

IN THE COURT OF APPEALS 10/01/96
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-00458 COA

CHARLES ROBERT MYERS

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. JERRY O. TERRY

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

F. HOLT MONTGOMERY, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: STEPHEN SIMPSON ASSISTANT D.A.

NATURE OF THE CASE: ARMED ROBBERY

TRIAL COURT DISPOSITION: CONVICTED OF ARMED ROBBERY AND SENTENCED TO
TWELVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF
CORRECTIONS.

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

FRAISER, C.J., FOR THE COURT:

This appeal arises from Charles Robert Myers's assertion that the trial court erred in denying his motion to exclude evidence of an out-of-court, showup identification of Myers and the in-court identification which resulted therefrom. Myers was indicted and convicted of the armed robbery of a convenience store by him and his "wheel man," Manning. Shortly after the robbery, the police arrested Myers and Manning several miles from the scene of the crime. The police transported the parties back to the store where the victim identified Myers as the robber. Prior to trial, Myers moved for the exclusion of any evidence of this showup identification, arguing that its admission would violate his rights to due process because the procedure was unnecessarily suggestive and created a serious likelihood of misidentification. Myers further sought to exclude any in-court identification which might be made at trial on the ground that such an identification would be unavoidably tainted by the initial showup identification. The trial court declined to issue a pre-trial ruling on Myers's motion. At the close of the defense's case, the trial court overruled Myers's motion. Upon careful consideration, we hold that the showup procedure used in this case was not unnecessarily suggestive. Further, even if we were to agree that the identification was unnecessarily suggestive, it was sufficiently reliable to avoid offending the requirements of due process. Thus, this Court concludes the admission of the out-of-court identification and the in-court identification did not deprive Myers of a fair trial under the due process clause of the fourteenth amendment.

FACTS

On May 23, 1992, Charles Robert Myers and Anthony Manning were driving to the Mississippi coast to attend the "Biker Blowout". On the way each consumed a large quantity of beer and smoked several marijuana cigarettes. During their revelry, Myers robbed a service station. In the course of the robbery, Myers walked from Manning's van to the convenience store and as he entered the store, pulled a confederate flag bandana up from around his neck to cover his face, cowboy style. Myers instructed the clerk, Susan Pucheu Keck, at gunpoint to give him all of the money in her register. After receiving the money, Myers pushed Keck into the convenience store bathroom and made his getaway. Keck called the police and gave them a detailed description of Myers, the gun he used in the robbery, the confederate bandana, the convenience store money bag, and the blue van with round windows in which he escaped, including the last two numbers of its licence plate, a one and a three. This information was broadcast to all police units. A police helicopter patrolling the Biker Blowout reported a blue van with round windows. A patrol car was directed to intercept the van. On sighting the van, the officers in the patrol car confirmed that the vehicle was a blue van with round windows. Additionally, the officers noted that the last two numbers of the license plate were a one and a three. The officers stopped the van and secured Myers and Manning. In the van the officers found a hand gun fitting the description of the gun used to rob the convenience store, a confederate flag bandana, and a money bag.

The officers arrested Myers and Manning, placed them in separate patrol cars, and returned them directly to the store for a "show up" identification. Myers and Manning were taken out of the cars together in the parking lot, and Keck successfully identified Myers as the man who pointed the gun at her and took the money. She stated that while the perpetrator had worn a bandana covering the lower

part of his face, his mask had fallen down for thirty seconds to a minute while he was a very short distance from her in excellent lighting. Additionally, she had seen him before he pulled his bandana on as he was walking to the store. Therefore, she was positive that Myers was the perpetrator.

DISCUSSION

The fundamental fairness requirement of due process of law protects against the admission of evidence derived from identification procedures which are "unnecessarily suggestive and conducive to irreparable mistaken identification." *Stovall v. Denno*, 388 U.S. 293, 302 (1967). In determining the scope of this due process protection, the United States Supreme Court has applied a two-part analysis to determine when the admission of an identification procedure would deprive a defendant of due process of law. *See Manson v. Brathwaite*, 432 U.S. 98, 113 (1977); *Neil v. Biggers*, 409 U.S. 188, 196-201 (1972); *see also United States v. Watson*, 76 F.3d 4, 6 (1st Cir. 1996); *United States v. Kwong*, 69 F.3d 663, 666 (2nd Cir. 1995); *United States v. Sanchez*, 988 F.2d 1384, 1389 (5th Cir. 1993); *United States v. Bouthot*, 878 F.2d 1506, 1514 (1st Cir. 1989); *Judd v. Vose*, 813 F.2d 494, 498 (1st Cir.1987); *Perron v. Perrin*, 742 F.2d 669, 675 (1st Cir. 1984); *Davis v. State*, 510 So. 2d 794, 795 (Miss. 1987). When applying this analysis, the court must focus on the totality of the circumstances. *Manson*, 432 U.S. at 113; *Biggers*, 409 U.S. at 199; *Stovall*, 388 U.S. at 302. The first part of the test involves a determination of whether the identification procedure utilized was unnecessarily suggestive. *Manson*, 432 U.S. at 109; *Stovall*, 388 U.S. at 302; *Watson*, 76 F.3d at 6; *Kwong*, 69 F.3d at 666; *Sanchez*, 988 F.2d at 1389; *Bouthot*, 878 F.2d at 1514; *Velez v. Schmer*, 724 F.2d 249, 251 (1st Cir. 1984). If the court concludes that the procedure was not unnecessarily suggestive, the court need not inquire further, and evidence as to the identification may be admitted without violating due process. *Stovall*, 388 U.S. at 302; *Perron*, 742 F.2d at 675.

If the court determines that the procedure was impermissibly suggestive, however, the court must scrutinize the identification further. *See Manson*, 432 U.S. at 109, 113-17; *Velez*, 724 F.2d at 251. Even where an identification is the product of an unnecessarily suggestive procedure the law does not automatically require its exclusion. Rather, "[t]he admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability." *Manson*, 432 U.S. at 106. Thus, under the second part of the analysis, a court must look at the totality of the circumstances and determine whether the identification was reliable despite the unnecessarily suggestive confrontation procedure. *See Biggers*, 409 U.S. at 188; *Perron*, 742 F.2d at 675; *Velez*, 724 F.2d at 251; *Nathan v. State*, 552 So. 2d 99, 104-05 (Miss. 1989); *Davis*, 510 So. 2d at 795. "[T]he factors to be considered in evaluating the likelihood of misidentification include the 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." *Biggers*, 409 U.S. at 199; *see Manson*, 432 U.S. at 114. If the court concludes that an identification is reliable even though obtained by a suggestive procedure, the admission of evidence concerning the identification will not violate due process. *Manson*, 432 U.S. at 110. Here the trial court found that the identification procedure was not

impermissibly suggestive.

While the practice of showing suspects to persons for identification purposes has been widely condemned, the admission of evidence of an identification obtained by means of a showup, without more, does not violate due process. *Biggers*, 409 U.S. at 198; *Stovall*, 388 U.S. at 302. As the Supreme Court explained, even though a showup procedure is naturally suggestive, it is not always "unnecessarily suggestive." *Stovall*, 388 U.S. at 302. In *Stovall*, the police showed the defendant to the victim in her hospital room, and the court held that the immediate hospital confrontation was imperative and necessary and did not violate due process. *Id.*

Following *Stovall*, several United States Circuit Courts have found showup identification procedures conducted at the crime scene immediately following the crime were not unnecessarily suggestive. *See Johnson v. Dugger*, 817 F.2d 726, 729 (11th Cir. 1987) (showup in police car immediately following the robbery not impermissibly suggestive where the police did not aggravate the suggestiveness); *United States v. Bagley*, 772 F.2d 482, 492-93 (9th Cir. 1985) (showup at the crime scene one and one half hours after the robbery was a legitimate identification procedure and not unnecessarily suggestive); *United States v. Kessler*, 692 F.2d 584, 585-87 (9th Cir. 1982) (showup at crime scene approximately one hour after the crime not unnecessarily suggestive); *United States v. Williams*, 626 F.2d 697, 703 (9th Cir. 1980) (showup at crime scene fifteen minutes after robbery is a permissible means of identification); *Frank v. Blackburn*, 605 F.2d 910, 912-13 (5th Cir. 1979) (showup at the crime scene immediately following defendant's arrest not unnecessarily suggestive). "[A]n immediate confrontation not only prevents the suspect from substantially altering his appearance and allows the witness to test [his or] her recollection while [his or] her memory is still fresh, but permits 'expeditious release of innocent subjects.'" *Frank*, 605 F.2d at 912 (quoting *United States v. Wilson*, 435 F.2d 403, 405 (D.C. Cir.1970)); *see also Johnson*, 817 F.2d at 729. "Additionally, where the innocent may have been mistakenly apprehended, prompt identification allows the police to realize their error and to continue their search while the criminal is still within easy reach." *Id.* (quoting *Allen v. Estelle*, 568 F.2d 1108, 1112-13 (5th Cir. 1978)).

Guided by the decisions enunciated by the Supreme Court of the United States, the United States Circuit Courts, and the Supreme Court of Mississippi, we turn to consider the showup identification procedure employed in the case *sub judice*. The trial court determined that the showup procedure used by the police officers when they returned Myers to the convenience store and showed him and Manning to the victim was not unnecessarily suggestive. Myers and Manning were apprehended shortly after the robbery. Within thirty minutes of the robbery, they were transported back to the crime scene and displayed to the victim outside the convenience store. Myers does not allege that the police made any suggestive comments. The victim positively identified Myers as the robber.

Looking at the totality of the circumstances, we find that the showup identification procedure used in this case was not unnecessarily suggestive. The appeal before us is similar to the situations in *Johnson*, *Bagley*, and *Frank*. This confrontation occurred immediately following the robbery. *See Johnson*, 817 F.2d at 728-29; *Bagley*, 772 F.2d at 492; *Frank*, 605 F.2d at 912. We are persuaded by those decisions, particularly by the reasoning of the Court of Appeals for the Fifth Circuit in *Frank*. Although showup identifications are unavoidably suggestive, they are also useful and necessary when employed at the crime scene immediately following a crime. *See Johnson*, 817 F.2d at 729; *Frank*, 605 F.2d at 912. Thus, Myers's allegation fails the first part of the test.

While failing the first part of this test is dispositive of Myers's appeal, we also note that Myers's assertion of error also fails the second part of the test. Under the totality of the circumstances Keck's identification of Myers as the robber was sufficiently reliable. The *Biggers* factors as applied to this case are:

1. Opportunity to view the accused the accused

Keck saw Myers as he approached the store in broad daylight before he pulled the bandana over the lower portion of his face. She saw the upper portion of his face for ten minutes in good light at a distance of three to four feet. Additionally, she saw Myers's face without the bandana covering it for about a minute. Further, she testified that she had good vision.

2. Degree of attention

Keck was three or four feet from Myers in good lighting doing exactly as Myers directed her. Keck testified that she paid particular attention to Myers's face. She stated that she watched his face because she believed she could determine whether Myers was going to harm her by watching his face. From her testimony, we conclude Myers had Keck's complete and undivided attention.

3. Accuracy of the prior description

Keck described Myers to the police as an unshaven white male twenty-seven to thirty years old with shoulder length brown hair, a white tank type t-shirt, a confederate bandana, and faded dirty brown jeans. This accurately described Myers on the day of the robbery.

4. Witnesses level of certainty at the confrontation

Keck testified that at the time of the showup identification she was positive Myers was the robber.

5. Length of time between the crime and confrontation

The time between the end of the crime and the confrontation was less than thirty minutes.

The totality of the circumstances surrounding the identification of Myers indicates that the identification was reliable and therefore did not offend due process.

Our analysis leads us to conclude that the showup procedure used by the police was not unnecessarily suggestive or conducive to misidentification. Even if the showup procedure had been unnecessarily suggestive, the store clerk's identification was sufficiently reliable to remedy any problems with the procedure. Myers's due process rights were not offended. The judgment of the Harrison County Circuit Court is affirmed.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF TWELVE (12) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.

**BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND
SOUTHWICK, JJ., CONCUR.**

THOMAS, P.J., NOT PARTICIPATING.