

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

FREDERICK J. BLACKMAN,

Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 3362 EDA 2011

Appeal from the Order Entered November 4, 2011  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0005649-2011

BEFORE: STEVENS, P.J., BOWES, J., and PLATT, J.\*

MEMORANDUM BY STEVENS, P.J.

Filed: January 11, 2013

The Commonwealth appeals from the order entered in the Court of Common Pleas of Philadelphia County granting, in part, Defendant/Appellee's motion to suppress the in-court identification made by purported victim, Michael Morris, to prove Defendant/Appellee was the man who came to his door and threatened him with a firearm to collect payment on an old drug debt. Specifically, the court ruled that the unavailability of the photo array shown to Morris for the purpose of learning the legal name of the alleged assailant unfairly precluded full cross-examination of Morris on his identification testimony. Claiming in its notice of appeal that the order substantially handicaps or terminates its prosecution of the case, the

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\* Retired Senior Judge assigned to the Superior Court.

Commonwealth argues that Morris' in-court identification resulted not from the photo array but from his longstanding relationship with Defendant/Appellee. After careful review, we vacate and remand.

On March 9, 2011, police arrested Appellee on charges of carrying firearms without a license, carrying firearms in public in Philadelphia, terroristic threats, simple assault, recklessly endangering another person (REAP), and possessing firearms by persons not to possess based on allegations by Michael Morris and his girlfriend, Denise Prendergast, that Appellee threatened them at gunpoint as described above. Appellee filed a pretrial motion to suppress all out-of-court identifications as the tainted by-product of a computerized photo array prejudicially unavailable to the defense for inspection. As any in-court identification by Morris or Prendergast would necessarily derive from the tainted out-of-court identification, Appellee continued, it, too, should be deemed inadmissible.

Evidence adduced at the suppression hearing included Mr. Morris' personal experiences of purchasing crack cocaine from Appellee, whom he knew as "Jay Jay," starting about two years before the date of the hearing. N.T. 11/4/11 at 12-13. Morris and Prendergast had quit the habit around March of 2010, approximately ten months before the assault in question. N.T. at 14. Morris, however, testified about the period in which he alleged he routinely purchased from Appellee. Morris stated he would look specifically for Appellee because "he sold what I was looking for. I knew he

wasn't going to sell me beat stuff. I knew he had legitimate stuff." N.T. at 16. The transactions were always face-to-face whereby Morris would hand Appellee money in exchange for the crack. N.T. at 16. At least twenty of these transactions took place over the course of approximately four months until March of 2010, when Morris and Prendergast stopped using because it was "ruining [their] lives." N.T. at 14.

According to Morris, on January 3, 2011, Appellee came to his home and threatened he would "lay out" Morris if Morris failed to pay an old drug debt. Apparently, Morris had made some purchases on credit and as a result owed Appellee money, a fact confirmed by Prendergast's testimony. N.T. at 38, 48. After Appellee allegedly threatened Morris and Prendergast at their home on January 3, 2011, Morris went to police to file a complaint.

Morris recollected giving the name "Jay Jay Hood" or "Jay Hood" to police, but the statement as recorded by police included only the name "Jay Jay." N.T. at 27. Morris would not thereafter agree with defense counsel that he never provided the name "Hood" as well, and he considered the names Jay Hood and "Jay Jay Hood" basically the same, anyway. N.T. at 27-29.

Prendergast also testified to Morris' and her history of buying from Appellee. She alleged to having witnessed about ten purchases made at their home when Appellee would respond to Morris' phone call with a

delivery. As far as she knew, Appellee was the only dealer that had delivered crack cocaine on credit to Morris. N.T. at 48.

Testimony completed, the defense argued that the Commonwealth's failure to preserve the photo array in any respect for defense examination rendered Morris' identification inherently unfair and unreliable. As to the notion that Morris' identification could be wholly independent of the array, moreover, the defense suggested this was neither provable without inspection of the photograph nor likely given the fact that Morris claimed to know Appellee for over a year but could not state his name.

The court agreed, ruling that Morris' identifications of Appellee were inadmissible:

**THE COURT:** [T]he court having heard the testimony and arguments of counsel on the suppression motion makes the following findings of fact and conclusions of law: On February 7th of 2011, complaining witnesses Morris and Prendergast made a police complaint alleging that someone known to them as Jay Jay had entered their home on January the 3rd of 2011, and threatened them with a gun.

Second, based on this complaint, complaining witness Morris was shown numerous photo images, which were generated by inputting the information, first name Jay, street name paul, and black male into the police photo imager.

Next, these photo images were not preserved and were therefore not provided to the Defense. Next, the defendant's photo was selected by complaining witness Morris. Complaining witness Prendergast was not shown the images.

Conclusions of law: This Court is satisfied that the out-of-court identification by complaining witness Morris may have tainted his future identification of this defendant; and that the failure to provide the Defense with copies of the images, which Morris viewed, causes an impermissible impairment to the defendant's ability to challenge the identification of this complaining witness.

The Court finds that there was no impermissible government action as it relates to complaining witness Prendergast. Therefore, the suppression motion is granted as to complaining witness Morris and denied as to complaining witness Prendergast.

N.T. 11/4/11 at 61-62.

On appeal, the Commonwealth raises the following issue:

**DID THE LOWER COURT ERR IN SUPPRESSING THE IN-COURT IDENTIFICATION OF DEFENDANT BY A VICTIM WHO HAD KNOWN DEFENDANT FOR OVER A YEAR BEFORE THE CRIME AND HAD MANY ENCOUNTERS WITH HIM DURING THAT PERIOD?**

Brief of Appellant at 4.

We begin our analysis of this claim by noting our well-established standard of review:

When the Commonwealth appeals from a suppression order, we follow a clearly defined standard of review and consider only the evidence from the defendant's witnesses together with the evidence of the prosecution that, when read in the context of the entire record, remains uncontradicted. The suppression court's findings of fact bind an appellate court if the record supports those findings. The suppression court's conclusions of law, however, are not binding on an appellate court, whose duty [it] is to determine if the suppression court properly applied the law to the facts.

**Commonwealth v. Baez**, 21 A.3d 1280, 1282 (Pa.Super.2011) (citation omitted).

Moreover, an in-court identification may be admissible despite the inadmissibility of a pre-trial identification where the in-court identification is not tainted by the prior identification. **Commonwealth v. Wade**, 33 A.3d 108 (Pa. Super. 2011)(citing **Commonwealth v. Baker**, 531 Pa. 541, 614 A.2d 663 (1992)). "In gauging reliability, we employ a totality of circumstances test." **Id.** at 114.

For example, in **Wade**, this Court applied the above standard in assessing whether a one-on-one identification tainted a subsequent in-court identification:

The purpose of a "one on one" identification is to enhance reliability by reducing the time elapsed after the commission of the crime. Suggestiveness in the identification process is but one factor to be considered in determining the admissibility of such evidence and will not warrant exclusion absent other factors. As this Court has explained, the following factors are to be considered in determining the propriety of admitting identification evidence: the opportunity of the witness to view the perpetrator at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the perpetrator, the level of certainty demonstrated at the confrontation, and the time between the crime and confrontation. The corrupting effect of the suggestive identification, if any, must be weighed against these factors. Absent some special element of unfairness, a prompt "one on one" identification is not so suggestive as to give rise to an irreparable likelihood of misidentification.

**Id.** at 114 (citations and quotation marks omitted).

The same factors militate in favor of finding Mr. Morris' in-court identification admissible in the case *sub judice*. According to Morris, he had

personally dealt with Appellee more than twenty times for the year or more he used crack cocaine. Morris would initiate these transactions by locating Appellee in the neighborhood, dealing with him face-to-face, and exchanging money for crack cocaine. Morris explained that he specifically sought out Appellee because the quality of the crack cocaine he sold was consistently good, which was often not the case with other dealers who used counterfeit drugs. He firmly denied, on cross-examination, having crack withdrawal, hallucinations, or a "racing" mind during these transactions. Morris again saw Appellee after he had stopped using crack, just one month before the photo identification, when Appellee entered his apartment seeking payment on an unpaid drug debt.

Moreover, police testimony confirmed Morris went to police claiming to know who his assailant was by sight but not by formal name. The purpose of the photo identification, therefore, was not to assist Morris in recognizing Appellee but, instead, to enable police to put a name to the face that Morris was sure he could identify. Morris supplied Appellee's nickname and other attributions to police, and they used this information to generate an array of photographs of men meeting the criteria. Morris thereafter identified photograph number 8 of Appellee as the photograph of the man, Appellee, he knew for more than a year.

This testimony therefore established that Morris' in-court identification resulted not from viewing the photo array but from his longstanding illicit

relationship with Appellee. Morris had for more than a year repeatedly identified Appellee by sight in order to locate him for transactions, and again recognized Appellee as the man who came to his home and demanded payment on an old drug debt. The sole purpose of the photo array given to him was to supply police with the proper name of an otherwise known suspect. Based on this evidence, we conclude that Morris' in-court identification of Appellee was independent from the array he viewed, reliably based on his long personal history with Appellee, and, therefore admissible at trial. Accordingly, we vacate the order to suppress Morris' identification.

Order vacated; case remanded for further proceedings consistent with this decision; jurisdiction relinquished.