

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-10-1122

Appellee

Trial Court No. CR0200903314

v.

Dontae Henderson

**DECISION AND JUDGMENT**

Appellant

Decided: March 30, 2012

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Michael J. Loisel, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

\* \* \* \* \*

**YARBROUGH, J.**

{¶ 1} Defendant-appellant, Dontae Henderson, appeals his conviction for felonious assault with a firearm specification following a two-day jury trial. The Lucas County Court of Common Pleas sentenced him to an aggregate prison term of five years and entered judgment thereon on March 29, 2010. This appeal followed.

{¶ 2} Henderson assigns but one error for our review, which states:

Mr. Henderson's due process rights were violated when the trial court denied Mr. Henderson's motion to suppress an out-of-court identification in which law-enforcement used a single-photo identification procedure.

### **I. Standard of Review**

{¶ 3} On appeal, a challenged suppression ruling presents mixed questions of law and fact. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 50. We must accept the trial court's factual findings if supported by competent and credible evidence. *Id.* In taking those facts as true, however, we afford no deference to the court's legal conclusions. We review those conclusions de novo to assess whether the court's ruling comported with the applicable legal standard. *Id.* citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (1977).

### **II. Suppression Hearing**

{¶ 4} A hearing on Henderson's motion to suppress was held on February 1, 2010. Testimony from the victim, Troy Moody, and Toledo police detective Kermit Quinn developed the irrefragable facts relevant to the assigned error.

{¶ 5} Among his other tasks on November 4, 2009, Moody was walking his dog in front of his house on Woodley Avenue. It was almost high noon. The day was sunny but very cold. Moody was wearing Carhartt overalls under a Carhartt coat. A car passed him on Woodley Avenue travelling in the opposite direction. The driver yelled out a greeting.

Moody responded and the car turned around and came back. Moody recognized the driver from school. The car pulled alongside Moody, still dog-walking, and coasted with him as the two men talked. Moody described their conversation as friendly. Inside the car were three other men. When the dog stopped, Moody stopped walking and the car stopped curbside where the men kept talking. It was a very pleasant chat that lasted about five minutes. The other men sat silently and stared. When the pleasantries with the driver ended, Moody turned away and started his dog back to the house.

{¶ 6} The record next reveals this bit of cautionary drama involving dog and man amid the urban milieu:

{¶ 7} Someone yelled, “Hey Troy, come here bro’.” Moody turned around and saw that the man seated behind the driver had rolled down his window. He recognized the man as “Dontae” or “Little Tae Woods.”

{¶ 8} From the backseat, Dontae asked Moody, “What’s this rumor going around saying you’re gay?” To this unexpected insinuation, Moody testily replied, “Ain’t no gay shit over here, my nigger.”

{¶ 9} This quip generated some discernible facial-twitching on Dontae, so Moody added: “You heard me. I offend you? I make you mad?”

{¶ 10} Dontae, aroused now by these edged retorts, got out of the car and came over to Moody. He stopped three feet away and lifted up his shirt. This exposed a “gat”—“a black gun”—tucked inside the waistband of his pants.

{¶ 11} Dontae said, “Bro’ I’ll pop you.”

{¶ 12} Moody took a step back and said, “You don’t want to do that.”

{¶ 13} “Do what?” said Dontae, drawing the gun out. He pointed the gun at Moody’s chest and said, “Nig, give me your coat.”

{¶ 14} Disinclined to surrender his Carhartt, Moody called Dontae “stupid as fuck” for demanding it, then asked: “You going [to] shoot me in broad daylight, I got my dog right here?”

{¶ 15} “Man, fuck you and your dog,” Dontae said. Then he fired a shot at the dog but missed. Then he aimed the gun back at Moody and fired again. The bullet struck Moody’s leg, a sharp pain dropping him to the ground. Inside the pant-leg of his Carhartt he could feel the incipient bleeding. At the suppression hearing, Moody reflected with existential understatement: “He ain’t hit the dog but he hit me.”

{¶ 16} Dontae looked around quickly, then got back in the car, and the car sped away down the street. Troy Moody eased to his feet. Back to his house he went, stepping stiffly, the dog walking ahead, unhurt, and after limping inside he ensconced the dog. Then he sat down on a chair, felt his leg wet, pulled up the pant-leg, saw the wound bleeding, and “blood all over my leg.” Within minutes he felt “woozy.” Probably the dog felt lucky, but no one asked. Relatives drove Moody to the hospital. Along the way he alerted Toledo police.

{¶ 17} In the emergency room Moody was interviewed by a Toledo patrol officer and Detective Quinn, the assigned investigator. Moody described the shooter as a young black male, about six-feet tall, telling Quinn he recognized the man by the sobriquets

“Dontae” and “Little Tae Woods.” He knew him from the same neighborhood on Coventry Avenue where they both had lived as kids. He told Quinn: “I also know him because he is my friend on My Space,” an internet-based social networking service. A picture of Dontae, which Moody had seen, was also posted there. At the hospital, however, no pictures were shown to Moody. Quinn had none at that point.

{¶ 18} Two days later Quinn met with Moody again at his house. Moody retold the story of the shooting. He also indicated that “he had gone to school” with Dontae and “had seen him in the neighborhood” and “would be able to identify him if I ever had a picture.” Before this meeting, Quinn had obtained a school picture of Henderson taken November 10, 2004. Quinn himself immediately recognized Henderson from his investigation of a separate incident in which the same suspect had used the street names, “Dontae” “Tae Tae,” and “Little Tae Woods.”

{¶ 19} Before showing Moody the picture, Quinn told him, “you may or may not know this suspect.” Moody testified that when Quinn handed him Dontae’s picture, “I laughed [and said] ‘yeah that’s him,’ I automatically knew him.” Quinn then had Moody sign his name to the picture and date it. At the suppression hearing, Moody was again shown the 2004 picture. He testified that Henderson, who was present in the courtroom, was the same person who shot him and “looks just like he looked there. \* \* \* [S]ame person, same picture.”

{¶ 20} In denying Henderson’s motion, the trial court ruled that the single-photo procedure was not unduly suggestive nor was Moody’s identification unreliable.

### III. Analysis

#### A.

{¶ 21} In the sole assigned error, counsel argues that Quinn’s use of “a single photo of Mr. Henderson accompanied by no other photos” was unnecessarily suggestive and “increase[d] the likelihood of a misidentification.” He urges that “due process [requires] more than a single-photo identification.” He insists that without a detailed description of the suspect’s “hairstyle, hair length, height, weight, clothing, [and other] distinguishing characteristics,” the single photo used here was “impermissibly suggestive.”

{¶ 22} The standards for the admissibility of pretrial identification evidence are well-established. Generally, they apply to all identification procedures, whether the methods involve line-ups, show-ups, street-side “cold stands” or photographs—and if the latter, whether using a single picture or a multiple photo array. Reviewing courts carefully apply what is typically described as a two-stage analysis. *See, e.g., State v. Wills*, 120 Ohio App.3d 320, 324, 697 N.E.2d 1072 (8th Dist.1997).

{¶ 23} First, the defendant has the burden of showing that a particular identification procedure was impermissibly suggestive. *State v. Heflin*, 6th Dist. No. L-10-1268, 2011-Ohio-4134, ¶ 17. If the procedure used was not unduly suggestive, any remaining questions go to the weight to be given the identification testimony, not its admissibility, and no further inquiry is required. *Wills* at 324-325. Second, even if the procedure was suggestive, the question for the court is whether, under the totality of the

circumstances, the identification was *reliable*—in that there was not “a very substantial likelihood of irreparable misidentification.” *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). “An unnecessarily suggestive identification process does not violate due process [if] such identification possesses sufficient indicia of reliability.” *State v. Parker*, 53 Ohio St.3d 82, 87, 558 N.E.2d 1164 (1990).

{¶ 24} The issue, in other words, is whether the victim’s identification, when viewed in totality, was reliable despite suggestiveness in the procedure. While the use of a single photograph does convey suggestiveness, that fact alone is not conclusive on the issue of whether it created a precipitous risk of irreparable misidentification. *State v. Barnett*, 67 Ohio App.3d 760, 588 N.E.2d 887 (4th Dist.1990) (“[C]ourts have been reluctant to hold that \* \* \* presentation of a single photograph of the defendant to a witness violates due process when \* \* \*[other] external factors ‘prove’ the accuracy of the identification.” (Emphasis sic.) *Id.* at 768.

## **B.**

{¶ 25} Henderson’s contentions are without merit, for the premise on which they are so tenuously perched is spurious. Where the perpetrator is someone already known to the victim before the crime—whether through some antecedent relationship or merely by face and name—the absence of a litany of physically identifying characteristics is

necessarily less critical.<sup>1</sup> In turn, the later use of a single-photo procedure “does not taint the original identification” where other factors *independent of that procedure* impart a high degree of reliability. *Parker* at 87.

{¶ 26} In emphasizing that “reliability is the linchpin in determining the admissibility of [identification] evidence,” the Ohio Supreme Court in *Parker* held that “sufficient indicia of reliability” will always be strongest in those cases “where a witness has already *identified a suspect* in circumstances which are not so impermissibly suggestive. \* \* \* [A] reliable identification does not become unreliable because of a subsequent identification which is impermissibly suggestive.” (Emphasis added; internal citations omitted.) *Id.* There, the court found that the victim’s “voice identification of [the] defendant was based on *her previous contacts with him*, the last of which was two days before the crime.” (Emphasis added.) *Id.*

{¶ 27} In *State v. Huff*, 145 Ohio App.3d 555, 564-565, 763 N.E.2d 695 (2001), the First Appellate District rejected an argument against the use of a single-photograph that is identical to the one Henderson makes here. In *Huff*, the shooting victims could only identify the shooter by his first name, “Cleavon.” They were uncertain of his last name, although some speculated it might be “Huff.” *Id.* at 559. Later, the investigating detective located a photograph of a “Cleavon Huff.” He met again with the victims and,

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<sup>1</sup> That shortly after the shooting Moody also gave Quinn an accurate, though limited, physical description of his assailant is a point that Henderson’s brief conspicuously ignores. A struthious approach to inconvenient facts is not likely to enhance the credibility of one’s argument.



after separating them, showed each one the photograph. All the victims positively identified Huff as the shooter. *Id.* Given these facts, the First District stated:

Even if we assume, for the sake of argument, that the one-  
photograph procedure was unduly suggestive, we conclude that the  
identification of Huff was reliable. \* \* \* *Huff had been identified by name  
as someone the victims knew before they had been shown the photograph.  
Thus, the victims identified Huff on a basis independent from the  
photograph. The photograph was not used to identify an unknown attacker,  
but was used merely to confirm Huff's true identity.* \* \* \* A strong showing  
of reliability can arise from the fact that a victim knew the perpetrator of a  
crime before the crime was committed. *Several of the victims testified that  
they had seen or knew Huff from the neighborhood before the shooting, and  
that they had witnessed him fighting before the shooting.*" (Emphasis  
added; internal citations omitted.) *Id.* at 564-565.<sup>2</sup>

{¶ 28} The same is true here. All pretrial identification practices that use  
photographs will carry some suggestiveness—in that the crime victim knows, or at least  
is aware, that he is being shown one or more photos by police for a reason. Yet, even

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<sup>2</sup> In *State v. Green*, 2d Dist. No. 19224, 2003-Ohio-5744, the Second Appellate District dismissed a similar challenge to a photographic identification. There, the perpetrator had robbed and burglarized a restaurant. The Second District stated: "[T]he record reflects that [the victim-employee] McCleskey knew [Green's] name, had seen him in the area, and even had spoken with him before the robbery. Unfortunately for Green, the fact that McCleskey knew him prior to the crime *only enhances the reliability of her photo identification.*" (Emphasis added.) *Id.* at ¶ 7. See also *State v. Barnett, supra*, at 768.

with single-photo identifications, “suggestive” does not necessarily mean “impermissibly suggestive,” if other facts exist from which reliability can be inferred. *Parker, Huff*. In our view, the strongest fact is the victim’s familiarity with the culprit *before* he offended. Such familiarity, whether complete or partial, may have accrued from a chance meeting, a previous relationship at work, school or other social context, or simply from having resided in the same neighborhood.

{¶ 29} Here, Quinn took the predicate information Moody furnished at the hospital to obtain Henderson’s picture, albeit one that was five years old. Two days later, Moody’s review of that picture did not produce a cold, first-time identification of someone otherwise unknown. Rather, as Quinn perspicuously noted at the hearing, the picture was “*to confirm* the identity of the suspect.” That confirmation was immediate and positive and, given the circumstances, highly reliable. Henderson has shown nothing in Quinn’s use or handling of the picture that even remotely evinces undue suggestiveness or detracts from the reliability of the identification. At best, the picture’s age would go to weight, not admissibility. *Heflin* at ¶ 17.

### C.

{¶ 30} Beyond Moody’s familiarity with Henderson, other salient facts decidedly indicate reliability.<sup>3</sup> These are: Moody’s visual opportunity to see Henderson, in that the

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<sup>3</sup> These facts relate to applying the so-called “*Biggers* factors” to gauge “the likelihood of misidentification.” *See Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). “Factors to be considered \* \* \* include: (1) the victim’s opportunity to view the defendant during the crime, (2) the victim’s degree of attention, (3) the accuracy of

shooting occurred in daylight; their physical proximity, in that only three-feet separated the men; the temporal elements, in that “15 or 20 minutes” elapsed between Moody’s initial conversation with the driver and the shooting, while only a brief time elapsed between the shooting and Quinn’s receipt of Henderson’s first name, known street aliases and partial physical description; and finally, Moody’s own testimony conveys his acute attentiveness as the flagitious act unfolded. When taken together, these facts eviscerate any remaining substance to Henderson’s complaint about Quinn’s use of the single picture here.

#### **IV. Conclusion**

{¶ 31} Accordingly, the sole assigned error is not well-taken.

{¶ 32} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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the victim’s prior description, if any, of the defendant, (4) the victim’s certainty, and (5) the amount of time that has elapsed between the offense and the identification.” (Internal citations omitted.) *State v. Heflin*, supra, at ¶ 17.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

\_\_\_\_\_  
JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

Arlene Singer, P.J.,  
CONCURRING SEPARATELY.

\_\_\_\_\_  
JUDGE

**SINGER, P.J.**

{¶ 33} Appellant, Dontae Henderson, contends that his due process rights were violated when the trial court denied his motion to suppress the out-of-court identification of him based on the use of a single photo. Henderson was convicted of felonious assault with a firearm specification for shooting Troy Moody in the leg. The victim stated that he had known Henderson since they were kids. The incident occurred in broad daylight during which Moody had spoken to Henderson. Given these facts, the trial court found that that the single photo procedure was not unduly suggestive and the identification procedure was not unreliable. We agree.