

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-000444-MR

DAVID L. DAHMS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HON. THOMAS L. CLARK, JUDGE  
INDICTMENT NO. 14-CR-00549-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, J. LAMBERT, AND NICKELL, JUDGES.

J. LAMBERT, JUDGE: David L. Dahms appeals from the Fayette Circuit Court's order entered August 19, 2014, denying his motion to suppress. After careful consideration, we affirm.

On April 6, 2014, at 6:36 p.m., Officer Kyle Toms of the Lexington Fayette Division of Police responded to a reported burglary in progress at 1317

Devonport Drive, Lexington, Kentucky. The report described the three individuals entering the residence through a rear window as a white male in a Carhartt jacket and cargo shorts, a black male in a hooded sweatshirt and black pants, and a white male in a zip-up hoodie and jeans. Officer Toms was nearby when the dispatch call came through, and he testified that it only took him between 30 seconds and a minute to arrive at the scene. Upon arrival, Officer Toms observed three individuals matching the given descriptions exiting the residence carrying television sets. He announced his presence and confronted the suspects.

At that point, two of the men carrying a large television out of the residence looked at the officer with what he described as a “deer in the headlights look” before dropping the television and running away. The two who fled were the black male and one of the white suspects later identified as the appellant. The third suspect, Byron Strunk, did not flee and was arrested at the scene. He gave the names of the other two men who had fled, identifying the white male as his roommate, David Dahms, and also provided police with the address of their apartment. Shortly thereafter, the black male suspect was arrested, leaving only the suspect believed to be Dahms still at large. Officer Toms confirmed his identification of the suspect thought to be Dahms that same evening, by looking up a December 2013 mugshot of Dahms at the Fayette County Detention Center. Later that evening at approximately 11:00 pm, Dahms was arrested at the apartment identified by his roommate and co-conspirator, Strunk. Dahms was officially booked the following day, April 7, 2014.

On August 14, 2014, Dahms and Officer Toms were the only two witnesses testifying with regard to the motion to suppress Officer Toms' eyewitness identification of Dahms. Officer Toms testified that the hoods of the hooded sweatshirts worn by the suspects were lowered, his view of their faces was not obstructed, and that he viewed them from close range. The circuit court later took note for the record that the officer's distance from the suspects, based on his estimation using a fixed point in the courtroom, was approximately twenty to twenty-five feet. The Commonwealth entered into evidence the December 2013 photograph of Dahms, as well as his booking photograph from the April 7, 2014, arrest. Officer Toms confirmed with complete certainty that Dahms was the man he confronted at the crime scene and that Dahms was the same man he observed in the December 2013 mugshot. While Dahms testified that the officer told him upon arrest that he could not see him because his hood was up, conflicting with Officer Toms' testimony, the circuit court specifically found Officer Toms to be a more credible witness. The court denied the motion to suppress in an order entered August 19, 2014. Dahms entered a conditional guilty plea to Burglary in the Second Degree, Fleeing or Evading Police in the Second Degree, and being a Persistent Felony Offender in the Second Degree. Thereafter he was sentenced to ten-years' imprisonment. This appeal now follows.

Dahms sole argument on appeal is that Officer Toms' eyewitness identification of him violated his due process rights and therefore should have been

suppressed. In *King v. Commonwealth*, 142 S.W.3d 645, 649 (Ky. 2004), the Kentucky Supreme Court stated:

The determination of whether identification testimony violates a defendant's due process rights involves a two-step process. First, the court examines the pre-identification encounters to determine whether they were unduly suggestive. 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.

(Internal citations and quotations omitted).

Dahms argues that Officer Toms' identification was "irretrievably tainted" by an unnecessarily suggestive identification procedure, comparing Officer Toms' act of looking up the December 2013 mugshot to the facts of *Moore v. Commonwealth*, 569 S.W.2d 150 (Ky. 1978). In *Moore*, the display of a single mugshot without any other pictures was determined to be an unnecessarily suggestive identification technique. *Id.* at 153. Addressing the second part of the test, Dahms then asserts that the suggestive identification was not sufficiently reliable under *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), in which the U.S. Supreme Court articulated five factors to be considered when dealing with witness identifications: "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.” *Id* at 199. *See also Savage v. Commonwealth*, 920 S.W.2d 512, 513-14 (Ky. 1995).

The circuit court determined that the officer confirming the identification of Dahms through a mugshot was not unduly suggestive. We agree. In *Barnes v. Commonwealth*, 410 S.W.3d 584 (Ky. 2013), the Kentucky Supreme Court found that there is nothing improper about a single photo identification used to confirm a previous observation or recollection:

There's certainly nothing wrong with a witness being allowed to reaffirm the accuracy of her previous identification as long as that previous identification has not been impermissibly suggestive or tainted. *People v. Jordan*, 2003 WL 21277267 (Cal. Ct. App. Jun. 03, 2003) (finding that showing a witness a single photo of the defendant to confirm the witness's previous identification was not unduly suggestive); *State v. Marsh*, 187 N.C. App. 235, 652 S.E.2d 744, 747–48 (2007) (overruled on other grounds by *State v. Tanner*, 364 N.C. 229, 695 S.E.2d 97 (2010)) (holding that no due process violation occurred where single photo identification was based upon identifier's own observations and recollection and was requested only to confirm defendant's identity).

*Barnes* at 587-88. In this case, the witness was a police officer who had an unobstructed view of Dahms just before he fled the crime scene. Dahms was then positively identified by name as being at the scene by his roommate and co-conspirator, who also gave police the address at which Dahms would later be found. The follow-up identification by Officer Toms using the Fayette County Detention Center mugshot was simply good police work, in that the officer used the photograph to clear or confirm the identity of the named suspect. The

photographic identification was not unduly suggestive – it was merely an attempt to verify information the police already had at their disposal.

Even though the circuit court found the identification was not unduly suggestive, the court went ahead with a full *Biggers* analysis of the facts and found that the identification was otherwise reliable under the totality of the circumstances. We again agree with the circuit court that under the totality of the circumstances, the identification was reliable. Officer Toms had a full opportunity to view the suspect at the scene of the crime, from very close range. He was assuredly at full attention, as he was responding to a police dispatch call and knew that the suspects were nearby. The prior description amounted to a dispatch call describing the number of suspects and their clothing, which corresponded with what the officer found at the scene. Officer Toms was completely certain as to his identification of Dahms. Finally, the length of time between crime and confrontation was a mere matter of hours. There is little doubt that the identification was otherwise reliable under a totality of the circumstances, as required by *Biggers*.

For the foregoing reasons, we affirm the Fayette Circuit Court's August 19, 2014, order denying Dahms' motion to suppress.

ALL CONCUR.

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