

[Cite as *In re T.W.*, 2017-Ohio-8875.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105346

**IN RE: T.W.
A Minor Child**

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL16111956

BEFORE: S. Gallagher, J., McCormack, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: December 7, 2017

ATTORNEY FOR APPELLANT

Michael C. O'Malley
Cuyahoga County Prosecutor
BY: Justin Washburne
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Mark A. Stanton
Cuyahoga County Public Defender
By: Frank Cavallo
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶1} The state appeals the suppression of a show-up identification, colloquially referred to as a “cold stand” identification, under Juv.R. 22(F). We reverse.

{¶2} The victim made plans with another individual to purchase marijuana. While they were parked in a driveway waiting for the seller, two teenagers wearing hooded sweatshirts attacked and robbed the pair. The victim was in the front, passenger side of the car. An unidentified teenager, the one who approached the driver side of the vehicle, was wearing a black hooded sweatshirt and had “poofy” hair sticking out from underneath the donned hood. T.W. was described as wearing a gray hooded sweatshirt, but also had “poofy” hair sticking out from under the hood. Although the other individual was also attacked in the robbery, our focus is on the victim and his identification of T.W. The other individual was unable to identify either assailant.

{¶3} During the robbery, T.W. approached the victim and demanded his property. The victim’s wallet and cash were stolen; however, the victim fought the assailant over a cell phone. The assailant struck the victim in the face with a gun and then punched him two more times, causing serious injury. Although it was dark out, the victim was able to see the assailant’s face, relative age, race, gender, hairstyle, and color of clothing. The assailant was within an arm’s length of the victim. After the victim refused to turn over his phone, the assailants both fled. The victim watched the assailants cut through the yard of a house on the same street.

{¶4} The police were immediately called and were provided the description of

both assailants. Within minutes of receiving the call, a police officer drove to the relative location of the fleeing attackers. That officer observed two teenagers fitting the descriptions in front of a nearby house with several other people. The officer noted there was no other activity in the area, but the house was in the same direction as the fleeing assailants ran. The officer watched the teenager with the black sweatshirt enter the house and exit wearing a white T-shirt. The teenager with the gray, hooded sweatshirt remained outside. After backup arrived, both teenagers were detained.

{¶5} Less than a half hour after the crime, the victim was brought to the area where the teenagers were detained for a show-up identification. The victim remained in the back of the squad car while the suspects were separately shown from a distance. The victim identified T.W. as one of the assailants but was unable to identify the other, and that teenager was immediately released. There was some hesitation on the victim's part, but he explained at the suppression hearing that he was concerned about the consequences of identifying the wrong person. The actual dialogue from the body-camera footage is as follows:

Officer: “[Victim] is this the guy?”

Victim: “I’m pretty sure uh I don’t, [sigh] I don’t want to — ?”

Officer (interrupting): “Hey — ?”

Victim: “It’s the grey hoodie and poofy hair that sticks out with me. I don’t [sigh] — I hate to — ”

Officer (interrupting): “Hey, look — ”

Victim: “It’s — if I would have to say, for, yeah — the gray hoodie and the hair was sticking out in front.”

T.W. was arrested based on the victim's show-up identification. At the suppression hearing, the victim claimed to be 95 percent certain that T.W. was the person who attacked him.

{¶6} In reviewing the admissibility of out-of-court identifications, courts use a two-prong test. *State v. Davis*, 8th Dist. Cuyahoga No. 101502, 2015-Ohio-1144, ¶ 19. "First, there must be a determination that the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification." *Id.*, citing *State v. Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732, 940 N.E.2d 634, ¶ 38 (10th Dist.), and *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

{¶7} If the defendant demonstrates that the identification procedure was unduly suggestive, then it must be determined whether the witness was unreliable under the totality of the circumstances. *Id.* at ¶ 21. The factors that must be considered are (1) the witness's opportunity to view the offender; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the witness's level of certainty when identifying the suspect; and (5) the length of time between the crime and the confrontation. *Id.*, citing *Biggers*. "The focus is therefore upon the reliability of the identification and not the identification procedures themselves." *Id.* at ¶ 18, citing *State v. Smith*, 8th Dist. Cuyahoga No. 94545, 2011-Ohio-924, ¶ 18. No one factor is dispositive.

{¶8} We must be mindful that returning a suspect or witness to the vicinity of the crime for immediate identification "fosters the desirable objectives of fresh, accurate

identification which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is fresh.” *State v. Madison*, 64 Ohio St.2d 322, 332, 415 N.E.2d 272 (1980), quoting *Bates v. United States*, 405 F.2d 1104, 1106 (D.C.Cir.1968). Nevertheless, the state conceded that the sole focus in this case is upon the witness’s reliability, or the second prong of the inquiry. The state did not contest T.W.’s claim that the identification procedure was unduly suggestive.

{¶9} Of the five *Biggers* factors, the trial court concluded that three weighed in favor of suppressing the show-up identification: the certainty of the victim’s identification, the length of time the victim interacted with the assailant, and the witness’s degree of attention at the time of the crime. The trial court concluded that the remaining two factors tended to demonstrate the reliability of the identification: the identification was near in time to the crime, and the victim’s prior description of the assailant was accurate. In light of the totality of the circumstances and its consideration of the *Biggers* factors, the trial court concluded that the show-up identification was unreliable.

{¶10} Appellate review of a motion to suppress involves mixed questions of law and fact. “When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses.” *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8, citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). The trial court’s findings of fact must be accepted only if supported by competent,

credible evidence. *Id.*, citing *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982). “After accepting these facts as true, the appellate court then independently determines, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.” *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶11} As to the “length of time” factor, the trial court found that the victim did not have an extensive opportunity to view the assailant and that the generic description of the assailant’s relative race, age, gender, clothing, and hairstyle did not “lend towards reliability of the identification.” Although we accept the trial court’s finding of fact, those conclusions are not based on the correct legal standard. A witness is not required to have an extended period of time to view the suspect in order for the identification to be deemed reliable; the witness just needs an opportunity. Mere seconds can be enough time. *State v. Walker*, 10th Dist. Franklin No. 02AP-679, 2003-Ohio-986, ¶ 17 (assailant was not wearing a mask, and part of his hair was visible so that the two or three seconds in which the victim observed the assailant demonstrated the reliability of the identification); *United States v. Wong*, 40 F.3d 1347, 1360 (2d Cir.1994) (looking at offender’s face for two to three seconds was sufficient for identification to be deemed reliable).

{¶12} In this case, although the assault was brief and in a dimly lit area, the victim was able to identify the assailants’ race, gender, relative age, attire (down to the color), and hairstyle. Although generic, the identification was accurate and allowed responding

officers to identify two suspects fitting the description in the area of the assailants' flight.

The law does not require an extended period of time to view a suspect; the focus is on what the witness is able to perceive within the time available. *Id.* The trial court's determination that an extensive period of time is necessary to demonstrate reliability is contrary to the law, and the trial court's own conclusion that the initial description of the assailant was accurate — the victim did not need extensive time to observe and note identifying factors in this case that allowed police officers to detain suspects fitting the earlier description.

{¶13} Further, the trial court concluded that although the victim was attentive during the robbery, a generic description of the assailant's race, age, gender, attire, and hairstyle did not lend itself toward reliability. Courts have concluded otherwise and have deemed such a description sufficient to demonstrate the reliability of the identification for the purposes of admissibility. *State v. McRae*, 8th Dist. Cuyahoga No. 96253, 2011-Ohio-6157, ¶ 14 (defendant apprehended near where the witness claimed the assailant had fled and wearing clothing matching the description demonstrated reliability of the witness's identification); *Walker* at ¶ 17 (witness's pre-identification description of the assailant's race, size, hair, hat, and clothing demonstrated reliability); *State v. Smith*, 11th Dist. Trumbull No. 2008-T-0023, 2008-Ohio-6998, ¶ 29 (witnesses' identification based on a particular hat increased the reliability of the identifications). The trial court did not provide any finding of fact to support the conclusion that the accurate, but generic, description of the assailant in this case detracted from the reliability of the

identification. Instead, the trial court erroneously concluded that the generic description was in and of itself unreliable, which is contrary to the weight of authority.

{¶14} And finally as it relates to the certainty of the victim's identification, the inquiry at this stage of the proceeding is limited to weighing the reliability of the identification against what has been deemed an inherently suggestive identification procedure. *Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401. On this point, the trial court concluded that the police officer's interruptions of the victim during the identification detracted from the certainty of the witness's identification and that the witness's explanation for why he hesitated in identifying T.W. was incredible by "what is so clearly shown during the actual identification." The first conclusion, however, impermissibly combines considerations relating to the suggestive nature of the identification with the witness's reliability factors under *Biggers*, and the second provides no factual basis to support the stated reason.

{¶15} The trial court considered factors that are to be considered in determining whether the procedure is unduly suggestive as weighing on the reliability of the witness. The manner in which the police officers conduct the show-up identification impacts the suggestiveness of the identification procedure, the first prong of analysis. When determining whether the procedure is unduly suggestive, the focus is on the police officer's conduct and procedure. *Id.* Factors used to review the procedure include the officer's statements to the witness before and during the identification. *See, e.g., United States v. Arthur*, 764 F.3d 92, 100 (1st Cir.2014) (in assessing whether the identification

procedure was unduly suggestive, the court considered the officer's statements to the witness). Those factors are separate from those that support the witness's reliability, which is the second prong of the inquiry. *State v. Jells*, 53 Ohio St.3d 22, 27, 559 N.E.2d 464 (1990), citing *State v. Lott*, 51 Ohio St.3d 160, 175, 555 N.E. 2d 293, 308 (1990); *Manson v. Brathwaite*, 432 U.S. 98, 114 , 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

{¶16} The second prong of the analysis is based on the reliability of the witness's identification independent of the police conduct and procedure. The purpose of the reliability inquiry is to determine whether the unduly suggestive nature of the identification was overcome by the reliability of the witness. Courts cannot bootstrap the suggestiveness inquiry, the first prong of the test, into the witness's reliability. *See, e.g., State v. Williams*, 10th Dist. Franklin Nos. 02AP-730 and 02AP-731, 2003-Ohio-5204, ¶ 44 (the officers' statements were immaterial because the witness's identification was reliable); *Williams v. Ercole*, S.D.N.Y. No. 06 Civ. 0044, 2007 U.S. Dist. LEXIS 26020, 19 (Apr. 6, 2007) (officer's statements do raise issues with the independence of reliability of the show-up identification). Each prong of the inquiry is separate from the other. *Davis*, 8th Dist. Cuyahoga No. 101502, 2015-Ohio-1144, at ¶ 22, citing *State v. Green*, 117 Ohio App.3d 644, 653, 691 N.E.2d 316 (1st Dist.1996). This is not to say that the statements are irrelevant. We are merely recognizing that the question of whether the police officer's statements made during the identification cast doubt on the accuracy of the identification, is one to be answered only by the trier of fact. *United States v. Martinez*, 462 F.3d 903, 911 (8th Cir.2006).

{¶17} With respect to the victim's certainty irrespective of the unduly suggestive procedure, the trial court did not provide any findings of fact to support the conclusion that the victim's explanation for his hesitation in identifying T.W. and his certainty of that identification were incredible. Instead, the trial court indicated that the victim's credibility was lacking by what was "so clearly shown during the actual identification."

{¶18} Upon review of the record, nothing inherently suggests that the victim did anything but identify T.W. solely based on his matching the description of the assailant's relative age, race, gender, hairstyle, and clothing. There is nothing in the footage that "clearly" demonstrates the victim to be incredible or having any uncertainty other than candidly admitting his identification was based on the generic description he provided police officers before the show-up identification took place. As already mentioned, courts have determined that such identifications are admissible, and therefore, a generic description of a suspect in and of itself is not a basis to deem the identification unreliable for the purposes of suppression. *See, e.g., McRae*, 8th Dist. Cuyahoga No. 96253, 2011-Ohio-6157, at ¶ 14; *Walker*, 10th Dist. Franklin No. 02AP-679, 2003-Ohio-986, at ¶ 17; *Smith*, 11th Dist. Trumbull No. 2008-T-0023, 2008-Ohio-6998, at ¶ 29; *State v. Broomfield*, 10th Dist. Franklin No. 96APA04-481, 1996 Ohio App. LEXIS 4785, at 9 (Oct. 31, 1996) (vague description of three suspects, indicating race and attire, demonstrated reliability of identification after police apprehended suspects in vicinity of the crime).

{¶19} Whether that identification is sufficient to prove the state's case is another

matter altogether, but that is an issue left for the trier of fact after reviewing all the evidence. If the pretrial identification was not unnecessarily suggestive or not unreliable based on the totality of the circumstances, “any remaining questions as to reliability go to the weight of the identification, not its admissibility, and the identification is admissible.” *Davis*, 8th Dist. Cuyahoga No. 101502, 2015-Ohio-1144, at ¶ 22, citing *State v. Fields*, 8th Dist. Cuyahoga No. 99750, 2014-Ohio-301, and *State v. Wills*, 120 Ohio App.3d 320, 324, 697 N.E.2d 1072 (8th Dist.1997).

{¶20} In light of the errors in law, the suppressing of the show-up identification must be reversed. Based on the applicable law as applied to the trial court’s findings of fact, the victim’s identification was reliable despite the state’s concession that the procedure was unduly suggestive. We reverse and remand for further proceedings.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

TIM McCORMACK, P.J., CONCURS;
ANITA LASTER MAYS, J., DISSENTS WITH SEPARATE DISSENTING OPINION

ANITA LASTER MAYS, J., DISSENTING:

{¶21} I respectfully dissent from the majority's opinion reversing the trial court's granting of T.W.'s motion to suppress a "cold-stand" identification and remanding for further proceedings. I conclude that the facts do not support the applicable legal standard.

{¶22} The victim and another individual planned to purchase marijuana. The alleged seller was an acquaintance of the victim's friend. The acquaintance drove to a location in the Collinwood neighborhood of Cleveland and parked in a driveway to wait for the drug transaction to occur. While they were sitting in the driveway, two individuals approached the car and demanded their property. The victim stated that there was an assailant on each side of the vehicle. The victim stated that the assailant on his side of the vehicle opened his door, took his money and wallet, and demanded his phone. A struggle ensued over the phone and the assailant struck the victim in the face, ultimately leaving without the phone. However, the victim testified that he was able to see the assailant's face and to describe his clothing and approximate age.

{¶23} The Cleveland police were called. The victim and his acquaintance lied regarding their reason for being in the neighborhood. An officer testified that the area was not well lit. The victim relayed the description of his assailant to the police. Officers searched the area and located two teenagers fitting the description in front of a home with several other people. The home was in the direction of the fleeing assailants.

After backup arrived, the two teenagers were detained. The victim was then brought to

the area where the teenagers were detained.

{¶24} The victim identified T.W. as the assailant, with hesitation, but was unable to identify the other teen. The body camera footage dialogue was as follows:

Officer: “[Victim] is this the guy?”

Victim: “I’m pretty sure un I don’t, [sigh] I don’t want to — ?”

Officer: (Interrupting) “Hey — ?”

Victim: “It’s the grey hoodie and poofy hair that sticks out with me. I don’t [sigh] — I hate to — “

Officer: (Interrupting) “Hey, look — ”

Victim: “It’s — if I would have to say, for, yeah — the gray hoodie and the hair was sticking out in front.”

T.W. was arrested based on this identification. At the suppression hearing, the victim now admitted that he was in the area to purchase marijuana and that now he was 95 percent certain that T.W. was the teenager that attacked him.

{¶25} When considering a trial court’s grant or denial of a motion to suppress, this court’s standard of review is divided into two parts. In *State v. Lloyd*, 126 Ohio App.3d 95, 709 N.E.2d 913 (7th Dist.1998), the court stated, “our standard of review with respect to motions to suppress is whether the trial court’s findings are supported by competent, credible evidence.” *State v. Winand*, 116 Ohio App.3d 286, 688 N.E.2d 9 (7th Dist.1996), citing *Tallmadge v. McCoy*, 96 Ohio App.3d 604, 645 N.E.2d 802 (9th Dist.1994). This is the appropriate standard because “[i]n a hearing on a motion to suppress evidence, the trial court assumes the role of trier of facts and is in the best

position to resolve questions of fact and evaluate the credibility of witnesses.” *State v. Hopfer*, 112 Ohio App.3d 521, 679 N.E.2d 321 (2d Dist.1996), quoting *State v. Venham*, 96 Ohio App.3d 649, 645 N.E.2d 831 (4th Dist.1994). “However, once we accept those facts as true, we must independently determine, as a matter of law and without deference to the trial court’s conclusion, whether the trial court met the applicable legal standard.” *State v. Parker*, 8th Dist. Cuyahoga No. 93835, 2011-Ohio-1059, ¶ 31.

{¶26} Courts employ a two-step process when determining the admissibility of identification testimony arising from relying on cold stands. The first step focuses only upon whether the identification procedure was impermissibly suggestive. *See, e.g., State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061; *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988); *State v. Jackson*, 8th Dist. Cuyahoga No. 91613, 2009-Ohio-2388, ¶ 24.

{¶27} The second part of the inquiry then focuses upon five factors necessary to assess the reliability of the identification, despite the taint of the show-up. *Id.* at ¶ 25. This court has previously explained the conditions necessary for a proper “cold stand.”

A cold stand or one-on-one show-up identification is permissible as long as the trial court considers the following factors: “(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’ degree of attention; (3) the accuracy of the witness’ prior description of the criminal; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation.”

State v. Patton, 8th Dist. Cuyahoga No. 88119, 2007-Ohio-990, ¶ 17, quoting *State v. Thompson*, 8th Dist. Cuyahoga No. 79938, 2002-Ohio-2390. *State v. Cole*, 8th Dist. Cuyahoga No. 93192, 2010-Ohio-5114, ¶ 22.

{¶28} After a review of the record, it appears that the state is not challenging the law that has been used regarding the second part of the inquiry, but the applicability of the facts to the law. I would find that the trial court's findings regarding the victim's hesitation of identification was supported by competent, credible evidence and the weight given was sufficient to grant the motion to suppress.

{¶29} I would submit that the record supports that the victim did not have an opportunity to sufficiently view T.W. The record reflects that the assailant opened the door and immediately began to rob and then attack the victim. The victim was hit several times with the gun. The record supports that in the little time the assailant attacked the victim, he was only able to see that the assailant was young with poofy hair and a grey hoodie. The attack was quick and in an area not well lit. This description was too vague.

{¶30} The victim's level of certainty was a mere guess. It is true that the record reflects that the victim saw a grey hoodie and poofy hair, but I am not convinced that the victim actually saw the assailant's face. This is evident by the victim's statement that "the grey hoodie and poofy hair sticks out to me" and "if I would have to say, for, yeah — the grey hoodie and hair was sticking out front." The victim's hesitation and uncertainty in his voice leads me to believe that his level of certainty was well below what he testified to in court. Additionally, the officer's interruptions, as if he was rushing the victim, pressured the victim to make an identification.

{¶31} For these reasons, I would affirm the trial court's findings suppressing the unreliable identification of T.W.