

[Cite as *State v. Black*, 2010-Ohio-2916.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23524
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-4075
v.	:	
	:	(Criminal Appeal from
CORY O. BLACK	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

.....

OPINION

Rendered on the 25th day of June, 2010.

.....

MATHIAS H. HECK, JR., by JOHNNA M. SHIA, Atty. Reg. #0067685, Montgomery County Prosecutor’s Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

CHRISTOPHER L. WESNER, Atty. Reg. #0082699, Chris Wesner Law Office, LLC, 430 North Wayne Street, Piqua, Ohio 45356
Attorney for Defendant-Appellant

.....

FAIN, J.

{¶ 1} Defendant-appellant Cory Black appeals from his conviction and sentence on two counts of Felonious Assault (Deadly Weapon), one count of Felonious Assault (Serious Harm), one count of Having a Weapon under a Disability, one count of Discharge of a Firearm on or near Prohibited Premises, and one count of Tampering with Evidence. Four of the counts also contain a firearm specification.

After the trial court denied motions to suppress evidence, Black pled no contest to all charges, and was sentenced to a total of ten years in prison.

{¶ 2} Black contends that the trial court erred in overruling his motion to suppress eyewitness identification testimony, because the identification resulted from an unduly suggestive show-up identification procedure that created a substantial likelihood of irreparable misidentification. Black further contends that the trial court erred in overruling his motion to suppress statements and evidence, because his consent to search his automobile and apartment was not voluntarily given.

{¶ 3} We conclude that the trial court did not err in overruling the motions to suppress. Black has the burden of proving that the pre-trial identification procedure was unduly suggestive and unreliable. The evidence supports a finding that the pretrial eyewitness identification is reliable. The evidence at the suppression hearing also shows that Black voluntarily consented to a search of his automobile and apartment. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 4} Black filed two motions to suppress evidence in the trial court. One motion challenged identification procedures used at the crime scene, and a later photo-spread shown to an eyewitness. The other motion contested the issue of Black's consent to a search of his apartment and automobile. Black did not present evidence at the hearings on his motions to suppress. The State presented the following evidence at the hearings, elicited from police officers and two eyewitnesses to the alleged crimes.

{¶ 5} In mid-October 2008, Jessica Marriott was awakened around 3:00 a.m., by an argument outside her home on South Jersey Street in Dayton, Ohio. Jessica was fourteen years old at the time. Jessica saw her neighbor, Kenneth “Andy” Spicer, and his girlfriend, Heather, arguing in the street. As Jessica watched the argument, she saw a car pull up that she recognized. Jessica was not able to see who was in the car, but the car belonged to a drug dealer known as “C-Note” (later identified as defendant Cory Black). Andy and the driver of the car began arguing, and Andy began hitting whomever was in the car. The car drove off, and Andy fell into the street.

{¶ 6} Heather woke Andy’s father, Manuel, and told him that Andy and some guy had been arguing. Then Heather apparently left. Manuel went out to talk to Andy, who was located about two houses away from where Manuel lived. Andy was looking for a key and Manuel stood there talking with Andy.

{¶ 7} At this point, Manuel saw a man he recognized as someone he had seen in the neighborhood many times. Manuel recognized the face, but did not know the man’s name. The man was standing between two houses. Manuel thought the man was conducting a drug deal, because he kept looking up and down the street. As Manuel talked to Andy, he saw the man reach into his coat, pull out a gun, and begin firing. Andy had his back turned to the man, and the man kept firing. Manuel ran towards the man, trying to stop the shooting, and the man fired once more at Manuel. Manuel chased the man for a few feet, but stopped, because the police had arrived as the man was still shooting.

{¶ 8} Jessica also saw the shooting unfold. Jessica saw Manuel and Andy

outside looking for keys. She then saw Manuel point to the side of her own house and say, "Who's that?" Jessica looked out the side window of her house, and saw the man she knew as C-Note. C-Note looked up at Jessica and she made eye contact. After seeing C-Note shoot Andy, Jessica ran downstairs and ran outside. Jessica saw C-Note run up the street, into the alley. The police and Manuel were chasing him. Jessica was able to give the police a description and C-Note's nickname. She was also able to tell the police where C-Note lived, which was an apartment located approximately one block away.

{¶ 9} Officers from the Dayton Police Department responded to a call regarding a disturbance with shots fired, and saw shots being fired as they arrived. Sergeant Brommel indicated that the witnesses at the scene were familiar with the shooter, C-Note. Everyone knew him from the area, and the descriptions were the same. The witnesses recognized C-Note's vehicle, which was a tan Monte Carlo. They also provided a description of his clothing (a black hoody or leather jacket), and his person (5'8", braids, and a muscular build). The witnesses additionally provided Brommel with the shooter's nickname and address, which was located at 8 Watts Street.

{¶ 10} Officers from the DPD went to C-Note's (Black's) apartment and arrested him. The officers also checked C-Note's apartment for other people, to make sure that no one else was inside who could harm the officers or destroy evidence. The apartment building was then secured so that no one could access the apartment.

{¶ 11} C-Note, or Black, was brought back to the scene within thirty-five to

forty minutes after the shooting occurred. Black was taken out of the cruiser in handcuffs, and the police held a light up to his face so that the witnesses could see him. Both Jessica and Manuel identified Black as the person who had shot Andy. There is no evidence that the police made any suggestions to either Jessica or Manuel regarding the identify of the individual being viewed.

{¶ 12} The police then transported Black to an interview room at the Safety Building in downtown Dayton, Ohio. Detective Engel of the Homicide Squad came from the crime scene to interview Black. When Engel arrived, Black was handcuffed in an interview room, and was sitting by himself. Two police officers were sitting nearby. Black had to use the restroom, so the handcuffs were removed. Black was allowed to use the restroom, and also took a drink of water from the drinking fountain. When Black returned to the interview room, the handcuffs remained off. Engel read Black his rights, and learned that Black had ten years of schooling and could read and write. Black signed a waiver form and agreed to speak to Engel. During the interview, which lasted about an hour, Black denied any involvement in the shooting, and stated that he had nothing to hide. Black also consented in writing to a search of his home and his automobile.

{¶ 13} After Black's consent was obtained, Engel notified Detective Hall, who was waiting at the scene. Although police officers had looked in the apartment for other people when Black was arrested, they did not search the apartment for anything, and had not recovered any evidence. Upon receiving consent, the police searched Black's apartment, but did not find the weapon right away. The officers had almost given up the search, when they pulled up the heating duct vent, and

found a gun wrapped in a rag. The gun was stuffed almost an arm's length up the shaft.

{¶ 14} The police subsequently prepared a photo-spread and showed it to Andy's girlfriend, Heather, who identified a person other than Black as someone who had pulled up in a gold car before the shooting and had asked her for a lighter. Heather was not present at the time of the shooting, however. The police also showed the photo-spread to Jessica about one week after the shooting. Jessica immediately identified Black as the person who had shot Andy. Andy was shown the photo-spread at the hospital, and picked Black as the shooter.

{¶ 15} Black was indicted on two counts of Felonious Assault (Deadly Weapon), one count of Felonious Assault (Serious Harm), one count of Having a Weapon under a Disability, one count of Discharge of a Firearm on or near Prohibited Premises, and one count of Tampering with Evidence. Four of the counts contained a firearm specification.

{¶ 16} Black filed two motions to suppress. One motion asked the court to suppress identification evidence, and the other motion asked for suppression of all statements and evidence obtained during Black's seizure and arrest, Black's interrogation, and the searches of his automobile and apartment.

{¶ 17} At the conclusion of the suppression hearing, the trial court overruled both motions to suppress. Black then pled no contest to the counts as charged, and was sentenced to a total of ten years in prison.

{¶ 18} Black appeals from his conviction and sentence.

{¶ 19} Black's First Assignment of Error is as follows:

{¶ 20} "THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. BLACK IN OVERRULING HIS MOTION TO SUPPRESS IDENTIFICATION TESTIMONY."

{¶ 21} Under this assignment of error, Black contends that the trial court erred in overruling the motion to suppress identification testimony. Black argues that the totality of circumstances indicate that the show-up identification was unreliable, and that the subsequent photo identification by Jessica was tainted by the earlier show-up procedure. Black cites the following facts as evidence of unreliability: the witnesses' lack of opportunity to view the shooter during the crime: the fact that the shooting occurred at night; Jessica's position on the second floor of her house; the distance between the witnesses and Black during the show-up (Black was on the other side of the cruiser); alleged "unnatural shadowing" of Black's face due to the flashlight the police used to highlight his face; the fact that the shooter wore a hood during the shooting; and the fact that Black was not dressed similarly to the shooter (Black was not wearing a shirt or coat when he was arrested).

{¶ 22} The trial court concluded that the show-up identification procedure and the photo-lineup were suggestive, but also held that both eyewitness identifications of Black are reliable. We agree.

{¶ 23} The respective roles of trial and appellate courts in reviewing motions to suppress are well established. In ruling on a motion to suppress, the trial court "assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate the credibility of the witnesses." *State v. Retherford* (1994), 93 Ohio App.3d 586, 592 (citation omitted). Accordingly, when we review

suppression decisions, “we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard.” *Id.*

{¶ 24} A defendant challenging allegedly improper identification procedures has the burden of proving that a show-up identification procedure was unduly suggestive and sufficiently unreliable as to implicate his or her right to due process. *State v. Duke*, Montgomery App. No. 23110, 2009-Ohio-5527, ¶ 10, following *State v. Poindexter*, Montgomery App. No. 21036, 2007-Ohio-3461, ¶ 11. In *Duke*, we also stated that:

{¶ 25} “ ‘When a witness identifies a defendant prior to trial, due process requires a court to suppress evidence of the witness's prior identification upon the defendant's motion if the confrontation was unduly suggestive of the defendant's guilt to an extent that the identification was unreliable as a matter of law under the totality of the circumstances.’ * * * ‘A one man show-up identification procedure, unlike a well-conducted lineup, is inherently suggestive. Nevertheless, such identifications are not unduly suggestive if they are shown to have been reliable. We have repeatedly held that one man show-ups which occur shortly after the crime are not per se improper, and that prompt on-the-scene show-ups tend to insure the accuracy of identification, involve a minimum intrusion, and support the prompt release of persons not identified.’ * * * When evaluating the reliability of pretrial identifications a court should consider ‘the prior 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.’ ” 2009-Ohio-5527, ¶ 12 (citations omitted).

{¶ 26} The trial court did not elaborate on the reliability factors, but concluded, nonetheless, that the identifications were reliable. We agree. Both Manuel and Jessica recognized Black from having seen him a number of times in the neighborhood. This was not a situation where a stranger committed a crime and was unknown to the witnesses. Jessica stated that she had seen Black many times, and that she made eye contact with him when he was at the side of her house. There is no indication that Jessica had difficulty with her eyesight or was too distant from Black to see clearly. Furthermore, the witnesses were able to give the police a detailed physical description of the shooter and his clothes, and Jessica was able to provide the police with Black’s nickname and address. The show-up procedure occurred close in time to the crime, and the witnesses were not a great distance away from Black when they identified him. The witnesses were not at all hesitant in their identification.

{¶ 27} We also accord little weight to Black’s failure to wear a shirt or the coat allegedly worn at the time of the shooting. Black was arrested at home, and had time to hide the gun and discard clothing he had worn. Finally, the record is devoid of any evidence that the police made any improper suggestions or comments to the witnesses when the show-up identification occurred.

{¶ 28} Black also contends that Jessica’s later identification of Black after viewing a photo-spread is unreliable, and should have been suppressed. Black’s

argument on this issue hinges on the unreliability of the show-up identification, which allegedly tainted the viewing of the photo-spread a week later. We reject this argument, because Jessica's identification of Black at the scene is reliable. Jessica's testimony indicates that she was acquainted with Black, had seen him in the neighborhood many times, and had no difficulty observing him the night of the shooting. Jessica stated during the suppression hearing that there was no doubt in her mind that Black, known as C-Note, was the shooter. Again, the record fails to contain evidence suggesting that the police followed improper procedures.

{¶ 29} Black's First Assignment of Error is overruled.

III

{¶ 30} Black's Second Assignment of Error is as follows:

{¶ 31} "THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. BLACK IN OVERRULING HIS MOTION TO SUPPRESS STATEMENTS AND EVIDENCE."

{¶ 32} Under this assignment of error, Black contends that the trial court erred in overruling his motion to suppress statements and evidence, because his consent was not voluntarily given. Specifically, Black notes that he was already in custody, was handcuffed, and would not likely feel that he had any choice but to consent during his hour-long interrogation.

{¶ 33} The police did not obtain a warrant to search Black's automobile and apartment. Thus, the State has the burden of showing the validity of the search, because warrantless searches are " 'per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated

exceptions.’” *State v. Hilton*, Champaign App. No. 08-CA-18, 2009-Ohio-5744, ¶ 21-22, citing *City of Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218.

{¶ 34} Consent is one exception to the warrant requirement, and requires the state to show by “ ‘clear and positive’ evidence that the consent was ‘freely and voluntarily’ given.” *State v. Posey* (1988), 40 Ohio St.3d 420, 427 (citations omitted). “A ‘clear and positive’ standard is not significantly different from the ‘clear and convincing’ standard of evidence, which is the amount of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations to be proved. It is an intermediate standard of proof, being more than a preponderance of the evidence and less than evidence beyond a reasonable doubt.” *State v. Ingram* (1992), 82 Ohio App.3d 341, 346 (citations omitted). Furthermore, “the question whether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.” *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854.

{¶ 35} The following six factors are generally used in Ohio to decide if a defendant's consent to search has been given voluntarily:

{¶ 36} “1) whether the defendant's custodial status was voluntary;

{¶ 37} “2) whether coercive police procedures were used;

{¶ 38} “3) the extent and level of the defendant's cooperation with the police;

{¶ 39} “4) the defendant's awareness of his or her right to refuse consent;

{¶ 40} “5) the defendant's education and intelligence;

{¶ 41} “6) the defendant's belief that no incriminating evidence will be found.”

State v. Loyer, Cuyahoga App. No. 87995, 2007-Ohio-716, ¶ 9, citing *State v. Webb* (Jan. 28, 2000), Montgomery App. No. 17676.

{¶ 42} The first factor weighs in favor of involuntary consent, because Black was in custody at the time he gave consent. The remaining factors, however, weigh in favor of voluntary consent. There is no evidence that coercive police procedures were used. In fact, Black was allowed to use the restroom and was not re-handcuffed during his interview with Detective Engel. Black's rights were read and he demonstrated understanding of his rights, as well as his awareness that consent could be refused. Black could read and write, he had ten years of education, and he cooperated with the police by making a statement. Black also stressed his non-involvement with the crime, and expressed his belief that no incriminating evidence would be found. The trial court, therefore, did not err in concluding that Black voluntarily consented to the search of his automobile and his apartment.

{¶ 43} Black's Second Assignment of Error is overruled.

IV

{¶ 44} Both of Black's assignments of error having been overruled, the judgment of the trial court is Affirmed.

.....

FROELICH and DONOFRIO, JJ., concur.

(Hon. Gene Donofrio, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Mathias H. Heck, Jr.
Johnna M. Shia
Christopher L. Wesner
Hon. Gregory F. Singer