2014 WL 5343329 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Eleventh Judicial Circuit
Miami-dade County

State of FLORIDA, Plaintiff,
v.
Jerome TIPPINS, Defendant.

No. F13-28256A.
May 9, 2014.

Order

Miguel M. de la O, Judge.

***1** SECTION 15

THIS CAUSE came before the Court on Defendant, Jerome Tippins' ("Tippins"), Motion to Suppress Out-of-Court and In-Court Identification ("Motion"). The Court has reviewed the Motion, held an evidentiary hearing, heard argument of counsel, and is fully advised in the premises. The Motion is denied.

I. THE FACTS.

A. THE CRIME.

On December 3, 2013, at approximately 10:51 in the morning, Solange Dorvilus ("Witness"), visited her bank's ATM and withdrew over $600, which she placed in a bank envelope. After making a small purchase at a nearby CVS, she was preparing to return home when she was accosted by a "black man" in his late 50s. The man appears to have been attempting to perpetrate a convoluted scam on the Witness. The man and the Witness were soon joined by a second "black man," also in his 50s but markedly taller than the first man, who appears to have been involved in the scam. The details of the scam are irrelevant for purposes of deciding the Motion. What is relevant is that the tall man distracted the Witness just enough to aid the short man in taking the proceeds from the ATM withdrawal (still in the bank envelope) from the Witness's hands. The Witness was able to clearly see both men for between 1 and a half to 4 minutes; it was daylight; the men were within three feet of her; nothing obstructed the Witness's view of the men; and the Witness and the two men were of the same race.

After the short man obtained the funds, both men beat a hasty retreat. The short man hopped in a small light colored car, while the tall man walked down the street and eventually boarded the car with the short man. The Witness approached a vendor for assistance. The vendor did not see the two men, but did observe the tag of the car in which they left. The vendor gave this information to a police dispatcher.

B. THE SHOWUP.

Within two hours, police found the car bearing the tag number called in by the vendor, and detained two men matching the description given by the Witness. The Witness was brought to the location where the men were stopped by police (in the general vicinity of the ATM, the CVS, and the Witness's home). Detectives Jacob Nicoli and Luis Sierra brought the Witness to the scene

of the arrest, and conducted a showup (the "Showup"). During the Showup, the Witness was seated in the back of Det. Nicoli's car, while one of the men stood handcuffed next to either 1, 2-3, or 4-6 police officers (depending on whom one believes). In addition, there were a number of police cars in the immediate vicinity when the men were shown to the Witness during the Showup. There is disagreement among the witnesses as to the number of police cars present and whether their overheard lights were activated. In light of the fact that this Court is asked to rule on the reliability of the Witness's observations on this day, the Court will accept the Witness's recollection that there were "many" officers and the road was blocked with police cars with overheard lights activated which surrounded the men when each was shown to the Witness.

***2** The Detectives failed to follow Departmental Orders regarding showups. In particular, they did not photograph Tippins at the time the Witness identified him; they did not advise the Witness that the investigation into her robbery would continue regardless of whether she did – or did not – make a positive identification; the men were in handcuffs at the time of the Showup (despite the fact that there appeared to be no officer safety concerns that would justify conducting the Showup with the men handcuffed); and they reinforced the Witness's identification of Tippins (and his co-Defendant) by giving her a "thumbs up" after she identified the men as her attackers.

As Det. Nicoli drove by each suspect, the Witness immediately recognized, without further prompting, the short man and the tall man who she claimed robbed her. Tippins is the man to whom the Witness refers to as the tall man. In addition, the Witness testified that even before she saw either man, she was able to identify the car in which the two men left the scene of the crime.

C. THE MOTION.

Tippins argues that the Showup was unduly suggestive. The State does not dispute this claim, and the Court agrees. The Showup was *poorly* executed. The Defense and the State further agree that a finding that the Showup was unduly suggestive does not end this Court's inquiry. Once the Defense establishes that the procedure used for an out-of-court identification was unduly suggestive, the burden shifts to the State to establish that there is clear and convincing evidence that the suggestive procedure did not result in an identification which is substantially likely to be unreliable. Posited in the affirmative, this Court must decide whether the unduly suggestive procedure employed here gives rise to a substantial likelihood of misidentification.

II. THE LAW.

This Court hardly writes on a clean slate regarding issues of out-of-court identifications, showups, and suggestiveness. These issues have been repeatedly addressed by the Supreme Court and this Court is "duty-bound to follow binding precedent." *State v. Washington*, 114 So. 3d 182, 190 (Fla. 3d DCA 2012). The Supreme Courts of both Florida and the United States have repeatedly warned law enforcement to avoid unduly suggestive identification procedures.

> The primary evil to be avoided in the introduction of an out-of-court identification is a very substantial likelihood of misidentification. *Neil v. Biggers*, 409 U.S. 188 (1972).… [A]s the analysis has evolved, a suggestive confrontation procedure, by itself, is not enough to require exclusion of the out-of-court identification; the confrontation evidence will be admissible if, despite its suggestive aspects, the out-of-court identification possesses certain features of reliability. *Manson v. Brathwaite*, 432 U.S. 98 (1977).

Grant v. State, 390 So. 2d 341, 343 (Fla. 1980), cert. denied, 451 U.S. 913 (1981) (citations omitted). When, despite these repeated warnings, law enforcement officers employ suggestive identification procedures, there is a two-step process courts must employ in determining whether to exclude the out-of-court and subsequent in-court identifications.

> Drawing on the general guidelines established in all of these cases, the Court revisited the issue of the admissibility of evidence of prior out-of-court identifications in *Neil v. Biggers*, 409 U.S. 188 (1972), and held that if, under the totality of the circumstances, the identification itself was reliable even though the confrontation procedure was suggestive, then evidence of the prior identification would be admissible. The

> identification is reliable if, when tested against a list of five factors set out by the Court, it is clear that the Witness's courtroom identification rests on an independent recollection of the initial encounter with the assailant, uninfluenced by the pretrial identification. *United States v. Crews*, 445 U.S. 463, 473 n.18 (1980).

***3** *State v. Guerra*, 455 So. 2d 1046, 1047 (Fla. 3d DCA 1984) (citations omitted).

"Reliability is the linchpin in determining the admissibility of identification testimony." *Manson*, 432 U.S. at 114. This Court must focus only on whether the Witness's initial opportunity to observe Tippins contains sufficient indicia of reliability to refute the presumption that the suggestive showup tainted the Witness's identification. Weaknesses in the Witness's out-of-court identification can be presented to the jury; such weaknesses go to the weight, not the admissibility, of the out-of-court identification.

"[W]hen the police have obtained a pretrial identification by means of an unnecessarily suggestive procedure [exclusion of in-court identification testimony may be required] unless it is found to be reliable and based solely upon the Witness's independent recollection of the offender at the time of the crime and uninfluenced by the intervening illegal confrontation." *Edwards v. State*, 538 So. 2d 440, 442 (Fla. 1989), and cited cases.… "The weaknesses in the eyewitness identifications … were argued to the jury, and … such weaknesses went to the weight not the admissibility of the … identification." *Perez v. State*, 539 So. 2d 600 (Fla. 3d DCA 1989).

Williams v. State, 545 So. 2d 302, 303 (Fla. 3d DCA 1989). The Third DCA's holding finds strong support from the Supreme Court.

> In essence what the *Stovall* due process right protects is an evidentiary interest.... It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart the 'integrity' of the adversary process. Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.

Manson v. Brathwaite, 97 S. Ct. 2243, 2252 n.14 (1977) (quoting *Clemons v. United States*, 408 F.2d 1230, 1251 (D.C. Cir. 1968)).

A. THE *BIGGERS* FACTORS.

Applying the *Biggers* factors, this Court finds that the Showup did not give rise to a substantial likelihood of misidentification. The Witness had sufficient opportunity to view the two men who robbed her. The Witness paid attention to the two men. She did not focus on specific details on the two men (such as facial hair, moles, or tattoos), but *Biggers* does not require that the Witness identify any particular details on a suspect. The Witness's initial description is accurate, albeit overly general to the point of being nearly worthless. In essence, the Witness described Tippins as a "light skinned black man in his 50s." More helpful was the fact she described him as the tall one, and described his co-Defendant as the short one with darker skin. These descriptions match Tippins and his co-Defendant. The Witness was certain of her identification at the Showup, which occurred less than two hours after the robbery.

B. EXTRINSIC EVIDENCE SHOWING RELIABILITY OF THE IDENTIFICATION.

***4** The State asks this Court to consider other evidence of Tippins' involvement in the robbery of the Witness in making its reliability finding. In particular, the State points to the Witness's identification of the car in which the robbers fled, and the discovery of currency in the car (inside the bank envelope) equal to the amount stolen from the Witness. If this extrinsic evidence of Tippin's involvement were properly admissible for purposes of deciding the Motion, this Court's task would be immeasurably easier and this Order far shorter. The extrinsic evidence clearly supports the conclusion that it is highly unlikely that the Witness has misidentified has Tippins. However, after an exhaustive review of the case law, this Court concludes that a trial court should not consider extrinsic evidence of a suspect's involvement in determining whether a Witness's out-of-court identification is rendered unreliable due to an unduly suggestive showup.

The State relies on *Lassiter v. State*, 858 So. 2d 1134 (Fla. 5th DCA 2003), where the Fifth DCA notes:

> Lassiter argues that the identification was tainted because Moore saw the van and the stolen items prior to the show-up, but the fact that Lassiter was stopped in the unique van described by Moore and the fact that the stolen items were found in the van indicate that Moore's identification was reliable.

Id., at 1136. It appears to this Court that *Lassiter* was engaging in a harmful error analysis when it discussed the extrinsic evidence of Lassiter's involvement in the crime. The Court so concludes for three reasons. First, other than *Lassiter* and the Mississippi intermediate appellate court decision to which *Lassiter* cites, *Hackett v. State*, 822 So. 2d 1078 (Miss. Ct. App. 2002), this Court can find no support for the notion that a trial court should evaluate the non-identification evidence in a case to determine whether the out-of-court identification was reliable. If *Lassiter* truly stands for the proposition that a trial court should look to extrinsic evidence, there should be a slew of appellate cases referring to a trial court's application of this factor. Yet, even in *Lassiter* and *Hackett* the trial court did not base its ruling on extrinsic evidence. It was the appellate courts, in reviewing the trial court's application of the *Biggers* factors, that discussed the extrinsic evidence. [1]

Second, the *Biggers* factors do not instruct a trial court to look at such extrinsic evidence, thus the Supreme Court appears implicitly to rule out such an analysis at the trial court level. Third, the Supreme Court expressly states that such extrinsic evidence plays no role in its analysis.

Although it plays no part in our analysis, all this assurance as to the reliability of the identification is hardly undermined by the facts that respondent was arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment.

Manson v. Brathwaite, 97 S. Ct. 2243, 2254 (1977) (emphasis added).

III. CONCLUSION.

There is no doubt that Tippins has raised many serious and valid concerns about the strength of the Witness's identification. A jury would be justified in declining to give much weight to the Witness's identification in light of the suggestive Showup and other factors discussed at the evidentiary hearing. However, that is not the test the United States Supreme Court has enunciated. Rather, a trial court should apply the *Biggers* factors and, unless there is a substantial likelihood of misidentification, it should allow the jury system to do its job and sift through the evidence.

Surely, we cannot say that under all the circumstances of this case there is "a very substantial likelihood of irreparable misidentification." Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

***5** *Id.*

DONE and ORDERED in Miami-Dade County, Florida this 9th day of May, 2014.

<<signature>>

Miguel M. de la O

Circuit Judge

Footnotes

1 The incongruity that an appellate court *can* consider this extrinsic evidence in reviewing the instant ruling for harmful error is not lost on this Court.

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