

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5037-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARCUS HUNT a/k/a
MARCUS J. HUNT,

Defendant-Appellant.

Submitted April 3, 2017 – Decided April 12, 2017

Before Judges Haas and Currier.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Indictment No.
13-03-0424.

Joseph E. Krakora, Public Defender, attorney
for appellant (Stephen W. Kirsch, Assistant
Deputy Public Defender, of counsel and on the
brief).

Gurbir S. Grewal, Bergen County Prosecutor,
attorney for respondent (Catherine A. Foddai,
Senior Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

A Bergen County grand jury charged defendant Marcus Hunt in
a six-count indictment with two counts of first-degree armed

robbery, N.J.S.A. 2C:15-1 (counts one and four); two counts of third-degree possession of a weapon, a metal wrench, for an unlawful purpose, N.J.S.A. 2C:39-4(d) (counts two and five); and two counts of fourth-degree unlawful possession of the metal wrench, N.J.S.A. 39:39-5(d) (counts three and six). After conducting an evidentiary hearing, the trial judge denied defendant's motion to suppress two out-of-court identifications and defendant's subsequent statement to the police.

Pursuant to a plea agreement reached by the parties with the input of the trial judge pursuant to Rule 3:9-3(c), defendant thereafter pled guilty to two amended counts of second-degree robbery (counts one and four). In accordance with the terms of the plea, the judge sentenced defendant to two concurrent five-year terms, subject to the 85% parole ineligibility provisions of the No Early Release Act ("NERA"), and three years of parole supervision upon his release. The judge also assessed appropriate fines and penalties, and dismissed the remaining counts of the indictment.

On appeal, defendant raises the following contentions:

POINT I

THE TRIAL COURT SHOULD HAVE SUPPRESSED THE SHOWUP IDENTIFICATIONS; ADDITIONALLY, THE MATTER SHOULD BE REMANDED FOR PROPER CONSIDERATION OF ALL THE RELEVANT FACTORS IN

DECIDING WHETHER TO SUPPRESS DEFENDANT'S
CONFESSION.

After reviewing the record in light of the contentions advanced on appeal, we affirm.

We derive the following facts from the two-day evidentiary hearing conducted by the trial judge. At approximately 2:20 p.m. on January 18, 2013, V.S.¹ was sitting in his truck that was parked in a parking lot across the street from a gas station. V.S. saw a man grab something from the gas station attendant and then run to a car with New Jersey license plates.

The man drove away in the car, and V.S. followed him in his truck. As he did so, V.S. called 9-1-1 and reported a possible robbery. V.S. was able to give the operator the make, model, and color of the car, together with a description of the clothing the suspect was wearing. As he was on the telephone, V.S. lost sight of the suspect and the operator advised him to go to his place of employment and wait for the police to contact him.²

A police dispatcher broadcasted the information V.S. provided to police units in the area, and Detectives Mark Delcarpio and John Moore, and Officers Franklin Bay and Travoun James were among

¹ In order to protect their privacy, we use initials to refer to the witness and the victim.

² The 9-1-1 tape was played at the evidentiary hearing and the State provided a copy of the transcript of the call.

the officers who responded to the call. Officer Bay observed the suspect, who was later identified as defendant, driving the car described by V.S., and he executed a motor vehicle stop. The police removed defendant from the car, and arrested and handcuffed him. Officer Bay then returned to the gas station to speak to the witnesses.

At the gas station, Officer Bay was joined by Officer James, and Detectives Delcarpio and Moore. By that time, V.S. had also returned to the gas station and he repeated the information he previously provided during his call to 9-1-1.

Detective Delcarpio drove V.S. to the scene of defendant's stop to conduct a showup. Before arriving at the scene, the detective advised V.S. that a potential suspect had been apprehended, and the police wanted to see if V.S could identify him. Detective Delcarpio and V.S. arrived at the scene only eight minutes after the alleged robbery. At that point, defendant was standing near other police officers while handcuffed. Detective Delcarpio parked about ten feet away from defendant and, from the backseat of the unmarked police car, V.S. stated "yes, that's him." Detective Delcarpio then transported V.S. to police headquarters.

The officers also interviewed the gas station attendant, E.J. E.J. told the police that he had been in the attendant's booth

when a man approached him. The man pressed either a pen or a pressure gauge against his stomach and said, "give me the money, give me the money or I'll fucking kill you," while trying to take something from his pocket. E.J. stated that he yelled for help and the man took off.³ E.J. also described the man's clothing.

At 2:45 p.m., just twenty-five minutes after the robbery, Officer Bay drove E.J. to the scene of defendant's stop to conduct a showup. Before driving E.J. to the scene, Officer Bay told him that they would drive by an individual to see if E.J. could identify him.

At the scene, Officer Bay stopped approximately ten feet away from where defendant was still standing in handcuffs in proximity to several police officers. E.J. stated, "If I had to swear under oath, that's the guy." Officer Bay then drove E.J. to police headquarters. The officer subsequently prepared a "Showup Identification Procedures Worksheet" documenting E.J.'s identification of defendant.⁴

³ Later that day, Detective Delcarpio retrieved video surveillance of the incident and he testified that it confirmed the accounts provided by E.J. and V.S.

⁴ Unlike Officer Bay, Detective Delcarpio did not prepare a worksheet concerning V.S.'s identification of defendant.

At headquarters, Detective Delcarpio took statements from E.J. at 3:11 p.m., and from V.S. at 3:27 p.m.⁵ E.J. stated that when he saw defendant at the showup, "I thought about it for a moment and said if I were under oath would I say he was the perp and I said to myself, yes I would say he was the perp under oath." E.J. told the detective that he was "98%" sure that defendant was the man who robbed him. In his statement, V.S. told Detective Delcarpio that he was "100% positive" that defendant was the same man he saw approach E.J. at the gas station.

The police also brought defendant to headquarters. Once he arrived, Officer James brought defendant to "the O.D. room to be processed." The officer recognized defendant as someone he had played basketball with in high school, but neither man acknowledged their previous acquaintance.

Defendant was placed in a chair and handcuffed to it. Officer James then "took [defendant's] information meaning [he] got his full name, his address, his phone number, . . . the last place he worked, just his general pedigree information." The officer used this information to prepare an arrest report. Officer James did not ask defendant any questions about the crime. The whole process took approximately ten to twelve minutes.

⁵ The State played the two video-recorded statements at the evidentiary hearing, and also provided transcripts of them.

After Officer James obtained defendant's pedigree information, another officer arrived to bring defendant to the detective bureau. After being advised of his Miranda⁶ rights, defendant gave a video-taped statement in which he confessed to robbing E.J. while using a metal wrench. Defendant also confessed to robbing another individual the day before, again using a metal wrench to threaten the victim.

Defendant did not testify at the evidentiary hearing and did not call any witnesses.

At the conclusion of the hearing, the trial judge denied defendant's motion to suppress the identifications provided by V.S. and E.J., and defendant's statement to the police concerning the robberies. In addressing the identifications, the judge noted the requirement set forth in Rule 3:11(a) to (c) that a record of the identification procedure be made. Here, the judge found that the police apprehended defendant almost immediately after V.S. made his 9-1-1 call. Within eight minutes, V.S. had identified defendant in the showup, with E.J. identifying him less than twenty minutes later. The State provided transcripts of the video-taped statements made by V.S. and E.J. approximately one hour after the robbery. Both witnesses provided information in their statements

⁶ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

detailing what they told the officers concerning their identification of defendant as the person who robbed E.J. Officer Bay also prepared a written identification report further documenting E.J.'s identification of defendant.

Under these circumstances, the trial judge found that the State met the requirements of Rule 3:11 and, therefore, the identifications were admissible. In so ruling, the judge also advised defendant that consistent with Rule 3:11(d), he would consider providing the jury with special instructions on the identification process if the matter proceeded to trial.

With regard to defendant's statement to the police, he did not dispute that the detectives advised him of his Miranda rights prior to speaking to him. However, defendant alleged that prior to speaking to the detectives, Officer James coerced him into confessing to the robberies by appealing to their prior friendship. The trial judge rejected this argument, finding that there was "absolutely no evidence" in the record to support defendant's bald assertion. This appeal followed.

On appeal, defendant argues that V.S. and E.J.'s identifications of him should have been suppressed because the State did not adequately document the showup procedure used to identify him as required by Rule 3:11. Defendant also asserts that the trial judge should have suppressed his confession because

Officer May failed to video- or audio-tape his conversation with defendant during which the officer asked for defendant's pedigree information. We disagree with both contentions.

Turning first to the identification issue, it is well settled that when reviewing a decision concerning a showup, "very considerable weight" is assigned to the trial judge's "findings at the hearing on the admissibility of identification evidence." State v. Adams, 194 N.J. 186, 203 (2008) (quoting State v. Farrow, 61 N.J. 434, 451 (1972)). The judge's findings should not be disturbed if they are supported by sufficient credible evidence in the record. Ibid. Review of the trial court's application of the law to the facts, however, is plenary. State v. Coles, 218 N.J. 322, 342 (2014).

In State v. Delgado, our Supreme Court addressed whether law enforcement officers had a duty "to record the details of out-of-court identification procedures that result in positive identifications and non-identifications as well as near misses and hits." Supra, 188 N.J. 48, 58 (2006). Recognizing that misidentification was "the single greatest cause of wrongful convictions in this country," id. at 60, the Court invoked its supervisory powers under Article VI, Section 2, Paragraph 3 of the New Jersey Constitution to require a written record as a condition to the admissibility of out-of-court identifications. Id. at 63.

The Court therefore directed law enforcement officers to make "a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results." Ibid. The Court explained that a detailed summary of the identification should be prepared whenever feasible and that electronic recordation was advisable, but not mandated. Ibid.

The Court "refer[red] to the Criminal Practice Committee the preparation of a rule for [its] consideration that incorporates the recording requirements for out-of-court identifications." Id. at 64. On September 4, 2012, the Supreme Court adopted Rule 3:11, entitled "Record of an Out-of-Court Identification Procedure." In pertinent part, the Rule states that "[a]n out-of-court identification resulting from a . . . showup identification procedure . . . conducted by a law enforcement officer shall not be admissible unless a record of the identification procedure is made." R. 3:11(a). "If the record that is prepared is lacking in important details as to what occurred at the out-of-court identification procedure," the Rule further provides that "the court may . . . declare the identification admissible, redact portions of the identification testimony," or "fashion an appropriate jury charge to be used in evaluating the reliability of the identification." R. 3:11(d).

Applying these principles, we agree with the trial judge that the State complied with the dictates of Rule 3:11(a). The robbery was reported at about 2:20 p.m., the showups were conducted within eight and twenty-five minutes, respectively, and the statements of E.J. and V.S. were taken within sixty minutes of the robbery. The State provided defendant with these statements, which included their contemporaneous expressions of their strong confidence in their identifications.

In addition, Officer Bay completed a written Showup Identification Procedures Worksheet containing information about E.J.'s identification of defendant. While Detective Delcarpio did not prepare a similar worksheet following V.S.'s identification of defendant at the showup, the trial judge properly determined that this omission could be addressed at trial by giving the jury "an appropriate jury charge to be used in evaluating the reliability of the identification" as specifically permitted by Rule 3:11(d). Under these circumstances, we discern no basis for disturbing the judge's reasoned determination denying defendant's motion to suppress the identifications.

Defendant's contention concerning the admissibility of his confession also lacks merit. Our review of a trial judge's decision on a motion to suppress is limited. State v. Robinson, 200 N.J. 1, 15 (2009). In reviewing a motion to suppress evidence,

we must uphold the judge's factual findings, "so long as those findings are supported by sufficient credible evidence in the record." State v. Rockford, 213 N.J. 424, 440 (2013) (quoting Robinson, supra, 200 N.J. at 15). Additionally, we defer to a trial judge's findings that are "substantially influenced by [the trial judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Ibid. (alteration in original) (quoting Robinson, supra, 200 N.J. at 15). We do not, however, defer to a trial judge's legal conclusions, which we review de novo. Ibid.

Applying this standard, we agree with the trial judge's finding that there is "absolutely no evidence" in the record to support defendant's claim that Officer James coerced him into confessing to the two robberies. Indeed, Officer James testified without contradiction that his discussion with defendant was strictly limited to obtaining his pedigree information. Therefore, the officer was not required to give Miranda warnings to defendant prior to this brief interview. See State v. M.L., 253 N.J. Super. 13, 21 (App. Div. 1991) (noting that a police officer is not required to provide a defendant with Miranda warnings before seeking pedigree information).

Contrary to defendant's contention, there was also no requirement that Officer May record his interview with defendant.

Rule 3:17(b)(iii) specifically states that electronic recording need not occur when "a statement is made in response to questioning that is routinely asked during the processing of the arrest of the suspect[.]" That was clearly the case here.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION