

[Cite as *State v. Hickman*, 2009-Ohio-4911.]

COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MARCUS T. HICKMAN

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.  
Hon. William B. Hoffman, J.  
Hon. Julie A. Edwards, J.

Case No. 09-CA-15

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Court of  
Common Pleas, Case No. 2008-CR-115

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

September 14, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Hoffman, J.*

{¶1} Defendant-appellant Marcus T. Hickman appeals the October 7, 2008 Judgment Entry of the Fairfield County Court of Common Pleas overruling his motion to suppress evidence. Plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On the evening of March 30, 2008, Donna Wade was walking in a residential area to meet a female friend, Dreama Azbell. Upon meeting Dreama, the two were approached by a white male, later to be identified as Dreama's brother, Tim Azbell. Both Tim and Dreama Azbell held Donna Wade at gunpoint. A black male then exited a parked, red Chevy Blazer and forced Donna Wade into the back seat of the Blazer. Wade was seated directly behind the black male, who drove the vehicle around town for a short period of time. The black male then stopped the vehicle, forced Wade out of the vehicle, and proceeded to shoot her in the neck.

{¶3} Donna Wade survived the shooting, and was transported to an area hospital. At the hospital, investigating officers from the Lancaster Police Department presented Wade with a photo array of six black males. Donna Wade identified Appellant from the photo array as the man who shot her in the neck.

{¶4} The Fairfield County Grand Jury indicted Appellant on attempted murder, felonious assault, kidnapping, aggravated robbery and tampering with evidence. On July 2, 2008, Appellant filed a motion to suppress the identification from the photo line-up. Via Judgment Entry of October 7, 2008, the trial court overruled the motion to suppress. Appellant subsequently entered a plea of no contest to the charges pursuant to a negotiated plea agreement.

{¶15} Appellant now appeals, assigning as error:

{¶16} “I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT’S MOTION TO SUPPRESS.”

{¶17} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 485; *State v. Guysinger* (1993), 86 Ohio App.3d 592. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 116 S.Ct. 1657, 1663, “... as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal.”

{¶18} Appellant argues the victim’s identification of him from the photo array should have been excluded because the photo identification was unreliable,

impermissibly suggestive and conducted under circumstances creating a substantial likelihood of irreparable misidentification. Specifically, Appellant argues Wade had a limited opportunity to view the black male involved in the incident, and at the time of the identification from the photo array she was “doped up” on pain medication. Further, Appellant maintains only two of the six photographs, one being Appellant’s own photo, matched the description provided by the victim relative to the shooter having braided hair below his ears, and the only other photograph having longer braided hair had a physical defect regarding one of his eyes.

{¶19} When a witness is shown a photograph of a suspect before trial, due process requires a court to suppress the photo identification of the suspect if the photo array was unnecessarily suggestive of the suspect’s guilt and the identification was not reliable. *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, superseded by constitutional amendment on other grounds. The defendant has the burden to show that the identification procedure was unduly suggestive. *State v. Harris*, 2d Dist. No. 19796, 2004-Ohio-3570, ¶ 19. If the defendant meets that burden, the court must then consider whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character. *Id.*, citing *State v. Wills* (1997), 120 Ohio App.3d 320, 324.

{¶10} If the pretrial confrontation procedure was not unduly suggestive, any remaining questions as to reliability go to the weight of the identification, not its admissibility, and no further inquiry into the reliability of the identification is required. *Id.* at 325. If the court finds the procedure is suggestive, then it must assess the reliability of the identification, considering: (1) the witness’s opportunity to view the defendant at

the time of the incident, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description, (4) the witness's certainty when identifying the suspect at the time of the confrontation, and (5) the length of time elapsed between the crime and the identification. *State v. Davis* (1996), 76 Ohio St .3d 107, 113. A photo array, “created by police prior to the victim giving a description of the suspect, \* \* \* is not unreasonably suggestive, as long as the array contains individuals with features similar to the suspect.” *State v. Jones*, 8th Dist. No. 85025, 2005-Ohio-2620, ¶ 15.

{¶11} As set forth in the statement of the facts and case, supra, Appellant entered a plea of no contest to the charges in the indictment following the trial court’s denial of his motion to suppress the victim’s pretrial photo array identification. Assuming, arguendo, we find the photo array at issue unduly suggestive and unreliable, Appellant cannot demonstrate prejudice due to his plea of no contest to the charges. Suppression of the victim’s identification of Appellant from the photo array prepared by the police would not necessarily preclude a valid identification of Appellant by the victim at trial. Furthermore, there may have been identification evidence independent from the victim’s testimony. Appellant having entered a no contest plea to the facts alleged in the indictment, the matter did not proceed to trial. Appellant cannot demonstrate prejudice as result of the trial court’s denial of his motion to suppress because by pleading no contest, he waived the right to challenge his identification at trial.

{¶12} For the foregoing reason, the October 7, 2008 Judgment Entry of the Fairfield County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Edwards, J. concur

s/ William B. Hoffman \_\_\_\_\_  
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin \_\_\_\_\_  
HON. W. SCOTT GWIN

s/ Julie A. Edwards \_\_\_\_\_  
HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MARCUS T. HICKMAN

Defendant-Appellant

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JUDGMENT ENTRY

Case No. 09-CA-15

For the reason stated in our accompanying Memorandum-Opinion, the October 7, 2008 Judgment Entry of the Fairfield County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman  
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin  
HON. W. SCOTT GWIN

s/ Julie A. Edwards  
HON. JULIE A. EDWARDS