

[Cite as *State v. Duke*, 2009-Ohio-5527.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

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| STATE OF OHIO | : | |
| | : | Appellate Case No. 23110 |
| Plaintiff-Appellee | : | |
| | : | Trial Court Case No. 08-CR-1294/2 |
| v. | : | |
| | : | (Criminal Appeal from |
| WILLIAMS H. DUKE | : | Common Pleas Court) |
| | : | |
| Defendant-Appellant | : | |
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OPINION

Rendered on the 16th day of October, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Williams Duke appeals from a conviction and sentence for Theft and Vandalism. Duke contends that the trial court erred by denying his motion to suppress a pre-trial identification made by an eyewitness. He

also contends that the trial court mistakenly concluded that Duke had the burden of proof on this issue.

{¶ 2} We conclude that the trial court did not err in overruling the motion to suppress. The burden of proof is on Duke to show that the pre-trial identification procedure was unduly suggestive and unreliable. The evidence supports a finding that the pretrial eyewitness identification was neither unduly suggestive nor unreliable. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} Duke was indicted upon one count of Theft, in violation of R.C. 2913.02(A)(1), and one count of Vandalism, in violation of R.C. 2909.05(B)(1)(a). Duke moved to suppress a pre-trial show-up identification. The following evidence was adduced at the evidentiary hearing on the motion to suppress.

{¶ 4} On March 20, 2008, Bruce Sexton was at work at Countrywood Apartments where he was the head of the maintenance department for the apartment complex. Sexton was working outside when he heard a loud hissing noise and observed a white cloud, which he believed to be Freon, escaping from an air-conditioning unit that was about seventy-five yards away from him. Sexton observed two men, one carrying a bundle of copper, walking away at a fast pace. Both of the individuals were black, and the one carrying the copper was wearing a blue and gold outfit. According to Sexton, the blue and gold outfit “caught his eye because he is not a real big Michigan fan.” Sexton followed the individuals for about four minutes to a nearby apartment, where he observed them stop by a Blazer and

begin stripping the copper of insulation and breaking it down into smaller pieces. He stopped within thirty yards of the men, and he was able to see the faces of both individuals. Sexton watched the men “for just a couple of minutes.” Sexton called the apartment office on his cellular telephone and instructed personnel in the office to contact the police. Sexton then returned to the complex, where he observed that the copper pipes leading from the air conditioner compressor into the apartment building had been cut.

{¶ 5} Dayton Police Officers Kari Staples and Melissa Orick were dispatched to the residence where Sexton indicated he saw the Blazer. They were provided a description of two black males along with a description of a gold sweatshirt. The officers went to the residence, where they found the Blazer; Orick knocked on the back door while Staples knocked on the front. The back door was opened by the residence tenant, who was later identified as Ms. Nixon. Nixon admitted the officers into the residence, where they heard sawing noises emanating from the basement. As Duke came up the stairs he was placed into handcuffs. Another individual also came up the stairs, and was also handcuffed. Dayton Police Detective Jamie Bullens also responded to Dixon’s residence. Upon receiving permission to do so, Bullens went into the basement, where he observed a hacksaw and copper. Officers Staples and Orick drove the two individuals they had apprehended over to the apartment complex in separate cruisers. Sexton identified both Duke and the other individual as the men he had observed with the copper.

{¶ 6} Following a hearing, the trial court denied the motion to suppress. Thereafter, Duke entered a plea of no contest to both charges and was sentenced

accordingly. Duke now appeals from his conviction and sentence.

II

{¶ 7} Duke's sole assignment of error states as follows:

{¶ 8} "THE TRIAL COURT ERRED IN NOT SUPPRESSING THE SHOW-UP IDENTIFICATION EVIDENCE IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS UNDER ARTICLE I, SECTION 10 AND 16 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

A. The Burden of Proof

{¶ 9} As a preliminary matter, Duke contends that the trial court erred when it noted, at the conclusion of the suppression hearing, that Duke had the burden to show, under the totality of the circumstances, that the pretrial identification was unreliable. He cites *State v. Miles* (1988), 55 Ohio App.3d 210, a decision of the Eighth District Court of Appeals, for the proposition that: "The state has the burden of proving by a preponderance of the evidence that it did not obtain identification testimony by using unduly suggestive identification procedures." *Id.*, at 211. The Eighth District Court of Appeals cites *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, for that proposition, but *Xenia v. Wallace*, as the opinion in *State v. Miles* notes, dealt with a warrantless search and seizure of evidence, in alleged violation of the Fourth Amendment to the United States Constitution. Where evidence is obtained as the result of a warrantless search and seizure, the State has the burden of

demonstrating that the search and seizure was nevertheless reasonable under Fourth Amendment standards.

{¶ 10} The issue in a suppression hearing involving allegedly improper identification testimony does not arise under the Fourth Amendment. The issue is whether an unduly suggestive eyewitness identification procedure violates a defendant's Due Process rights. *Stovall v. Denno* (1967), 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199; *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401; *Manson v. Braithwaite* (1977), 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140. Although none of these cases directly addresses the issue of the burden of proof, the last of these three cases does expressly reject the proposition that "evidence of, or derived from, a showup identification should be inadmissible unless the prosecutor can justify his failure to use a more reliable identification procedure." *Manson v. Braithwaite*, supra, at 432 U.S. 98, 111 - 114. By implication, then, the normal burden of proof would apply, wherein the proponent of a proposition – in this case, that a show-up identification procedure is unduly suggestive and sufficiently unreliable to implicate a criminal defendant's right to due process – is obliged to prove that proposition. We have so held in *State v. Poindexter*, Montgomery App. No. 21036, 2007-Ohio-3461, ¶ 11, which we approve and follow.

B. The Merits

{¶ 11} Duke contends that the trial court should have excluded the pretrial show-up identification utilized by the police because the procedure was impermissibly suggestive so as to render the eyewitness identification unreliable.

Specifically, Duke claims that the identification was tainted because the police indicated, to the eye witness, that they were bringing Duke as a suspect for the identification.

{¶ 12} “When a witness identifies a defendant prior to trial, due process requires a court to suppress evidence of the witness's prior identification upon the defendant's motion if the confrontation was unduly suggestive of the defendant's guilt to an extent that the identification was unreliable as a matter of law under the totality of the circumstances.” *State v. Pillow*, Greene App. No. 07CA095, 2008-Ohio-6046, ¶126. “A one man show-up identification procedure, unlike a well-conducted lineup, is inherently suggestive. Nevertheless, such identifications are not unduly suggestive if they are shown to have been reliable. We have repeatedly held that one man show-ups which occur shortly after the crime are not per se improper, and that prompt on-the-scene show-ups tend to insure the accuracy of identification, involve a minimum intrusion, and support the prompt release of persons not identified.” *Id.* at ¶ 128 -129. When evaluating the reliability of pretrial identifications a court should consider “the prior opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” *State v. Johnson*, Montgomery App. No. 22656, 2009-Ohio-1288, ¶ 20.

{¶ 13} When reviewing decisions regarding suppression of evidence, reviewing courts afford deference to the findings of the trial court as the finder of fact.

Johnson, at ¶16. “An appellate court is bound to accept the trial court’s factual findings as long as they are supported by competent, credible evidence.” *Id.*

{¶ 14} Under the totality of the circumstances, we agree with the trial court that the identification procedure herein was neither unduly suggestive nor unreliable, and thus Duke’s due process rights were not violated. Sexton had the opportunity to view Duke for a period of several minutes while he followed him from the crime scene and for a few more minutes as he watched Duke strip the copper pipes. Sexton observed the two individuals for approximately five to six minutes. The accuracy of Sexton’s description of a black man dressed in blue and gold was corroborated by Staples’ description of the person found a few minutes later in Dixon’s home. Sexton immediately, and without hesitation, identified Duke as one of the individuals he had observed commit the offense. Finally, the evidence in the record does not support Duke’s claim that Sexton was informed, prior to the show-up, that Duke was the individual who had committed the offense. Indeed, when asked whether the police had told him that the individuals brought in the cruiser were the suspects, Sexton answered in the negative. Based upon this evidence, we conclude that Sexton’s identification of Duke was reliable and that no abuse of discretion by the trial court has been demonstrated.

{¶ 15} Duke’s sole assignment of error is overruled

III

{¶ 16} Duke’s sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and BROGAN, J., concur.

Copies mailed to:

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