

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DARIUS WILLIAMS,

Defendant-Appellee.

UNPUBLISHED

July 20, 2001

No. 226603

Wayne Circuit Court

LC No. 99-002114

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendant was charged with assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b, arising from a drive by shooting of the victim. The circuit court granted defendant's pretrial motion to suppress the victim's corporeal lineup identification of defendant and any in court identification of defendant by the victim on the basis that police conduct at an initial photographic lineup had rendered the subsequent corporeal lineup unduly suggestive. After granting defendant's motion to suppress, the circuit court dismissed the charges against defendant. The prosecutor appeals as of right. We reverse and remand.

The prosecutor first contends that the circuit court incorrectly found unduly suggestive the corporeal lineup where the victim identified defendant. Defendant conceded at the *Wade*¹ hearing that the corporeal lineup had not been conducted improperly, but complained that the victim's identification of defendant at the corporeal lineup was suggested by what occurred at a prior photographic lineup. At the photographic lineup, which occurred approximately three months before the corporeal lineup, the victim did not positively identify a photograph of defendant among six total photographs. After the photographic lineup, the investigating police officer stated to the victim that "he failed to identify the person he said shot him."

To challenge an identification on the basis of lack of due process, "a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Williams*, 244

¹ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

Mich App 533, 542; 624 NW2d 575 (2001), quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). The suggestiveness of a lineup must be examined in light of the totality of the circumstances. *Kurylczyk, supra* at 311-312 (Griffin, J.), 318 (Boyle, J.). We review for clear error the circuit court's factual findings made at a suppression hearing. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

When examining whether the totality of the circumstances warrants suppression of an identification, courts look at a variety of factors to determine the likelihood of misidentification.

[T]he factors to be considered in evaluating the likelihood of misidentification 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 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. [*Kurylczyk, supra* at 306, quoting *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972).]

See also *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998) (enumerating these factors).

With respect to the first factor, in this case the victim testified at the *Wade* hearing that he was able to positively identify defendant holding a gun immediately before the shooting. During daylight hours on the day of the shooting, the victim observed defendant standing near and then entering a particular "300M" vehicle; as the vehicle passed the victim, defendant waved at him. Later that evening, the victim, as he walked along the sidewalk of the street (Parkside) where he had seen defendant earlier that day, recognized the 300M approaching him. Although darkness had fallen and the 300M turned off its lights as it approached the victim, the victim testified that he saw defendant leaning out the rear window of the vehicle behind the driver and holding a gun, explaining that a streetlight "was shining dead on the car."²

The victim further testified to a heightened degree of attention at the time of the shooting. The victim, who was shot on August 28, 1998, averred that he had paid particular attention to defendant's presence since earlier the same month. The victim owned a rental property located on Parkside, the street where the shooting occurred. About three weeks before the shooting, defendant approached the victim on Parkside and the two discussed the victim's ownership of the rental property and defendant's interest in leasing the property, then shook hands. The victim's testimony reflected that he regularly spent time on Parkside, and that before their conversation he had seen defendant many times driving down the street, sometimes in a noticeably loud truck, often stopping to speak with friends who lived on Parkside. The victim explained as follows that after his conversation with defendant he paid defendant special attention:

² Although the victim spotted two other individuals inside the 300M, defendant was the only shooter.

Well, when he approached me about the house, everybody was telling me, over there on that street, that he was the one that had been selling drugs out [sic] my house.^[3] And I guess he was noticeable to me, because after he approached me about the house, I did pay attention every time he was on that street.

Approximately one week before the shooting, the victim observed, from a porch directly across Parkside from his rental home, defendant approaching the rental home. The victim inquired of defendant what he was doing, and defendant silently returned to a vehicle and left. According to the victim, immediately before the shooting his attention was drawn to the 300M, which he subsequently recognized on the basis of his sighting of it earlier that day, because the vehicle's headlights went off as it approached the victim. The victim testified at the hearing to his certainty that defendant was the man who approached him to converse several weeks before the shooting, that he "was positive as I'm sitting in this chair" that defendant was the individual the victim saw many times driving along Parkside, and that he was positive defendant was the individual who fired at him from the 300M. We find that the victim's testimony strongly suggests his heightened alertness to defendant's presence and identity at the time of the shooting.

Regarding the victim's prior identifications of defendant, on awakening in the hospital after the shooting the victim told his visiting brother that "Burt" shot him. While the victim's prelineup description of defendant to police did not capture every detail of defendant's appearance, neither did the description vary inexplicably from defendant's appearance at the corporeal lineup. To the police, the victim first described defendant, whom the victim knew as "Burt," as a black male of dark complexion, approximately twenty-three years of age, six feet one inch tall, weighing between 140 and 160 pounds. The victim further indicated that defendant had short hair and drove a turquoise Suburban.⁴ Approximately three months passed between the victim's late September 1998 description of defendant to the investigating police officer and the corporeal lineup. At the time of the corporeal lineup, defendant, who was also known as Burt Williams, was a black male with brown skin, twenty-seven years of age, weighing approximately 225 pounds. The victim's *Wade* hearing testimony indicates that defendant had somewhat longer hair at the time of the corporeal lineup than during the shooting. Defendant's exact height is not ascertainable from the available record, but no one challenged the victim's estimates of six feet or six feet one inch tall. The victim believed defendant's complexion appeared somewhat lighter at the January 1, 1999 corporeal lineup because the victim last had seen defendant on August 28, 1998, when the victim opined that "[e]verybody know [sic] we get darker in the summertime." From the available record it appears that of the many details of the victim's description of

³ The victim earlier had testified that not long before the shooting the police raided his rental home looking for drugs, scaring off the tenants.

⁴ The investigating police officer testified at the hearing that after taking the victim's description of defendant, he "talked with officers in Narcotic Enforcement, because I knew who I was looking for a doper. And they provided me with the information. Officers who are out there, they know who drives the turquoise Suburban." The narcotics officers indicated that Burt Williams drove the turquoise Suburban. No one disputed at the hearing that defendant sometimes drove a turquoise Suburban.

defendant, only the victim's estimate of defendant's weight varied significantly from defendant's appearance at the corporeal lineup.

Testimony from the *Wade* hearing also indicates that the victim identified defendant with certainty during the corporeal lineup. The attorney who was present at the corporeal lineup testified that the victim began viewing the lineup at 11:38 a.m., and by 11:39 a.m. had identified defendant as the shooter. The victim similarly recalled recognizing and selecting defendant within seconds. According to the attorney, the victim did not equivocate in identifying defendant, but stated, "He [defendant] was in the car coming up the street; dusk, dark. He was the one who shot me."

The length of time between the August 28, 1998 shooting and the January 1, 1999 corporeal lineup approximates four months. While this amount of time might provide ample opportunity for one's memory to lose certain details regarding a stressful, shocking experience, this period of one-third of one year does not represent an inordinate amount of time. In light of the totality of the instant circumstances showing (1) the victim's recognition of the 300M involved in the shooting as the vehicle in which defendant rode earlier that day and the victim's positive identification of the street light-illuminated shooter as defendant, (2) the victim's heightened attention to the 300M and defendant's presence on the street at the time of the shooting, (3) the overall consistency of the victim's description of defendant with the individual the victim selected at the corporeal lineup, and (4) the certainty of the victim's corporeal lineup identification of defendant as the shooter, we do not find the four-month period of time between the victim's description and the lineup sufficiently prolonged to create a substantial risk that the victim would mistakenly identify defendant at the lineup. See *Kurylczuk, supra* at 307-308 (noting that "Courts have held that delays as long as eighteen months after a crime do not invalidate an eyewitness identification").

Furthermore, we are not convinced that the investigating officer's statement, after the victim did not positively select defendant during the October 1998 photographic lineup, that the victim failed to identify the person "he said shot him" somehow rendered the January 1999 corporeal lineup unduly suggestive. The hearing testimony reflected that the victim declined to positively identify defendant from the photograph included within the photographic lineup.⁵ The victim explained at the hearing that during the photographic lineup he believed that in the photograph of defendant, which was taken in 1993, approximately five years before the shooting, defendant's appearance differed somewhat from his appearance at the time of the shooting. The victim expressed his desire to view a live lineup.⁶ As defendant acknowledged at the hearing, the subsequent corporeal lineup occurred absent any further hint of procedural suggestiveness. Compare *McElhaney, supra* at 287 (observing that the mere fact "that the complainant was told that the perpetrator was in the lineup" "would not render the lineup unduly suggestive").

⁵ We note that "[w]here there are other indicia of reliability, an initial inability to identify the defendant or a tentative false identification of another person will not invalidate a witness' identification of the defendant." *Kurylczuk, supra* at 309.

⁶ The victim explained, "I wanted to make sure that I'm getting the right person that shot me."

Even accepting defendant's argument that his appearances within both the photographic and corporeal lineups created some risk of suggestion to the victim that defendant was the assailant because (1) no other individual likewise appeared in both lineups and (2) the investigating officer's statement after the photographic lineup that the victim failed to identify the alleged shooter was interpreted by the victim to mean that defendant indeed appeared within the photographic lineup, we do not find the victim's corporeal lineup identification of defendant unduly suggested. Given the totality of the instant circumstances, the evidence heretofore discussed reflecting the victim's otherwise strong sense of his assailant's identity convinces us that the investigating officer's statement did not influence the victim's identification of defendant at the corporeal lineup. *Kurylczyk, supra* at 302, 306.

Though we may reverse a trial court's suppression hearing findings of fact only for clear error, in this case we possess the definite and firm conviction that the circuit court erred in determining that the investigating officer's statement following the photographic lineup rendered the subsequent corporeal lineup unduly suggestive. We note that the circuit court seemed focused on its perception that the investigating officer had determined from the beginning of the case that defendant was the correct suspect. Whatever the investigating officer might have believed remains irrelevant to the instant analysis, however, because the record contained absolutely no indication that the investigating officer, based on his belief that defendant was the shooter, did anything whatsoever to influence the victim's identification of defendant at either the photographic or corporeal lineup. See *People v Gray*, 457 Mich 107, 113-114; 577 NW2d 92 (1998) (noting the distinction between a police officer's subjective intent and the officer's actions, the Supreme Court explained that "only the effects of, rather than the causes for, pre-identification encounters should be determinative of whether the confrontations were unduly suggestive"), quoting *Thigpen v Cory*, 804 F2d 893, 895 (CA 6, 1986). Moreover, the record does not reflect that the circuit court weighed the evidence showing the victim's (i) opportunities to observe defendant, (ii) description of defendant, and (iii) certain identification of defendant at the corporeal lineup in reaching its conclusion that the investigating officer's post photographic lineup statement impermissibly tainted the corporeal lineup.

We conclude that the circuit court committed clear error in suppressing the victim's corporeal lineup identification of defendant. Because we find no substantial risk that the victim's corporeal lineup identification of defendant was impermissibly suggested, we further conclude that the circuit court erred in suppressing any in court identification of defendant by the victim. *McElhaney, supra* at 288 ("Because there was no impropriety in the complainant's pretrial identifications of defendant, there was no need to establish an independent basis for an [in court] identification.").

Lastly, we note briefly that even assuming that the circuit court correctly found the corporeal lineup unduly suggestive and unreliable, the *Wade* hearing testimony clearly and convincingly established that the victim had an independent basis for making his in court identification of defendant. *Colon, supra* at 304. The hearing testimony we previously discussed reflected the following: the victim's conversation with and many observations of defendant before the shooting; the victim's opportunity to view defendant illuminated immediately before the shooting in the 300M that the victim recognized as the vehicle in which defendant rode earlier that day; the reasonably brief four month period that passed between the shooting and the

corporeal lineup; the general consistency of the victim's initial descriptions of defendant with defendant's actual characteristics;⁷ although the victim did not select defendant's photograph during the initial photographic lineup, he identified defendant by name on awakening after the shooting and never identified anyone other than defendant as the shooter; immediately before the shooting the victim's attention was drawn to the approaching 300M, which the victim recognized as a vehicle associated with defendant and the victim had a heightened awareness of defendant's presence before the shooting. *Gray, supra* at 116-124.⁸

We find in the totality of the instant circumstances sufficient evidence of the victim's independent basis to permit his in court identification of defendant. *Gray, supra* at 115. Because we fail to detect the circuit court's weighing of these factors in ruling inadmissible the victim's in court identification, we conclude that the circuit court clearly erred in refusing to admit any in court identification of defendant by the victim.

We reverse the circuit court's grant of defendant's motion to suppress the victim's corporeal lineup and in court identifications of defendant, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder

⁷ "Any discrepancy between complainant's initial description and defendant's actual appearance is relevant to the weight of such evidence, not to its admissibility." *People v Davis*, 241 Mich App 697, 705; 617 NW2d 381 (2000).

⁸ The Supreme Court in *Gray* explained that the following eight factors should be considered when determining whether an independent basis exists: (1) prior relationship with or knowledge of the defendant; (2) the witness' opportunity to observe the offense; (3) the length of time between the offense and the disputed identification; (4) the accuracy or discrepancies in the prelineup description and defendant's actual description; (5) any previous proper identification or failure to identify the defendant; (6) any identification prior to the lineup of another individual as the defendant; (7) the nature of the offense and the physical and psychological state of the victim; and (8) any idiosyncratic or special features of the defendant. *Id.* at 116.