NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2007-K-1207**
VERSUS	*	**COURT OF APPEAL**
RICKY LANGSTON AND BOBBY COLLINS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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ON APPLICATION FOR WRIT OF CERTIORARI, WRIT OF PROHIBITION
TO REVIEW RULING DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 468-745, SECTION "E"
HONORABLE CALVIN JOHNSON, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Michael E. Kirby, Judge David S. Gorbaty, Judge Edwin A. Lombard)

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WRIT GRANTED; JUDGMENT GRANTING MOTION TO SUPPRESS IDENTIFICATION REVERSED; CASE REMANDED FOR FURTHER PROCEEDINGS

STATEMENT OF THE CASE

The State charged Ricky Langston and Bobby Collins on February 23, 2007, with two counts each of simple robbery. At his arraignment on March 6, Langdon pled not guilty, while Collins pled not guilty at his arraignment on March 13. On May 15, the court held the preliminary hearing and heard their motions to suppress the identifications. The court took the matters under advisement, and on August 6 it suppressed the identifications. The State objected and noted its intent to seek writs.

FACTS

Garrett Jacobs testified that at approximately 4:00 a.m. on September 20, 2006, he was walking down Broadway Street, having just come from a dorm on Tulane University's campus. He stated that a car passed him as he was walking and then disappeared around a corner. He stated that as he approached the corner of Broadway and Maple Streets, the same car stopped across the street from him. He testified that two men got out of the car, and one of them approached him from behind. That man asked him for a cigarette. Jacobs testified that he turned around

and told the man that he did not smoke. As he turned back around, the second man hit him in the head, and Jacobs fell to the ground. Jacobs stated that one of the men demanded Jacobs' valuables, and Jacobs gave him the contents of his pocket. Jacobs stated that one of the men also took his camera from around his neck. Jacobs testified that the men then walked back to the car, and Jacobs started to follow, asking for the camera. He stated that one of the men told him to keep walking, and the men entered the car and drove away. Jacobs identified the car as a dark Chevy Impala.

Jacobs testified that approximately one to two weeks later, he viewed two photographic lineups from which he chose one photo from each lineup as depicting the men who robbed him. Jacobs could not identify either man in court, stating that much time had passed since the robbery. He testified that when he made the identifications, the officer showing him the lineups did not promise him anything or coerce him into making the identifications, nor did the officer indicate what photographs Jacobs should choose, if any. Jacobs indicated that when he made his identifications, he was not one hundred per cent sure that they were the men who robbed him, but rather he was "pretty sure" at the time of the identifications that these were the two men who robbed him.

On cross-examination, Jacobs testified that he had not been drinking prior to the robbery. He described the surroundings as "pretty dark." He testified that although he did not see the men's faces while he was on the ground, he got a good look at them when the first man approached him and asked for a cigarette, and he saw the second one when the men turned around when he asked for his camera. He testified that both men were African-Americans with dark complexions, both around 6'0" or 6'2". He stated that the man who asked him for the cigarette had

dreadlocks, while the man who punched him had a buzz cut. He testified that he did not remember if the police officer who showed him the lineups told him that the suspects were in custody.

Det. Patrick Conaghan testified that he received information from other officers involving a separate incident of simple robbery wherein the perpetrators pulled up to the victim in a dark red Impala, and one of the perpetrators punched the victim before robbing him. Based upon the men arrested in that case, Det. Conaghan prepared photographic lineups of two of them who fit the descriptions given by Garrett Jacobs and showed them to Jacobs. From those lineups, Jacob chose the photograph of Ricky Langston as the person who punched him and the photograph of Bobby Collins as the person who asked him for the cigarette. Det. Conaghan testified that he did not coerce Jacobs or promise him anything to get him to make an identification, nor did he indicate what photographs Jacobs should choose. Det. Conaghan stated that he did not remember Jacobs' description including the fact that one of the robbers had dreadlocks. He admitted that he showed the lineups to Jacobs after he had shown them to the victim in the other case, but he insisted that the photographs were face-up when Jacobs viewed them.

DISCUSSION

The trial court suppressed the identifications in this case because it found that the photographs the victim identified did not fit the descriptions he gave of the perpetrators. The State contends that the court erred by so finding because the testimony adduced at the suppression hearing shows that the identification procedures were not suggestive and that the circumstances of the case show a basis for the reliability of the identifications.

In State v. Holmes, 2005-1248, pp. 6-7 (La. App. 4 Cir. 5/10/06), 931 So. 2d 1157, 1161, this court set forth the standard for determining whether an identification should be suppressed:

> La. Code of Criminal Procedure art. 703(D) provides that the defendant has the burden of proof on a motion to suppress an out of court statement. To suppress an identification, a defendant must first prove that the identification procedure was suggestive. *State v. Prudholm*, 446 So.2d 729, 738 (La. 1984). An identification procedure is suggestive if, during the procedure, the witness' attention is unduly focused on the defendant. *State v. Robinson*, 386 So.2d 1374, 1377 (La. 1980). Moreover, **a defendant who seeks to suppress an identification must prove both that the identification itself was suggestive and that a likelihood of misidentification existed as a result of the identification procedure.** *State v. Valentine*, 570 So.2d 533 (La. App. 4 Cir.1990).
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> The Supreme Court has held that even if the identification could be considered suggestive, it is the likelihood of misidentification that violates due process, not merely the suggestive identification procedure. *State v. Thibodeaux*, 98-1673 (La. 9/8/99); 750 So.2d 916, 932. Fairness is the standard of review for identification procedures, and reliability is the linchpin in determining the admissibility of identification testimony. *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 2253 (1977). **Even a suggestive, out-of-court identification will be admissible if it is found reliable under the totality of circumstances.** *State v. Guy*, 95-0899 (La. App. 4 Cir. 1/31/96), 669 So.2d 517. If a suggestive identification procedure has been proved, a reviewing court must look to several factors to determine, from the totality of the circumstances, whether the suggestive identification presents a substantial likelihood of misidentification at trial. *State v. Martin*, 595 So.2d 592, 595 (La. 1992). The U.S. Supreme Court has set forth a five-factor test to determine whether a suggestive identification is reliable: (1) the opportunity of the witness to view the assailant at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the assailant; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation. *Manson v. Brathwaite, Id*. The corrupting effect of the suggestive

> identification itself must be weighed against these factors. *Martin*, 595 So.2d at 595.
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> In evaluating the defendant's argument, the reviewing court may consider all pertinent evidence adduced at the trial, as well as at the hearing on the motion to suppress the identification. *State v. Lewis*, 2004-0227 (La. App. 4 Cir. 9/29/04); 885 So.2d 641, 652. A trial court's determination on the admissibility of identification evidence is entitled to great weight and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Offray*, 2000-0959 (La. App. 4 Cir. 9/26/01); 797 So.2d 764. (emphasis added)

See also State v. Lagarde, 2003-0606 (La. App. 4 Cir. 12/10/03), 861 So. 2d 871; and see State v. Simmons, 99-1154 (La. App. 4 Cir. 12/6/00), 779 So.2d 856, where this court reiterated that a defendant must establish that an identification procedure was suggestive before the court looks to the Manson factors to determine whether to suppress an identification.

Here, there is nothing to show that the procedure used during the photographic lineups was suggestive. Both Jacobs and Det. Conaghan testified that the officer did not promise Jacobs anything in return for his identifications, nor did he coerce him into making the identifications or indicate to him which photographs to choose. Det. Conaghan testified that the photographs were face-up when Jacobs viewed them; thus, he could not see any writing on the backs that may have been placed there by the victim in the other robbery who viewed the photographs before Jacobs did. In addition, although Jacobs could not positively identify either of the defendants in court, he testified that he was "pretty sure" when he made the identifications that they were the men who robbed him. Given these circumstances, the State proved that the procedures used in the identifications were not suggestive. In addition, there was no indication or argument that the

photographs themselves were suggestive. Without a showing of suggestiveness, the Manson factors should not be considered.

The trial court did not suppress the identifications because it found that the procedures or photographs were suggestive. Instead, it appears that the court suppressed the identifications because none of the photographs depicted a man with dreadlocks, even though the victim indicated that one of the men had dreadlocks. The defense could easily argue that the identifications were not reliable because the victim was not one hundred per cent sure of the identifications and because none of the men in the lineup had dreadlocks. However, these factors do not go to the *admissibility* of the identifications; rather, they go to the *weight* the fact finder at trial would give to these identifications.

Langston alleges that the defense "demonstrated that the photographic lineups were comprised in a manner which unduly focused attention on the defendant." He alleges that his photograph was "darker" than the others used in his lineup. None of the parties has submitted the actual lineups used. However, in suppressing the evidence the trial court did not indicate that the lineups were suggestive. Rather, the court suppressed the identifications because at least one did not fit the descriptions given by the victim, that being that one of the robbers had dreadlocks. Langston's final arguments concern the five Manson factors, but these are used to determine admissibility of an identification *only after* there has been a showing that the identification procedure was suggestive. There was no showing here that it was. The fact that the victim said one of the perpetrators had dreadlocks would not go to the admissibility of the identifications but rather to the weight the fact-finder at trial will give to the identifications.

Collins also argues that the identification procedure was suggestive, but he does not indicate in what way. He argues the Manson factors, but these cannot be considered unless the lineups themselves or the procedure were suggestive. There is nothing before this court to show that they were.

Collins also attacks his stop and detention in the unrelated case, arguing that there was no reasonable suspicion to stop him or to arrest him in that case. He contends that because the stop and arrest were unlawful, any identification procedure resulting from that arrest cannot be used as "the fruit of the poisonous tree," apparently referring to Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963). Because the arguments of counsel at the hearing were not transcribed, it is unclear if counsel raised this issue at the hearing. The State did not present much evidence concerning the stop and arrest in the other case, but it would appear that any identifications in this case would not be tainted by any impropriety in the unrelated case because these identifications would be *attenuated* from the other case. As per United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244 (1980), there are three exceptions to Wong Sun's exclusionary rule: the independent source doctrine, the inevitable discovery doctrine, and the attenuation doctrine. This court discussed the attenuation exception in State v. Cheatham, 2004-0095 (La. App. 4 Cir. 5/19/04), 876 So.2d 137, where this court upheld the defendant's conviction, even though he was originally illegally detained, because the officers who detained him subsequently learned that there were outstanding warrants for his arrest. In so finding, this court looked to the attenuation factors set forth in Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975): (1) the time between the illegal detention and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

Here applying the Brown factors, it is unclear how much time elapsed between the defendant's arrest in the other case and the identifications in this case. Nonetheless, Det. Conaghan testified that after the defendants were arrested in the unrelated robbery, information about the robbery "disseminated throughout the district" because there apparently had been a spate of similar robberies. Thus, it appears that some time elapsed and several intervening circumstances occurred between the arrests in the other case and the identifications in this case. In addition, there was no showing of purposeful or flagrant official police misconduct in the other case. Thus, the identifications in this case were attenuated from any "taint" that may have occurred in the stop and arrest in the other case.

For the above reasons we find that the trial court erred by suppressing them.

WRIT GRANTED; JUDGMENT GRANTING MOTION TO SUPPRESS IDENTIFICATION REVERSED; CASE REMANDED FOR FURTHER PROCEEDINGS.