

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL ELAM, )  
 ) No. 70, 2000  
 Defendant-Below, )  
 Appellant, ) Court Below: Superior Court  
 v. ) of the State of Delaware in  
 ) and for New Castle County  
 )  
 STATE OF DELAWARE, ) Cr.A.No. IN98-09-1109  
 )  
 Plaintiff-Below, )  
 Appellee. )

Submitted: November 21, 2000  
Decided: January 16, 2001

Before **VEASEY**, Chief Justice, **WALSH** and **STEELE**, Justices.

**ORDER**

This 16<sup>th</sup> day of January, 2001, it appears to the Court that:

1. Michael Elam appeals his conviction for Robbery Second Degree following a jury trial in the New Castle County Superior Court. Elam argues that the Superior Court erred when it denied his motion to suppress a witness' identification. Elam suggests that the police employed a pretrial identification process that was unduly suggestive and that under the totality of the circumstances, the identification became so unreliable that admitting it in evidence violated his due process rights. Elam further argues that the suggestive pretrial identification process so tainted the in-court identification that the Superior Court erred by

admitting it as well. Elam's arguments have no merit. We AFFIRM the Superior Court.

2. Police arrested Elam after the complainant first picked his photograph out of a mug shot book containing several hundred photographs. She later confirmed Elam's identification when she saw a Polaroid picture police took of Elam on the day of the robbery.

3. In the early morning of September 6, 1998, the complainant sat on the outside steps of an apartment building waiting for her cousin. The complainant told police that a 5'10" light complected 180 lb. black male in his thirties approached her, struck up a conversation, and then immediately demanded money. After a struggle, this man took thirty-five dollars from her. The entire incident lasted no longer than one minute.

4. The complainant flagged down two police officers who took her to the police station where they asked her to review four mug shot books which contained 250 mug shots each. Although the complainant picked a photograph of a person who resembled her attacker, the police nevertheless asked her to continue looking. Their review of that person's criminal history showed prior arrests for drugs but none for assaults. Approximately ten to fifteen minutes later, the complainant selected a photograph of Elam.

5. Police sought out and found Elam at his residence after their review of his criminal history revealed a lengthy criminal record which did include robbery. Elam insisted he had not left his house since the night before. A search of Elam's residence discovered no items from the robbery. The police took a polaroid picture of Elam and then went to the complainant's residence. The complainant viewed the single photograph and confirmed her identification of Elam as her attacker. Less than four hours had past from the time of the robbery to the complainant's second photographic identification.

6. This Court reviews the Superior Court's denial of a motion to suppress evidence pursuant to an abuse of discretion standard.<sup>1</sup>

7. Elam argues that the Superior Court erred when it denied his motion to suppress the photographic identification because the police improperly suggested that the complainant continue looking through the mug shot books and the police improperly showed the complainant a single polaroid picture of him. The procedures used, Elam argues, give rise to a "substantial likelihood of irreparable misidentification."<sup>2</sup>

8. The Superior Court, however, found that the police made no suggestive comments to the complainant while she reviewed the mug shot books.

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<sup>1</sup> *Richardson v. State*, Del. Supr., 673 A.2d 144, 147 (1996); see also *Hicks v. State*, Del. Supr., 631 A.2d 6, 8 (1993); *Gregory v. State*, Del. Supr., 616 A.2d 1198, 1200 (1992).

<sup>2</sup> *Id.*

The Superior Court also found no indication that the second photograph influenced the complainant's prior positive identification of Elam from the mug shot books.

9. As this Court stated in *Richardson*, identification procedures will be held unconstitutional only where they are “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”<sup>3</sup> In this case, the Superior Court reviewed the initial identification procedure employed by the police and concluded that there were no circumstances that would lead to the conclusion that the procedure “suggested” the outcome.<sup>4</sup> Police asked the complainant to review mug shot books containing almost one thousand photographs with no suggestion that the books contained a photo of her attacker. The police did not embellish their request that she continue her review after selecting the first photo in a way that suggested that she then pick out a photo of Elam. In addition, the Superior Court found the second, Polaroid, photo identification of Elam taken a few hours after the robbery to be no more than a confirmation of the original, unsuggestive identification. The polaroid did not show Elam in police custody, in handcuffs or in any posture which suggested that the investigation focused on a single person.<sup>5</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> See *Tyson v. State*, Del. Supr., No. 349, 1983, order at 3-4, Christie, J. (Dec. 7, 1984).

<sup>5</sup> See eg, *Richardson* at 147.

10. Because this Court finds no error in the pretrial identification, the Superior Court could not have erred by admitting an untainted in-court identification.

NOW, THEREFORE, IT IS ORDERED, that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

s/s Myron T. Steele  
Justice