[Cite as *State v. Robinson*, 2009-Ohio-4937.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-02-004
	:	O P I N I O N
- vs -		9/21/2009
	:	
DAVID ROBINSON, JR.,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 08CRI00028

David B. Bender, Fayette County Prosecuting Attorney, 1st Floor, Courthouse, 110 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

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RINGLAND, J.

{¶1} On February 4, 2008, Fayette County Sheriff Deputy Todd Oesterle responded to a report of a "strong-arm" robbery that had just occurred at the Flying J truck stop on State Route 41 in Jefferson Township, Fayette County, Ohio. Upon Deputy Oesterle's arrival, Joseph Toth reported that he had been awakened in his truck by an unknown individual who asked him to come to the back of Toth's vehicle to look at something. When Toth did so, he

was jumped by five persons who took $3,000 from his pocket. Wayne Jones told Deputy Oesterle that he saw one of the individuals who had been involved in the robbery, later identified as David Robinson, run across the lot after the incident occurred and climb into a green van that left as soon as Robinson got inside.

{¶2} About a half hour later, Deputy Oesterle saw a van that matched the one described by Jones and advised Deputy Michael Wears that the vehicle was heading towards Wears' location. The van turned into an Arby's parking lot at State Route 41 and Carr Road, approximately one-half mile from the Flying J truck stop. Both deputies pulled into the parking lot and approached Robinson, asking him for his identification and what he was doing in the area. Robinson replied that he was selling CB antennas to truck drivers so that he could get money to return to Cincinnati. Deputy Wears saw that the van Robinson was driving matched "to a T" Jones' description of the van in which the perpetrator had driven away.

{¶3} The deputies brought Toth and Jones to the Arby's parking lot to identify the van. Toth and Jones immediately identified the van as the one involved in the robbery, and without any prompting from the deputies, identified Robinson as one of the individuals who had robbed Toth and then ran across the lot and jumped into the van. The identifications occurred approximately 25 minutes after the robbery had been reported.

{¶4} On February 11, 2008, Robinson was indicted on one count each of robbery, a felony of the third degree, in violation of R.C. 2911.02(A)(3); complicity to theft, a felony of the fifth degree, in violation of R.C. 2923.03(A)(2) and 2913.02(A)(1); and attempted theft, a misdemeanor of the second degree, in violation of R.C. 2923.02(A) and 2913.02(A)(1).

{¶5} In February 2009, Robinson moved to suppress the out-of-court identification of him as the perpetrator of the alleged offenses, which the trial court overruled. Robinson then pled no contest to the charges in the indictment in exchange for the state's agreement that

Robinson would be sentenced to only one-year in prison for those offenses. The trial court accepted Robinson's no contest plea, found him guilty as charged, and sentenced him to an aggregate one-year prison term for the offenses on which he had been convicted.

{¶6} Robinson now appeals, assigning the following as error:

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT OVERRULED APPELLANT'S MOTION TO SUPPRESS EVIDENCE."

{¶9} Robinson argues the trial court erred when it denied his motion to suppress evidence of his on-scene identification by Toth and Jones because the identification procedure used by police to identify him as the perpetrator was unreliable and created a substantial likelihood of irreparable misidentification.

{¶10} "Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran,* Preble App. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. Id. Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis,* Butler App. No. CA2005-03-074, 2005-Ohio-6038. 'An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard.' *Cochran* at ¶ 12." *State v. Acord*, Fayette App. No. CA2009-01-001, 2009-Ohio-4263, ¶11.

{¶11} When a witness has been confronted with a suspect before trial, due process requires a court to suppress the witness' identification of the suspect if (1) the confrontation was unnecessarily suggestive of the suspect's guilt, *and* (2) the identification was unreliable under the totality of the circumstances. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524,

¶19. The factors to be considered in making this determination include "'(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, and (5) the length of time between the sighting and the confrontation.'" Id., quoting *State v. Broom* (1988), 40 Ohio St.3d 277, 284, citing *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243.

{¶12} "'To warrant suppression of identification testimony, appellant bears the burden of establishing that the identification procedure was 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' *Neil v. Biggers* (1972), 409 U.S. 188, 198, 93 S.Ct. 375. Generally, a confrontation is unnecessarily or unduly suggestive when the witness has been shown only one subject. *Manson v. Brathwaite* (1977), 432 U.S. 98, 116, 97 S.Ct. 2243. The admission of evidence of a show up without more, however, does not violate due process, so long as the identification possesses sufficient aspects of reliability. *Manson* at 115; *State v. Lamb,* Butler App. Nos. CA2002-07-171 and CA2002-08-192, 2003-Ohio-3870. Furthermore, under certain circumstances, the viewing of a subject in a one-man show up near the time of the alleged act tends to insure accuracy. *State v. Madison* (1980), 64 Ohio St.2d 322, 332." *State v. Brown*, Butler App. No. CA2006-10-247, 2007-Ohio-7070, ¶14.

{¶13} A review of the factors set forth in *Manson*, *Broom* and *Gross* leads us to conclude that there was not "a very substantial likelihood of irreparable misidentification" in this case. *Gross*, 2002-Ohio-5524 at ¶25. Both of the witnesses in question, Toth and Jones, (1) had a good view of the criminal at the time of the crime; (2) identified Robinson, without hesitation, as the criminal a short time after the crime was committed; and (3) identified Robinson's distinctive van, without hesitation, as the one in which the perpetrator fled. See id., and *Brown*, citing *Madison*. Therefore, the trial court did not err by overruling

Robinson's motion to suppress the testimony of the state's identification witnesses.

{¶14} Consequently, Robinson's first assignment of error is overruled.

{¶15} Assignment of Error No. 2:

{¶16} "THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT CONVICTED APPELLANT OF COMPLICITY TO COMMIT THEFT OR ATTEMPTED THEFT, VIOLATING APPELLANT'S RIGHTS AGAINST DOUBLE JEOPARDY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶17} Robinson argues the trial court committed plain error when it convicted him of complicity to theft and attempted theft because those crimes are lesser included offenses of robbery, and therefore he could not be convicted and sentenced for both the greater offense and the lesser included ones. We disagree.

{¶18} Robinson was sentenced to an aggregate, one-year prison term on his convictions for robbery, complicity to theft and attempted theft pursuant to the terms of an agreed sentence arrived at between his defense counsel and the prosecutor. R.C. 2953.08(D)(1) provides that a sentence imposed upon a defendant is not subject to appellate review if the sentence (1) is authorized by law, (2) has been recommended jointly by the defendant and the prosecution in the case, and (3) is imposed by a sentencing judge. See *State v. Miniard*, Butler App. No. CA2006-03-074, 2007-Ohio-458, ¶9. See, also, *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶24; *State v Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶25.

{¶19} A sentence is "authorized by law" for purposes of R.C. 2953.08(D)(1) when "the prison term imposed is not greater than the maximum term prescribed by statute for the offense." *Miniard* at ¶10. "[I]n enacting R.C. 2953.08(D) '[t]he General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties

agreed that the sentence is appropriate.'" Id. at ¶11, quoting *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶25.

{¶20} In this case, the sentences imposed against Robinson for robbery (one year in prison), complicity to theft (six months in prison) and attempted theft (90 days in jail), which he was ordered to serve concurrently, were not greater than the maximum term prescribed by statute for those offenses. See R.C. 2929.14(A)(3) and (5) and 2929.24(A)(2). Moreover, Robinson's sentence was agreed to by his defense counsel and the prosecutor, and was imposed by a sentencing judge. Thus, Robinson is prohibited under R.C. 2953.08(D)(1) from challenging his agreed sentence. *Miniard*, 2007-Ohio-458 at ¶9 and ¶11.

{¶21} Robinson's second assignment of error is overruled.

{¶22} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

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