

IN THE COURT OF APPEALS 04/23/96
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00161 COA

JERRY DALE SMITH

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. THOMAS GARDNER III

COURT FROM WHICH APPEALED: MONROE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

J. DUDLEY WILLIAMS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE LOWERY

DISTRICT ATTORNEY: ROB COLEMAN

NATURE OF THE CASE: CRIMINAL: BURGLARY

TRIAL COURT DISPOSITION: SENTENCED TO TEN (10) YEARS IN MDOC TO RUN
CONSECUTIVE WITH MONROE COUNTY CIRCUIT COURT #12,873

BEFORE BRIDGES, P.J., COLEMAN, AND DIAZ, JJ.

BRIDGES, P.J., FOR THE COURT:

Jerry Dale Smith was arrested and convicted for burglary. On appeal, he argues that the lower court erred in failing to suppress an improper identification. We disagree and affirm the decision of the lower court.

STATEMENT OF THE FACTS

On December 2, 1993, Tim Laney's (Laney) home was burglarized. Laney's home is located in a very rural area of Monroe County, where there are only a few homes located within any amount of distance. Two eyewitnesses, Bobby Laney, Tim Laney's father, and Kenneth Gilmore, a neighbor, saw someone who they identified as Jerry Dale Smith (Smith) leaving Laney's home after the burglary. Gilmore knew Smith personally and informed local police officers that Smith was the person leaving Laney's home.

Ruble Macxy, Monroe County Sheriff, conducted a photographic line up in which six white males approximately five feet, eleven to six feet tall, with medium or slender builds were shown to both Bobby Laney and Gilmore. Of the six photographs, only Smith's photograph was taken on a background without a height chart. It was an old line-up photograph, taken of Smith before the height charts were "put up" in the booking room. Smith's photo was also the only one without criminal case numbers on the bottom of the photograph. Both Bobby Laney and Gilmore picked Smith as the person they saw leaving the Laney home.

Smith was indicted for burglary of a dwelling. He was found guilty and thereafter sentenced to serve a term of ten (10) years in the custody of the Mississippi Department of Corrections, that sentence to run concurrently with the sentence from his previous conviction of larceny of a building. Smith was on parole for that offense at the time he committed this one; therefore, the trial judge revoked his parole and ordered that he serve time for both. He appeals his conviction arguing that the trial court erred in allowing into evidence an "unnecessarily suggestive photographic line up and subsequent 'show-up'" which bolstered testimony of the eyewitnesses. We disagree and affirm the decision of the lower court.

ARGUMENT AND DISCUSSION OF THE LAW

An in-court identification is not subject to suppression or objection unless it is shown to have been tainted by some suggestive out-of-court identification. *Smith v. State*, 430 So. 2d 406, 407 (Miss. 1983). If there is substantial credible evidence to support the trial judge's finding that the in-court identification testimony has not been impermissibly tainted, this Court may not reverse the trial court's findings. *Nicholson v. State*, 523 So. 2d 68, 71 (Miss. 1988). We must review the lower court's decision based upon the totality of the circumstances. *Id.*

In the case sub judice, Smith's picture was shown to two witnesses at a photo array. The picture of Smith was noticeably different than the five other pictures. It did not contain a height chart, nor did it contain criminal numbers at the bottom. However, all of the men pictured were about the same height and build. Smith does not argue that the pictures of the other men were unduly suggestive based on

their individual characteristics. He simply argues that the absence of height lines and criminal numbers at the bottom of his picture rendered the photo array unduly suggestive. The Mississippi Supreme Court set out the appropriate standards of review for allegedly improper identifications of a defendant in *York v. State*, 413 So. 2d 1372, 1383 (Miss. 1982). The court held:

Only pretrial identifications which are suggestive, without necessity for conducting them in such manner, are proscribed. A lineup or series of photographs in which the accused, when compared with the others, is conspicuously singled out in some manner from the others, either from appearance or statements by an officer, is impermissibly suggestive. A showup in which the accused is brought by an officer to the eyewitness is likewise impermissibly suggestive where there is no necessity for doing so.

An impermissibly suggestive pretrial identification does not preclude in-court identification by an eyewitness who viewed the suspect at the procedure, unless: (1) from the totality of the circumstances surrounding it (2) the identification was so impermissibly suggestive as to give rise to a *very substantial likelihood of irreparable misidentification*. Even if testimony is proffered of the out-of-court identification itself, the same standard exists as to the above, with the omission of the word "irreparable."

Id. (emphasis added).

The question becomes whether in fact the photographic line up was unduly suggestive. Reviewing all of the evidence, it appears that it was not. The five factors to be considered in evaluating whether there was a substantial likelihood of misidentification are:

- (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.
- (5) The length of time between the crime and the confrontation.

York, 413 So. 2d at 1383.

When there is substantial credible evidence to support the trial court's finding that there was no substantial likelihood of misidentification, this Court will affirm. *Hansen v. State*, 592 So. 2d 114, 138 (Miss. 1989) (citations omitted). We examine the five factors under *York*.

1) Opportunity to view: Both Bobby Laney and Gilmore testified that they got a good view of Smith leaving Laney's home. Bobby Laney testified that he saw Smith exiting his son's home through the

back door. Smith was standing about three or four feet from Bobby Laney at that time. He further testified that Smith made eye contact with him after he fired a shot at Smith with a gun he had hanging behind the seat of his pickup truck. Gilmore testified that he saw Bobby Laney chasing Smith. Gilmore also testified that he knew Smith personally and recognized him when he ran "right even" to him. He identified Smith as the burglar before he was shown any photographs. This testimony shows ample opportunity for the witnesses to observe the perpetrator.

2) Degree of Attention: Bobby Laney testified that he saw Smith leaving his son's home and chased him for some time. During this time, nothing was distracting his attention. Both Laney and Gilmore noticed the coloring, build, and clothing of Smith. Bobby Laney also noticed Smith's distinctive facial features. This testimony shows that both witnesses were paying strict attention to Smith.

3) Accuracy of Prior Description: Laney provided a completely accurate description of Smith to the sheriff when he first reported the burglary. Gilmore knew and recognized Smith.

4) Level of Certainty: Both witnesses were completely certain in their identifications of Smith. Gilmore knew Smith personally and recognized him when he saw Bobby Laney chasing him. Bobby Laney recognized Smith's distinctive features during the time he saw Smith leaving his son's home and while he was chasing him.

5) Length of Time between the Crime and the Confrontation: The photographic display was conducted one day after the burglary.

In conclusion, even if the pre-trial identifications of Smith were impermissibly suggestive, the in-court identifications were positive, based on an excellent opportunity to view Smith during the crime, and accordingly were reliable. There was substantial credible evidence that under the totality of the circumstances there was no substantial likelihood of misidentification. The trial court did not commit error in allowing the in-court identifications.

THE JUDGMENT OF THE CIRCUIT COURT OF MONROE COUNTY OF CONVICTION OF BURGLARY OF A DWELLING AND SENTENCE OF TEN (10) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVELY WITH MONROE COUNTY CIRCUIT COURT #12,873 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO MONROE COUNTY.

FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.