SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0187-17T4

STATE OF NEW JERSEY,

    Plaintiff-Appellant,

v.

STEBBIN DREW,

    Defendant-Respondent,

and

JAMAR T. JOHNSON,

    Defendant.

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Argued February 7, 2018 – Decided May 24, 2018

Before Judges Alvarez and Nugent.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
16-02-0283.

Erin M. Campbell, Assistant Prosecutor, argued
the cause for appellant (Esther Suarez, Hudson
County Prosecutor, attorney; Erin M. Campbell,
of counsel and on the briefs; Adam J. Salzer,
on the brief).

Janet Costello argued the cause for
respondent.

PER CURIAM

By leave granted, the State appeals Judge Mark J. Nelson's June 29, 2017 order suppressing the out-of-court identification of defendant Stebbin Drew. Judge Nelson properly applied the State v. Henderson[1] factors in reaching his decision. We affirm.

Defendant and his codefendant Jamar T. Johnson were charged in a sixteen-count indictment with the first-degree armed robberies of four separate victims on four separate dates in the latter part of July 2015. See N.J.S.A. 2C:15-1. Christopher Maza, the victim relevant to this appeal, was robbed on July 20, 2015. The items taken from Maza's backpack included a laptop and a cell phone.

We summarize the facts from the testimony at the suppression hearing and two video recordings of police interviews with Maza. Nine days after the incident, on July 29, Jersey City Police asked Maza to appear at the South Precinct station in order to identify items retrieved from a pawn shop that officers believed belonged to him.

As Maza walked into the station, he saw defendant's picture on a computer in a "NY/NJ HIDTA [High Intensity Drug Traffic Area] Mugshot Profile." An independent detective who had no knowledge

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[1] 208 N.J. 208 (2011).

of the investigation showed Maza a photo array; Maza was unable to make a positive identification.

After the unsuccessful photo array, Detective Michael Post spoke with Maza while on video camera. Post told Maza the identification attempt had "turned out to be a negative—as far as that photo display goes." Post asked Maza again to describe the person who robbed him and the belongings taken from him.

Maza described the robbery and said the assailants had a black gun with a long silver barrel. On the video, Maza does not appear to be African-American. He stated the suspect was an African-American man, approximately five foot ten, with shoulder-length dreads, a zip-up hoodie, and gray pants. When asked, he added the robber may have had "a little" facial hair.

Maza listed the stolen items, and Post told Maza the police had a suspect. Maza identified the recovered items on the table between him and the officer. Post said they had recovered the laptop from a pawn shop where the suspect had been attempting to sell it. He added they would charge the person who attempted to pawn the computer with receiving stolen property, but because the identification had not gone as officers hoped, they would be unable to charge anyone with robbery.

As Post escorted Maza from the interview room, he took Maza to his desk in order to "finalize" some paperwork. Post's computer

was open, and he had inadvertently left a HIDTA photograph of defendant up on the screen. When Maza saw it, he said "that's him right there." Post testified the HIDTA photos were more recent than the ones included in the six-pack array.

Post returned to the interview room with Maza and videotaped that second discussion. Initially, Post asked Maza to explain why he could not identify anyone from the photo array. The victim responded when he saw one particular photograph, he "had a feeling" but was uncertain. Post responded "at that time, you couldn't be 100% sure, so you held off on saying yes." Post repeated for the camera he had been in the process of turning over the laptop to Maza when Maza noticed the mugshot on the computer screen.

Maza volunteered when he entered the precinct earlier in the day, he had seen that same picture, and assumed it would be one of the photos Post would show him. Post said the photo was of an individual who had multiple "akas" and was "a suspect" who "was also involved at the pawn shop selling your goods that he took from you." Post also told Maza because he "happened to see that" photograph, they would charge defendant with robbery. Post reiterated Maza's viewing of the HIDTA mugshot was "random."

During the suppression hearing, Post testified unequivocally he did not know why the HIDTA photograph was on his computer screen

A-0187-17T4

and he did not purposely display it there. He did not intend for Maza to identify the photograph.

The trial judge found the detective's testimony credible and did not believe the detective acted in bad faith. Regardless, he determined the incident violated the <u>Henderson</u> system variables. 208 N.J. at 248. After the failed photo array, the detective recorded his conversation with Maza, informing the victim police did "have a suspect." Additionally, showing Maza the recovered items was a form of feedback. The judge quoted from his notes of the first videotaped interview, "to the best of my memory, this is how I wrote it down, it was recovered at a pawn shop with the person who's going to be charged with receiving stolen property." The detective also informed Maza they could not charge anyone with robbery because he was not able to make a positive identification. Only after the suggestive discussion did the detective and victim walk towards the detective's desk. At that point, Maza said he was 100% confident defendant was the perpetrator.

The judge concluded defendant had met his burden of proof pursuant to <u>Henderson</u>. The detective informed Maza the person who was attempting to pawn his things was either arrested or about to be arrested. The perpetrator used a weapon during the robbery, adding to the victim's stress. He also noted defendant and Maza

appeared to be different races, hence race bias may also have distorted the identification.

The prosecutor argued to the judge that so long as the victim viewed the photograph inadvertently and it was not staged in bad faith, the out-of-court identification should not be suppressed. The judge observed given both the estimator and system variables, there was simply too much feedback before the victim made the identification and too much possibility for misidentification. For that reason, he suppressed the identification.

The State argues the judge erred as follows:

> THE TRIAL COURT INCORRECTLY SUPPRESSED THE OUT OF COURT IDENTIFICATION OF STEBBIN DREW.
>
> a.   The trial court incorrectly granted an evidentiary hearing
>
> b.   The trial court incorrectly applied Henderson in its ruling suppressing the out-of-court identification
>
> c.   Assuming arguendo that Henderson is applicable to the case at bar, the trial court erred in finding system and estimator variables

I.

"[A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243 (2007)

(citation omitted). The court "should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Johnson, 42 N.J. 146, 161 (1964).

The trial court's findings should only be disturbed if they are so clearly mistaken "that the interests of justice demand intervention and correction." Id. at 162. Only in those circumstances should an appellate court "appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." Ibid. However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

In order to demonstrate he or she is entitled to a Wade[2] hearing, a defendant must proffer some evidence of impermissible suggestiveness. Henderson, 208 N.J. at 238. That evidence may be linked to system variables, in other words, those factors within the control of the criminal justice system. Id. at 215; 288-89.

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[2] United States v. Wade, 388 U.S. 218 (1967).

This is in contrast to estimator variables, which are factors over which the legal system has no control. Ibid.

In order to decide whether a hearing is warranted, a court must first assess whether the identification procedures may have resulted in a mistaken identification. Id. at 288. Where such a finding is made, the court must then weigh whether the procedure resulted in a "very substantial likelihood of irreparable misidentification." State v. Micelli, 215 N.J. 284, 287 (2013) (citation omitted).

The burden then shifts to the State to prove "by clear and convincing evidence that the identification[] . . . had a source independent of the police-conducted identification procedures." State v. Madison, 109 N.J. 223, 245 (1988) (citing Wade, 388 U.S. at 240). However, "the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification." Henderson, 208 N.J. at 289.

In this case, the Wade hearing was clearly necessary. The system variables require an administrator to provide neutral instructions and advise that the suspect may not be present in the lineup or the photographic array, and that the eyewitness should not feel he or she must make an identification. Henderson, 208 N.J. at 290.

A-0187-17T4

Post informed Maza if he was unable to identify anyone, they would not charge anyone with robbery. That statement alone, although stating the obvious, puts pressure on a victim. Furthermore, as the trial judge observed:

> After [Maza] didn't identify someone, [he] happened to be talking to a police officer and [] see[s] a photo of the guy, the guy being the one who committed the crime on the detective's computer screen so there's clearly . . . some . . . suggestiveness . . .

Henderson states unequivocally "when defendants can show some evidence of suggestiveness, all relevant system and estimator variables should be explored at pretrial hearings." Id. at 215. The case provides an example that offers clear guidance: "assume that a defendant claims an administrator confirmed an eyewitness' identification by telling the witness she did a 'good job.' That proffer would warrant a Wade hearing." Id. at 291. The judge found defendant provided such evidence of suggestiveness when Post said to Maza, after he identified the computer photograph, the person he "happened to see" would be charged with robbery. The statement has the same effect as in the Court's hypothetical. Ibid.

The State did not object to the court conducting the motion hearing, an acknowledgment that the identification process was suggestive. The trial judge correctly applied the Henderson

principles in determining defendant met his threshold burden and in conducting the hearing.

<center>II.</center>

The State argues the out-of-court identification should not be suppressed because it was inadvertent. That argument overlooks the fact that the Henderson analysis was adopted not only to prevent police misconduct. As the Court said, ". . . a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect." Id. at 249. In other words, Henderson is not just directed at deliberate improper police behavior, but also conduct which increases the risk of misidentification.

The cases cited by the State in support of its argument are all significantly factually dissimilar and, therefore, inapposite. In State v. Mance, 300 N.J. Super. 37 (App. Div. 1997), for example, a corrections officer, who had been assaulted during a prison riot, was able to identify two of his attackers when seven prisoners were inadvertently led past him. Id. at 57-58. In Mance, the identification process was not suggestive because it involved seven prisoners. This case involved only one photograph, shown to the victim two times, and a different photograph that was shown once.

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In addition, the State cites to cases from other jurisdictions to support the assertion that an inadvertently suggestive identification process does not warrant suppression. If an identification procedure violates the Henderson system and estimator variables, the identification should be suppressed, regardless of the good faith of the officers, given the unequivocal language of the opinion.

The State also draws to our attention State v. Chen, 208 N.J. 307, 327 (2011), regarding accidental or spontaneous identification. But in Chen, there was no police action. Here, the identification procedure was administered by police. The argument that inadvertence negates suggestibility lacks merit.

III.

The State also contends the trial court erred in its evaluation of the system and estimator variables. We disagree.

The judge found the feedback Maza was given was most consequential. After Maza was unable to select a photograph from the array, Post told Maza there was a suspect in custody who they could only charge with receiving stolen property. Following Maza's identification of defendant's photo on the computer screen, Post said now that Maza identified someone, they could charge this person with numerous aliases who was found in possession of the property. Studies have found feedback, before and after an

identification, runs the risk of affecting memory. Henderson, 208
N.J. at 253 (citations omitted).

Although the trial judge largely focused on that factor, he
took into account the totality of the circumstances viewed through
the prism of system and estimator variables. These circumstances
included estimator variables such as the stress of an armed
robbery, weapons focus, and cross-racial identification.

Henderson also instructs law enforcement is to "attempt to
shield witnesses from viewing suspects or fillers more than once."
Id. at 256. In this case, Maza saw a photograph of defendant as
he entered the station, saw a different photograph of him in the
array, and finally, saw defendant a third time when his photograph
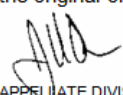was the only picture on the officer's computer screen.

Memory decay, which is the effect of a time lapse between the
crime and identification, is another factor that can be taken into
account. Id. at 267; 292. Although inadvertent, the
identification here resembled a showup——which studies have found
are inherently suggestive. Id. at 260 (citations omitted). In
sanctioning the continued use of showups, however, the Henderson
Court said "the record casts doubt on the reliability of showups
conducted more than two hours after an event, which present a
heightened risk of misidentification." Id. at 261. In this case,

the identification process, unintentionally converted to a showup, took place nine days after the incident.

"[I]f after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence." Id. at 289. The trial judge did not err in concluding the identification procedure, conducted more than a week after the armed robbery, violated Henderson principles, was too suggestive, and required suppression.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION

A-0187-17T4