King also filed a

motion for a new trial on the grounds that one of the jurors had belonged to the same church as King's ex-wife and live-in girlfriend Margaret Helvey. The affidavit in support of the motion stated that several church members disapproved of Helvey and King living together. On June 22, 2001, the trial court granted King's motion to set his sentence at 15 years in prison on each conviction, with the sentences to run concurrently. The trial court denied King's motion for a new trial, stating that King's affidavit fell far short of the constitutional standard required. This appeal followed.

King argues that the in-court and pretrial witness identifications by Wilson, Carnes and Ross of him should have been suppressed because the identification procedures employed by the police were so unduly suggestive that he was denied his right to due process of law. Identification testimony following a pretrial identification is violative of a defendant's constitutional right to due process of law if the pretrial identification procedure was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."³ The determination of whether identification testimony would violate a defendant's due process rights involves

³Dillingham v. Commonwealth, Ky., 995 S.W.2d 377, 383 (1999) (quoting Thigpen v. Cory, 804 F.2d 893, 895 (6th Cir. 1986), cert. denied sub nom. Foltz v. Thigpen, 482 U.S. 918, 107 S.Ct. 3196, 96 L.Ed.2d 683 (1987); and Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968)).

a two-step process.⁴ "First, the court examines the pre-identification encounters to determine whether they were unduly suggestive."⁵ If not, the analysis ends and the identification testimony is allowed. "If so, 'the identification may still be admissible if under the totality of the circumstances the identification was reliable even though the [identification] procedure was suggestive.'"⁶ Determining whether under the totality of the circumstances the identification was reliable requires consideration of the five factors enumerated by the United States Supreme Court in Neil.⁷ These factors "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witnesses' 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."⁸ We will consider the above test as we examine each witness' identification testimony separately.

The trial court concluded that the pretrial identification procedure used for Wilson was impermissibly suggestive and it ordered all evidence of that pretrial

⁴Id.

⁵Id.

⁶Id. (quoting Stewart v. Duckworth, 93 F.3d 262, 265 (7th Cir. 1996) and Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401, 411 (1972)).

⁷Wilson v. Commonwealth, Ky., 695 S.W.2d 854, 857 (1985).

⁸Neil, supra 409 U.S. at 199, 34 L.Ed.2d at 411.

identification to be suppressed. However, the trial court allowed Wilson to identify King at trial from her independent recollection of the event. Since we agree with the trial court's finding of undue suggestiveness as to Wilson's pretrial identification, a review of Wilson's at-trial identification requires us to apply the five Neil factors.

As to the first two factors, we note that Wilson had an adequate opportunity to view the suspect and that she gave his transactions considerable attention. From a review of the surveillance tapes, we note that on December 5 Wilson engaged in three transactions with King, with each transaction lasting a minute or more. According to Wilson's testimony at the suppression hearing, the first two times King attempted to purchase items through her, his credit card was denied. The third time he presented the card belonging to Deborah Day. When Wilson asked him for identification he was unable to produce it and instead explained to Wilson that it was his daughter's card. Not only did this series of interactions between Wilson and King provide an opportunity for Wilson to view King, but the denial of the credit card enhanced the level of attention that Wilson paid to King. Thirdly, we note that Wilson provided a highly accurate description of King prior to her viewing King in the ante room at the police station. She was also very certain in her identification of King following their confrontation. Finally, we note that Wilson's identification occurred the very night of the alleged transactions while her interactions with King were

still fresh in her mind. Considering all of these factors, we conclude that the trial court properly allowed Wilson to identify King at trial.

As to Carnes and Ross, the trial court allowed evidence of both the pretrial identifications and the at-trial identifications because the photo lineup shown to them was not unduly suggestive. Wilson argues, to the contrary, that he was singled out in the lineup because he was older than the other men, because he was shorter than four of the other men, and because he was the only man wearing eyeglasses and a jacket. We disagree and affirm the decision of the trial court.

In reviewing claims of undue suggestiveness, we are without the benefit of clear guidelines. Nonetheless previous decisions in the courts of our Commonwealth seem to suggest that the test is one of degree. That is, whether the defendant is so singled-out within the photo lineup that the likelihood of irreparable misidentification is substantial.⁹ Given this standard, we are unconvinced by King's claims. All six men were African-American males, all were pictured within substantially similar surroundings, and it was clear that all six were in custody at the time the photographs were taken.¹⁰ While King was shorter than four of the five other men, the height charts pictured behind the men were not clearly visible. The garments being worn by the men were likewise not readily apparent. It is

⁹See Dillingham, supra at 383.

¹⁰See id.

difficult to tell from the neck-up photos that King was wearing a jacket, and since the photographs were in black-and-white it was impossible to discern that King's jacket was blue. While King was factually older than the other men, the ages of the men were not obviously discernable from the photo lineup. Finally, while it is troubling that King was the only man depicted wearing eyeglasses, we do not believe this in and of itself rises to the level of a due process violation. Therefore, we cannot say that the trial court abused its discretion by allowing the admission of the identification evidence.

Finally, we turn to King's second issue on appeal--that he received an unfair trial because of juror bias. King alleges that during voir dire the potential jurors were asked if they were acquainted with defense witness Margaret Helvey. While none of the jurors responded in the affirmative, it was later discovered that juror Raymond Troutman attended the First Baptist Church of Barboursville along with Helvey. Helvey also alleged in an affidavit filed with the motion for a new trial that a church member had approached her concerning her out-of-wedlock cohabitation with King. The unnamed church member allegedly told Helvey that she risked being ejected from the choir if she did not cease her live-in relationship with King. King asserts that Troutman's presence on the jury rendered his trial fundamentally unfair. We disagree.

All defendants are entitled to the right of due process of law which includes the right to an unbiased decision by an

impartial jury.¹¹ If an unqualified juror participates in the verdict, a defendant's right of due process has been violated.¹² Doubts concerning whether there was bias must be resolved in favor of the defendant.¹³ The defendant's right to challenge a juror includes the incidental right that the information elicited on voir dire shall be true.¹⁴ A juror is qualified to serve unless there is a showing of actual bias.¹⁵ "It is incumbent upon the party claiming bias or partiality to prove the point."¹⁶

In filing his motion for a new trial, King failed to present convincing evidence in support of the motion. King did not present any testimony from juror Troutman. Nor did King present any evidence showing that juror Troutman was actually acquainted with witness Helvey, let alone that he was biased toward Helvey. As the trial court noted in its ruling on the motion, the First Baptist Church had a large congregation; and it was highly probable that not all parishioners were acquainted with one another. In other words, the evidence presented by King in support of his motion for a new trial was nothing more than speculation that juror Troutman harbored animosity toward Helvey.

¹¹Grooms v. Commonwealth, Ky., 756 S.W.2d 131, 134 (1988).

¹²Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 669 (1990).

¹³Randolph v. Commonwealth, Ky., 716 S.W.2d 253, 255 (1986).

¹⁴Id. at 256.

¹⁵Watson v. Commonwealth, Ky., 433 S.W.2d 884 (1968); Polk v. Commonwealth, Ky.App., 574 S.W.2d 335 (1978).

¹⁶Polk, supra at 337.

In ruling on the motion for a new trial, the trial court could only base its decision on the evidence presented at the hearing and the trial. There is nothing in the record to indicate that there was any juror bias to support King's claim that the trial court's ruling was clearly erroneous in denying the motion.¹⁷

Accordingly, for the foregoing reasons, the judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

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¹⁷See Caldwell v. Commonwealth, Ky., 634 S.W.2d 405 (1982); and Polk, supra.