

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-09-240
	:	
- vs -	:	<u>OPINION</u>
	:	4/5/2010
	:	
CHARLES DEONTE MCDONALD,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-01-0093

Robin N. Piper III, Butler County Prosecuting Attorney, Gloria J. Sigman, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45012-0515, for plaintiff-appellee

Brian K. Harrison, P.O. Box 80, Monroe, Ohio 45050, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Charles Deonte McDonald, appeals from the Butler County Court of Common Pleas decision denying his motion to suppress and its decision sentencing him to serve seven years in prison following his conviction for felonious assault. For the reasons outlined below, we affirm.

{¶2} In the early morning hours of November 7, 2008, Johnny Brown, who had been drinking at a local bar, asked his fiancée, Darlene VanWinkle, to walk him home.

Thereafter, while the couple made their way down East Avenue located in Hamilton, Butler County, Ohio, three men attacked Brown with a hammer causing him significant facial injuries. That morning, following the subsequent police investigation, which included VanWinkle's positive identification of appellant as the man wielding the hammer during her fiancé's brutal beating, appellant was arrested and charged with felonious assault. Neither of appellant's alleged accomplices were identified or apprehended.

{¶3} After filing a motion to suppress, which was denied, and following a two-day jury trial, appellant was found guilty and sentenced to serve seven years in prison. Appellant now appeals the trial court's decision denying his motion to suppress and his seven-year prison sentence, raising two assignments of error.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING APPELLANT'S MOTION TO SUPPRESS IDENTIFICATION EVIDENCE."

{¶6} In his first assignment of error, appellant argues that the trial court erred by denying his motion to suppress because the photographic and show-up identification procedures used by police were unduly suggestive and produced an unreliable pretrial identification. We disagree.

{¶7} Appellate review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. When considering a motion to suppress, the trial court assumes the role of the trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of the witnesses. *State v. Smith*, 80 Ohio St.3d 89, 105, 1997-Ohio-355; *State v. Anderson* (1995), 100 Ohio App.3d 688, 691. An appellate court must defer to the trial

court's factual findings if they are supported by competent, credible evidence. *State v. Curtis*, Brown App. No. CA2009-01-004, 2009-Ohio-6740, ¶15, citing *State v. Retherford* (1994), 93 Ohio App.3d 586, 593. Accepting the trial court's factual findings, the appellate court then determines "without deference to the trial court, whether the court has applied the appropriate legal standard." *State v. Heltsley*, Preble App. No. CA2009-04-011, 2009-Ohio-6749, ¶15, citing *Anderson* at 691.

{¶8} "The rationale for excluding a tainted pretrial identification is to protect the defendant from misconduct by the state." *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶19; *State v. Brown* (1988), 38 Ohio St.3d 305, 310. To warrant suppression of identification testimony, appellant bears the burden of establishing that the identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Neil v. Biggers* (1972), 409 U.S. 188, 198, 93 S.Ct. 375. In turn, when a witness has been confronted with a suspect before trial, due process requires a court to suppress the witness' identification of the suspect if (1) the confrontation was unnecessarily suggestive of the suspect's guilt, *and* (2) the identification was unreliable under the totality of the circumstances. *State v. Robinson*, Fayette App. No. CA2009-02-004, 2009-Ohio-4937, ¶11; *Gross* at ¶19; *State v. Waddy* (1992), 63 Ohio St.3d 424, 438. However, because reliability is the linchpin in determining the admissibility of identification testimony, even if identification procedures were unnecessarily or unduly suggestive, there is no due process violation where the identification itself possesses sufficient aspects of reliability. *Manson v. Brathwaite* (1977), 432 U.S. 98, 115, 97 S.Ct. 2243; *Curtis*, 2009-Ohio-6740 at ¶22; *State v. Brown*, Butler App. No. CA2006-10-247, 2007-Ohio-7070, ¶14; *State v. Sawyer* (May 17, 1999), Butler App. No. CA98-07-140, 3.

{¶9} When determining the reliability of a witness' identification, a court

examines whether the identification was unreliable under the totality of the circumstances. *State v. Lamb*, Butler App. Nos. CA2002-07-171, CA2002-08-192, 2003-Ohio-3870, ¶50, citing *State v. Poole* (1996), 116 Ohio App.3d 513, 522. The factors considered relevant in making this determination include: (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 at the confrontation, and (5) the length of time between the sighting and the confrontation. *Manson*, 432 U.S. 98 at 114; *Biggers*, 409 U.S. 188 at 198-199; *State v. Broom* (1988), 40 Ohio St.3d 277, 284; *Brown*, 2007-Ohio-7070 at ¶15.

{¶10} After a thorough review of the record, we find that the totality of the circumstances prove VanWinkle's positive photographic and show-up identifications of appellant as the man wielding the hammer possessed a sufficient indicia of reliability. VanWinkle, who witnessed the brutal beating, had the opportunity to view the attackers at close range during the commission of the crime, and then, when confronted with four male suspects mere minutes after the incident occurred, was able to positively identify appellant as the man who beat her fiancé with a hammer.¹ In addition, when presented with a photo array shortly after witnessing the violent attack, VanWinkle immediately singled out appellant's photo and identified him as "the one with the hammer."² Therefore, under the totality of the circumstances, and after considering all relevant factors, we find no error with the trial court's decision finding the reliability of VanWinkle's photographic and show-up identifications of appellant "to be pretty plain

1. VanWinkle was shown the four male suspects and positively identified appellant, who matched the description she previously provided to police, approximately ten minutes after witnessing the attack.

2. VanWinkle was provided with the photo array approximately one hour and 30 minutes after witnessing the beating.

and pretty clear." See, e.g., *Brown*, 2007-Ohio-7070 at ¶14; *State v. Grays*, Madison App. No. CA2001-02-007, 6, 2001-Ohio-8679; *Sawyer*, Butler App. No. CA98-07-140 at 8-9. Accordingly, appellant's first assignment of error is overruled.

{¶11} Assignment of Error No. 2:

{¶12} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED APPELLANT BASED ON HIS REFUSAL TO IDENTIFY AND TESTIFY AGAINST ALLEGED ACCOMPLICES."

{¶13} In his second assignment of error, appellant argues that the trial court abused its discretion by basing its sentencing decision on his refusal to identify and testify against any of his alleged accomplices.³ However, contrary to appellant's claim, the trial court's sentencing decision was not based on his refusal to assist law enforcement in furthering their investigation, but instead, was properly based on a "careful and substantial deliberation to the relevant statutory considerations."⁴ *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶20. In fact, before classifying appellant's actions as "one of the coldest, cruelest heartless attacks on a person that [it had] ever been aware of," the trial court explicitly stated that it was "not holding [his] silence against [him] * * *." Therefore, after a thorough review of the record, which includes the transcript of the two-day jury trial, we find the trial court did not abuse its discretion by sentencing appellant, who had an extensive criminal record, to serve a seven-year prison term for violently beating Brown, the victim, with a hammer. See *State v. Blanton*,

3. We note that appellant failed to object to his sentence at the trial level, and therefore, has forfeited any claimed error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶15; see, e.g., *State v. Addis*, Brown App. No. CA2009-05-019, 2010-Ohio-1008, ¶8. However, although appellant has forfeited this error on appeal, "we believe it is necessary to analyze appellant's claimed error under *Kalish* as it is the most recent guidance the Supreme Court has offered to review sentencing issues." *State v. Simms*, Clermont App. No. CA2009-02-005, 2009-Ohio-5440, fn. 3; *State v. Burk*, Clermont App. No. CA2009-03-019, 2009-Ohio-5643, fn. 1.

Butler App. No. CA2008-09-235, 2009-Ohio-3311, ¶22; *State v. Williams*, Warren App. No. CA2007-12-136, 2009-Ohio-435, ¶28; *State v. Wright*, Warren App. No. CA2008-03-039, 2008-Ohio-6765, ¶58. Accordingly, appellant's second assignment of error is overruled.

4. Appellant concedes that his seven-year prison sentence was not clearly and convincingly contrary to law. Therefore, we will not address that issue here. See, e.g., *State v. Hunt*, Butler App. No. CA2009-07-184, 2010-Ohio-1099, ¶5.

{¶14} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.