

[Cite as *State v. Davis*, 2015-Ohio-1144.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101502

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JAVON DAVIS**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-13-579350-A

**BEFORE:** McCormack, J., Celebrezze, A.J., and Blackmon, J.

**RELEASED AND JOURNALIZED:** March 26, 2015

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TIM McCORMACK, J.:

{¶1} Defendant-appellant, Javon Davis, appeals the trial court's denial of Davis's motion to suppress. For the reasons that follow, we affirm the trial court.

### **Factual and Procedural Background**

{¶2} Davis was charged with aggravated robbery with a firearm specification, kidnapping with a firearm specification, carrying a concealed weapon, theft, and having a weapon while under disability. He filed a motion to suppress the victim's identification of Davis. Following a hearing, the trial court denied Davis's motion. On April 16, 2014, Davis withdrew his former plea of not guilty and pleaded guilty to aggravated robbery with a one-year firearm specification and having a weapon while under disability. He was sentenced to four years in prison.

{¶3} During the suppression hearing, the court heard testimony from Deandre Smith, the victim. Smith testified that in the early afternoon on September 6, 2013, he was walking down Warrensville Center Road, heading home from the store, when he was approached by two males. He recognized the taller male from "around [his] apartment complex." At the hearing, Smith described one male as a tall, lighter skinned black male with dreadlocks and the other male as taller, "about 6'2", 6'3" " with a "flat top" haircut, a darker complexion and was between 19 and 21 years of age.

{¶4} He stated that the male with the flat top asked to see the hat that Smith was wearing. Smith gave him the hat, and the male did not return it. The same male then asked Smith if he wanted to fight. When Smith told the male that he did not want to fight, the male told Smith, "I need everything." When Smith refused to give the male his items, the male pulled out a gun from his sock. Smith gave the male his money, which totaled approximately \$400, shoved the male, and then ran into a nearby apartment building where his friend lived. Smith

testified that during the entire encounter of approximately five to ten minutes, the males were within an arm's length of him and they were conversing while walking. The male with the flat top was doing most of the talking.

{¶5} Smith further testified that after the robbery, he waited inside the building for approximately 15 to 20 minutes. When he exited the building, he saw a Maple Heights police officer, Stephen Govedich, and reported what happened moments earlier.

{¶6} Officer Govedich testified that on September 6, 2013, he was investigating another matter when Smith approached him, reporting that he was robbed. Officer Govedich contacted Officer Steve Basiewicz to conduct the investigation.

{¶7} Officer Basiewicz testified that he was dispatched to the area of Warrensville Center Road and Gardenview in connection with a purported robbery, where the victim reported that he had been robbed by two males at gunpoint. Officer Basiewicz stated that Smith, also known as "Red," described the perpetrator as a dark skinned, black male, approximately 6'3" tall, medium build, 18 to 21 years of age, with a "flat top" haircut, and was wearing gray sweat pants and a gray hoody.

{¶8} Smith also testified that about one month after the robbery, approximately October 17, 2013, he saw the male with the flat top, later identified as Davis, walking down the street, in the same general area of the purported robbery. He stated that he recognized the male as the person who robbed him in September at gunpoint. Smith called the police, provided a description of the male, and reported the direction Davis was heading and that he saw Davis going inside a convenience store. Approximately five to ten minutes later, the police placed Smith in a patrol car and drove to another location in the neighborhood, where another officer had detained an individual matching the description provided by Smith. Upon viewing the

detained male from the patrol car, Smith identified the male as the person who had robbed him approximately one month earlier. He testified that there was no doubt in his mind. He further identified Davis in the courtroom as the person who had robbed him.

{¶9} Officer Jason Ponyicky testified that he received a call from dispatch that advised him that Smith had been robbed and Smith had located the male who robbed him. In approximately five to seven minutes after receiving the call, Officer Ponyicky met Smith at the convenience store where Smith had last seen the individual who robbed him. Smith advised the officer that the male had walked towards the Gardenview area. Officer Ponyicky radioed the description provided by Smith, and another officer, Officer French, responded that he located a male matching the description in the area of Gardenview and Clanford, which was approximately one block away from the convenience store where Smith had initially spotted the male.

{¶10} Officer Ponyicky testified that he drove Smith to the location identified by Officer French for an on-street identification, where Smith looked out of the patrol car window at a distance of approximately 15 feet. Officer Ponyicky stated that Smith positively identified the male that Officer French had located as the person who robbed him, indicating that he was 100 percent certain. Officer Ponyicky identified Davis in the courtroom as the individual Smith had identified.

{¶11} Davis was subsequently arrested and charged. He now appeals the court's denial of his motion to suppress Smith's identification, alleging one assignment of error.

### **Assignment of Error**

The trial court erred in failing to grant appellant's motion to suppress his impermissibly suggestive identification in violation of his right to due process.

### **Law and Analysis**

{¶12} In his sole assignment of error, Davis claims that the trial court erred in failing to grant his motion to suppress the identification made by Deandre Smith. Specifically, Davis argues that the police failed to follow the procedure outlined in R.C. 2933.83 when they conducted a “live lineup” and, as a result, the identification was impermissibly suggestive and thus violated his right to due process.

{¶13} It is well settled that a defendant waives all appealable errors that may have occurred at trial when he or she enters a guilty plea as part of a plea bargain, unless the purported errors are shown to have precluded the defendant from entering a knowing and voluntary plea. *State v. Brusiter*, 8th Dist. Cuyahoga No. 98614, 2013-Ohio-1445, ¶ 5; *State v. Milczewski*, 8th Dist. Cuyahoga No. 97138, 2012-Ohio-1743, ¶ 5, citing *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991); *State v. Ketterer*, 111 Ohio St.3d 70, 82, 2006-Ohio-5283, 855 N.E.2d 48 (A guilty plea waives “any complaint as to claims of constitutional violations not related to the entry of the guilty plea.”). This includes the denial of a motion to suppress. *Brusiter*; *State v. Ramsey*, 3d Dist. Marion No. 9-10-55, 2012-Ohio-134, ¶ 15; *State v. Wheeler*, 2d Dist. Montgomery No. 24112, 2011-Ohio-3423, ¶ 3; *State v. Bump*, 11th Dist. Ashtabula No. 2010-A-0028, 2011-Ohio-6687, ¶ 42-43; *State v. McQueeney*, 148 Ohio App.3d 606, 2002-Ohio-3731, 774 N.E.2d 1228, ¶ 15 (12th Dist.).

{¶14} Here, Davis pleaded guilty to aggravated robbery with a one-year firearm specification and having a weapon while under disability. Therefore, by virtue of pleading guilty, we find that Davis has waived his right to appeal the trial court’s denial of his motion to suppress. In any event, we find that the motion to suppress was properly denied.

{¶15} R.C. 2933.83, effective July 2010, governs the administration of photo lineups and live lineups and is aimed at preventing the use of unnecessarily suggestive procedures. *State v.*

*Fields*, 8th Dist. Cuyahoga No. 99750, 2014-Ohio-301, ¶ 11. R.C. 2933.83 requires any law enforcement agency that conducts live and photo lineups to adopt specific procedures for conducting the lineups, including the use of “a blind or blinded administrator” to conduct a live or photo lineup and a written record of the lineup that includes all results obtained during the lineup, the names of all persons at the lineup, the date and time of the lineup, and the sources of the photographs used in the lineup. Further, if a blind administrator is used, the administrator is required to inform the eyewitness that the suspect may or may not be in the lineup and that the administrator does not know who the suspect is. *State v. Alexander*, 8th Dist. Cuyahoga No. 98941, 2013-Ohio-2533, ¶ 25.

{¶16} R.C. 2933.83(A)(7) defines a “live lineup” as an “identification procedure in which a group of persons, including the suspected perpetrator of an offense and other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator of the offense.”

{¶17} We note, however, that what occurred in this case is not a “live lineup” as defined under R.C. 2933.83(A)(7). Here, the police did not display “a group of persons” that included “other persons not suspected of the offense” for the eyewitness’s identification. Rather, the victim himself phoned the police, providing a description of the robber, the police stopped an individual matching the victim’s description, and the police drove the victim to the individual for on-street, or cold stand, identification of that individual. Davis was thereafter arrested based upon the victim’s positive identification. Therefore, R.C. 2933.83 would not apply. *See State v. Pressley*, 2d Dist. Montgomery No. 24852, 2012-Ohio-4083, ¶ 33 (finding R.C. 2933.83 is not applicable to show up identification procedures); *State v. Barker*, 11th Dist. Portage No. 2013-P-0084, 2014-Ohio-4131, ¶ 45; *see also State v. Johnson*, 8th Dist. Cuyahoga No. 99656,

2013-Ohio-5430 (failure to follow procedures in R.C. 2933.83 does not automatically render cold stand identification inadmissible).

{¶18} Generally, the showing of a single suspect, one who is not part of a line up, for identification purposes, is discouraged. *State v. Smith*, 8th Dist. Cuyahoga No. 94545, 2011-Ohio-924, ¶ 18. However, ““an exception is recognized when the suspect is apprehended at or near the scene of the crime and is presented to the victim or witness shortly thereafter.”” *Id.*, quoting *State v. Davis*, 8th Dist. Cuyahoga No. 83033, 2004-Ohio-1908, ¶ 7. Moreover, a cold stand or one-on-one show up identification is permissible as long as the trial court considers the totality of the circumstances. *Id.* at ¶ 19; *State v. Cole*, 8th Dist. Cuyahoga No. 93192, 2010-Ohio-5114, ¶ 22. The focus is therefore upon the reliability of the identification and not the identification procedures themselves. *Smith*.

{¶19} Accordingly, regarding the admissibility of identification testimony in general, the courts have adopted a two-prong test. First, there must be a determination that the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. *State v. Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732, 940 N.E.2d 634, ¶ 38 (10th Dist.), citing *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Second, it must be determined that the identification itself was unreliable under the totality of the circumstances. *Id.*

{¶20} “An identification derived from unnecessarily suggestive procedures, which have a likelihood of leading to a misidentification, violates a defendant’s right to due process.” *Fields*, 8th Dist. Cuyahoga No. 99750, 2014-Ohio-301, at ¶ 10, citing *Biggers*. The burden of demonstrating that the procedures utilized were unnecessarily suggestive is upon the defendant. *State v. Quarterman*, 8th Dist. Cuyahoga No. 99317, 2013-Ohio-4037, ¶ 26.



{¶21} “If the defendant meets that burden, the court must consider whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character.” *Fields* at ¶ 10, citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L.Ed.2d 140, 97 S.Ct. 2243 (1977); *see also Monford*. The factors that must be considered when evaluating reliability under the totality of the circumstances test are as follows: (1) the witness’s opportunity to view the offender at the time of the crime; (2) the witness’s degree of attention at the time of the crime; (3) the accuracy of the witness’s prior description of the offender; (4) the witness’s level of certainty when identifying the suspect at the confrontation; and (5) the length of time that has elapsed between the crime and the confrontation. *Monford* at ¶ 39, citing *Biggers* at 199-200.

{¶22} If the pretrial procedures were not unnecessarily suggestive, “any remaining questions as to reliability go to the weight of the identification, not its admissibility, and the identification is admissible.” *Fields*, citing *State v. Wills*, 120 Ohio App.3d 320, 324, 697 N.E.2d 1072 (8th Dist.1997). Pretrial identification may be suppressed only if they are both unnecessarily suggestive and unreliable under the totality of the circumstances. *Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732, 940 N.E.2d 634, at ¶ 40. If the defendant fails to meet the first part of his burden, the court need not consider the totality of the circumstances test under the second prong. *State v. Green*, 117 Ohio App.3d 644, 653, 691 N.E.2d 316 (1st Dist.1996).

{¶23} Here, the incident that occurred on September 6 lasted approximately five to ten minutes during an arm’s length conversation, during which time the robber asked Smith several questions while taking Smith’s hat and putting it on. At this time, Smith had the opportunity to observe, at relatively close range, the would-be robber’s overall general appearance, including race, skin tone, approximate age, build, height, hairstyle, and clothing. In fact, Smith recognized

the individual as someone from around his neighborhood. He provided the police with a relatively detailed description of the individual, reporting that the robber was a dark skinned black male between 18 and 21 years of age, approximately 6'2" or 6'3", medium build, and he had a flat top haircut.

{¶24} Although the police did not locate Davis and present him for Smith's identification until at least one month after the robbery, the cold stand, or show up, identification was prompted by the victim's own discovery of Davis at a convenience store, during which Smith recognized Davis as the individual who robbed him in September. He reported his discovery to the police, providing a description of the male and the direction the individual was heading. Within minutes, the police found a person matching the description provided by Smith in the area of the store where Smith reported seeing the alleged robber. During the show up, Smith identified Davis with 100 percent certainty as the individual who had robbed him one month previously. Further, Smith positively identified Davis in the courtroom, and Officer Ponyicky identified Davis in the courtroom as the individual Smith had identified on the street.

{¶25} In light of the above, we find nothing in the record to indicate that the identification procedure was unduly suggestive. Moreover, in considering the totality of the circumstances, we find Smith's identification of Davis as the individual who robbed him to be reliable. Davis's due process rights were not violated by Smith's identification, and the motion to suppress was properly denied.

{¶26} Davis's sole assignment of error is overruled.

{¶27} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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TIM McCORMACK, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and  
PATRICIA ANN BLACKMON, J., CONCUR