

RENDERED: AUGUST 6, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001570-MR

JOSEPH PETRO

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 08-CR-00080

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * ** * **

BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Joseph Petro appeals as a matter of right from a judgment of the Clinton Circuit Court sentencing him to five years' imprisonment for felony theft by unlawful taking. After careful review, we reverse.

On February 4, 2008, Freddie Wilson was working on a job site at David Neal's home. As Wilson was walking out of the residence, he noticed an

individual hooking up a trailer to a red Ford Ranger pickup truck. Wilson testified that he said “hey” to the individual and that the individual looked at him. Wilson otherwise observed the individual for a few moments from approximately thirty (30) to thirty-five (35) feet away as the individual dropped the trailer on the hitch and drove away.

Approximately an hour later, Steve Bridgeman, Wilson’s employer, returned to the job site, and Wilson told Bridgeman what had happened. Wilson told Bridgeman that the man who took the trailer was short and slim with a goatee and burr haircut. Wilson stated that the man got into a red Ford Ranger pickup truck and drove away with the trailer attached. Bridgeman then called Neal to determine whether anyone had permission to take his trailer. Neal indicated that he did not give anyone permission to take his trailer.

After learning that his trailer was stolen, Neal filed a police report. Clinton County Sheriff Rick Riddle took Bridgeman’s statement, but never spoke to Wilson, who observed the crime occur. Sheriff Riddle did not write anything down or make a written report after speaking with Bridgeman. Bridgeman apparently gave Sheriff Riddle an inaccurate description of the truck, telling him that the person who stole the trailer was driving a white pickup truck with a blue stripe, when in fact Wilson had told Bridgeman it was red. There is nothing to indicate that Sheriff Riddle ever had a physical description of the suspect who stole the trailer, because he never spoke with Wilson.

Four days later, an accident occurred close to Neal's residence involving a white pickup truck with a blue stripe. Because Sheriff Riddle thought the vehicle of the individual who stole the trailer was a white pickup with a blue stripe, he called Wilson to the scene to determine if this was the same truck as the one used in the theft of the trailer.

At the scene, Wilson identified the white pickup as the truck he had seen take the trailer from the residence; however, Wilson later again reaffirmed at trial that the truck at the scene of the theft was a red Ford Ranger pickup truck. Sheriff Riddle then took Wilson to the hospital and conducted a show up identification of Petro, who was involved in the accident outside Neal's residence. Wilson identified Petro as the person he observed stealing the trailer.

Petro was indicted for theft by unlawful taking or disposition (\$300.00 or more). On June 29, 2009, Petro filed a motion in limine to suppress the show up identification. After hearing the above testimony, the trial court denied the motion to suppress, and the case proceeded to trial. At trial, Wilson testified to the above events. He stated that he was working at Neal's residence and went outside to cut a piece of trim and that is when he observed the theft of the trailer taking place. He described that he was somewhat distracted when he first observed the person hooking up the trailer and that he did not observe him for an extended period of time. On cross examination and re-direct, Wilson again stated that the truck he observed stealing the trailer was a red Ford Ranger pickup truck. The jury found Petro guilty of theft by unlawful taking. This appeal now follows.

Show ups are inherently suspect and “should be accepted with caution.” *Myers v. Commonwealth*, 499 S.W.2d 277, 279 (Ky. 1973). Because they are a “one-on-one presentation of the suspect to the eyewitness” often attendant with the added impression that law enforcement believes the suspect to be criminal, “a show up is not a generally approved method of securing an identification.” Prof. Leslie Abramson, 9 Ky. Prac., *Crim. Pract. & Proc.* § 20:23 (2009-2010). This is not to say that show ups do not have a place in law enforcement. To the contrary, show ups are helpful when used immediately after the crime to establish probable cause or to clear a suspect. *See Savage v. Commonwealth*, 920 S.W.2d 512, 513 (Ky. 1996). Although show ups are allowable for law enforcement purposes when conducted close in time to the crime, unnecessary show ups “are condemned for the further reason that the increased chance of misidentification is gratuitous.” *See Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

To determine whether an identification should be suppressed because it was unacceptably tainted by a show up, courts look to the totality of the circumstances. *Neil*, 409 U.S. at 199; *Savage*, 920 S.W.2d at 513. To guide in this determination, the United States Supreme Court has enunciated the following factors to consider: the opportunity of the witness to view the suspect, the witness’ degree of attention, the accuracy of prior descriptions, the level of certainty at the confrontation, and the time between the crime and the confrontation. *Neil*, 409 U.S. at 199-200. Kentucky courts also consider whether other evidence “tends to

corroborate the witness' identification.” *St. Clair v. Commonwealth*, 140 S.W.3d 510, 551 (Ky. 2004).

In the instant case, we agree with Petro that the totality of these circumstances mandates suppression. Wilson testified that he was preoccupied with the job he was doing when he first noticed the person stealing the trailer. Wilson also testified that he saw the suspect for a few seconds from approximately thirty feet away. While it does appear that Wilson was fairly certain that Petro was the person who stole the trailer when he identified him at the hospital, there is no evidence of any other prior descriptions given to the authorities by Wilson matching Petro's appearance. Thus, there is no accuracy of prior descriptions to compare with this description, and this factor does not give any credence to the fact that the show up identification was proper or improper.

Most importantly, four days had passed before the show up identification took place. There was no other evidence tying Petro to the crime, and the record offers no explanation for why a regular lineup of suspects was not used in this case. Although Petro was treated at the hospital for injuries sustained in the motor vehicle accident, there was no evidence in the record to suggest that Petro was a flight risk or was found fleeing the location. Furthermore, there was no other evidence identifying Petro as the suspect. Given these circumstances and the nature of this crime, we simply cannot say that the show up identification in this case was reasonable or necessary under the circumstances, and thus the subsequent conviction was in error.

Accordingly, we reverse the judgment of conviction and sentence entered by the Clinton Circuit Court on August 17, 2009.

ALL CONCUR.

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