

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

STATE OF OHIO	:	
	:	Appellate Case No. 23744
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2009-CR-904
v.	:	
	:	
TURELL JUSTICE	:	(Criminal Appeal from
aka TURRELL JUSTICE	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 29th day of December, 2010.

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MATHIAS H. HECK, JR., by CARLEY J. INGRAM, Atty. Reg. #0020084, and ANDREW T. FRENCH, Atty. Reg. #0069384, Montgomery County Prosecutor’s Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
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FAIN, J.

{¶ 1} Defendant-appellant Turell Justice appeals from his conviction and sentence for Aggravated Burglary, Aggravated Robbery, Kidnapping and Having a Weapon Under Disability following a plea of no contest. Justice contends that the

trial court erred by failing to grant his motion to suppress evidence of statements and pre-trial identification testimony. The State has cross-appealed, contending that the trial court abused its discretion by sentencing Justice to a prison term of just seven years, one year more than the minimum sentence.

{¶ 2} We conclude that the trial court did not err by overruling the motion to suppress. There is no evidence that the show-up identification was unduly suggestive or unreliable. Further, the record does not support a finding that any statements made by Justice were sufficiently prejudicial as to deprive Justice of due process. Finally, the State has failed to demonstrate that the trial court abused its discretion with regard to the sentence imposed.

{¶ 3} Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 4} This case stems from a home invasion that occurred in mid-March, 2009 in Trotwood, Ohio. On that date, Trotwood Police Officers were dispatched at 9:50 p.m. to 7528 West Creek in response to a hang-up call to 911. Officer Garcia arrived at the scene slightly less than four minutes after the dispatch, and Officer Douglas arrived a few seconds later. The officers approached the residence and listened for noise. When they heard no sounds, Officer Garcia rang the doorbell, at which time one of the residents, later determined to be Brian Pinson, ran from the residence screaming that three black males with guns were in the home with Mr. Pinson's family.

{¶ 5} The officers told Mr. Pinson to take cover, and they called for additional

officers to respond. The officers heard one person run from the back of the house and jump over fencing that separated the property from the Woodland Hills Apartment Complex. They then observed a second individual do the same. As Garcia moved toward the back of the residence, he observed a black male in dark clothing with braided hair attempting to get out of a second floor window. Garcia ordered him to put his hands up, but the man withdrew back into the residence. Garcia then heard Douglas yell that he had a man of the same description approaching him at the front door of the residence. The individual then ran out the back of the house and also escaped over the fencing. Garcia and Douglas both had been using their radios throughout these events to give a description of the men and the location to which they had fled. Garcia and Douglas remained at the residence securing the premises.

{¶ 6} Other officers responded to the Woodland Hills Apartment Complex to search for the three offenders. Officers Craun and Barnes were stopped by a tenant of the complex who stated that a man had come to her residence and told her that he had just been robbed. The man did not want the resident to call the police. The resident further told the police that the man had braided hair and appeared to have a gun. Officers Barnes and Rasor then began a search of a different building.

{¶ 7} While Barnes and Rasor were in the building, Craun noticed a black male come from inside the building where the resident lived and then walk back into the same building. A moment later the individual was seen walking away. Craun asked the individual to stop, but the man continued to walk away. Craun again told him to stop and ordered him to the ground. The man then ran away. At that point,

Barnes had rejoined Craun. Following a pursuit during which the officers lost the suspect, another male approached Barnes and stated that a person was hiding along the fence line. Barnes found a man “squatted down hiding behind a parked car in that location.” Barnes immediately radioed the other officers, and then made contact with the man by telling him to show his hands and “to lay down on the ground beside this car on his stomach.” The man complied, and Barnes approached him with his gun aimed at the man. Almost immediately, officers Craun and Rasor, along with a K-9 unit, joined Barnes. Craun recognized him as the man who had run away from them a few minutes earlier. The officers noted that the man was no longer wearing a shirt or shoes. They also noticed that the man had blood from “fresh cuts,” and that he was “breathing heavily.”

{¶ 8} Both Barnes and Craun had their guns aimed at the man while he lay on the ground; therefore, Rasor had the K-9 lay down. A pat-down search was conducted and Rasor handcuffed the man. Barnes asked the man for his name (which he did not provide); “why he was breathing heavily and where his shirt was because it wasn’t hot outside,” (to which he responded that he was “breathing heavy because he was hot.”); whether he lived in that apartment complex (to which he replied that he was visiting his girlfriend); and also “inquired about the blood on his hands, which he didn’t answer.” Officer Craun then advised the man that he was under arrest and read him his rights pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. Thereafter, the man provided his social security number, which allowed the officers to ascertain that the man was Turell Justice and that he had an outstanding warrant in another state.

{¶ 9} Approximately fifteen minutes after the last suspect had escaped from the Pinson residence, Officer Garcia was summoned to the location where the other officers had detained Justice. Garcia noted that Justice was the individual he had seen in the upper bedroom window of the Pinson home. He placed Justice in the back of his cruiser and drove him back over to the Pinson residence where Mr. Pinson immediately identified him as one of the three men in his home.

{¶ 10} Justice was indicted on four counts of Aggravated Robbery, five counts of Aggravated Burglary, four counts of Kidnapping, and two counts of Having Weapons Under Disability. The Aggravated Robbery, Aggravated Burglary and Kidnapping charges had firearm specifications.

{¶ 11} Justice filed a motion to suppress statements, physical evidence and identification testimony. Following a hearing, the trial court overruled the motion. Thereafter, Justice entered a plea of no contest to two counts of Aggravated Burglary, two counts of Aggravated Robbery, two counts of Kidnapping (first degree felonies), two counts of Kidnapping (second degree felonies), one count of Having a Weapon Under Disability, and to the firearm specifications associated with all but the last count. He was sentenced to a seven-year prison term.

{¶ 12} Justice appeals, challenging the denial of his motion to suppress. The State cross-appeals, challenging the sentence imposed by the trial court.

II

{¶ 13} Justice's First Assignment of Error provides as follows:

{¶ 14} "THE TRIAL COURT ERRED IN ADMITTING THE EVIDENCE OF THE

SHOW-UP IDENTIFICATION WHICH WAS INHERENTLY SUGGESTIVE AND UNRELIABLE, AND THEREBY A VIOLATION OF DUE PROCESS.”

{¶ 15} Justice contends that the trial court erred in overruling his motion to suppress eyewitness identification testimony, because the identification resulted from an unduly suggestive show-up identification procedure that created a substantial likelihood of irreparable misidentification.

{¶ 16} A defendant challenging allegedly improper identification procedures has the burden of proving that a show-up identification procedure was unduly suggestive and sufficiently unreliable as to implicate his right to due process. *State v. Duke*, Montgomery App. No. 23110, 2009-Ohio-5527, ¶ 10, following *State v. Poindexter*, Montgomery App. No. 21036, 2007-Ohio-3461, ¶ 11.

{¶ 17} “ ‘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.’ * * * ‘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.’ * * * 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.' ” *Duke*, supra, 2009-Ohio-5527, ¶ 12 (citations omitted).

{¶ 18} In this case, the trial court failed to elaborate on the reliability factors in its ruling, merely stating that “the one man show up identification, though inherently suggestive, was nonetheless reliable under all the circumstances the night (and approximate hour) of the identification.”

{¶ 19} 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 Justice's due process rights were not violated.

{¶ 20} The record shows that Pinson was in his residence with Justice for a period of at least five to six minutes before the officers rang the doorbell and Pinson escaped. Furthermore, the show-up occurred less than an hour after the call was made to 911 and Pinson was able to immediately identify Justice as one of the three offenders. Finally, there is no evidence in the record that the police made any improper suggestions or comments to Pinson when the show-up identification occurred.

{¶ 21} Justice's First Assignment of Error is overruled.

III

{¶ 22} Justice's Second Assignment of Error states:

{¶ 23} “THE TRIAL COURT ERRED IN NOT SUPPRESSING STATEMENTS

MADE BY MR. JUSTICE WHILE HE WAS DETAINED AND INTERROGATED.”

{¶ 24} Justice contends that the trial court should have sustained his motion to suppress any evidence regarding statements made following his detention by the officers. Justice contends that there was no basis for his detention and that the officers failed to inform him of his rights prior to questioning.

{¶ 25} Police officers may detain, briefly, individuals in order to investigate circumstances that cause a suspicion of criminal activity. See, *Terry v. Ohio* (1968), 392 U.S. 1. To justify a stop under *Terry*, “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *State v. Andrews* (1991), 57 Ohio St.3d 86, 87. The propriety of an investigative stop is to be determined by considering the totality of the circumstances through the eyes of a reasonable and prudent police officer on the scene. *Id.*

{¶ 26} In this case, we conclude that the officers had a reasonable suspicion, based upon articulable facts, that Justice was engaged in criminal activity. Justice was found “squatting” down behind a car at a time when numerous police officers were clearly visible searching the apartment complex following the home invasion. This justified the officers in their decision to hold him at gunpoint. Then, Justice was recognized as the person who ran away from Craun and as a person fitting the description provided by Garcia, who had seen him in the Pinson residence window. Therefore, we cannot say that it was unreasonable for the officers to take the actions they took in approaching Justice.

{¶ 27} The questions regarding Justice’s name and where he lived were not

impermissible in the absence of *Miranda* warnings. However, we cannot say that the questions regarding Justice's shirt were designed to elicit proper identification information. Because Justice merely replied that he "was hot," we conclude that this response, even if it should have been suppressed, would not have prejudiced Justice at trial. Therefore, any error in the trial court's not having suppressed this question and answer was harmless.

{¶ 28} Justice's Second Assignment of Error is overruled.

IV

{¶ 29} The State's sole assignment of error, on its cross-appeal, states as follows:

{¶ 30} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING TURELL JUSTICE TO A SEVEN YEAR PRISON TERM, WHICH WAS ONLY ONE YEAR MORE THAN THE MINIMUM TERM AVAILABLE, FOR NINE FELONIES COMMITTED DURING THE COURSE OF A VIOLENT HOME INVASION AND WHICH HE COMMITTED WHILE ON POST-RELEASE CONTROL FOR AN EARLIER HOME INVASION."

{¶ 31} The State contends that the trial court should have sentenced Justice to a longer prison term.

{¶ 32} The record reveals that on November 3, 2009, the trial court sentenced Justice to a seven-year prison term. That same day the trial judge called counsel for the State and Justice into chambers and informed them that he had inadvertently believed that there was a plea agreement between the parties that Justice would

serve a six-year sentence. However, the trial court later realized that the six-year agreement pertained to a different home invasion case. Therefore, the trial court set the matter for re-sentencing on November 6, 2009 at which time it allowed both parties to present arguments for, and against, the sentence previously imposed.

{¶ 33} Following arguments, the trial court stated:

{¶ 34} “The Court has considered the pre-sentence investigation report * * *, the sentencing memoranda submitted by counsel, together with some case law submitted by the State, the facts and circumstances surrounding the case, including those adduced at a motion to suppress hearing held earlier in this case.

{¶ 35} “The Court has considered the youth of the Defendant, the nature and character of the offense as it related to the principal victim, and the fact that though a firearm was involved, none of the victims was harmed, physically shot at or shot.

{¶ 36} “It concludes now, after considering the purposes and principles of sentencing and the seriousness and recidivism factors, that the Court’s earlier sentence in this case was appropriate and declines to disturb it.”

{¶ 37} We have noted with regard to sentencing that, “the Supreme Court of Ohio has held, in *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, paragraph seven of the syllabus, that ‘[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or their reasons for imposing maximum, consecutive, or more than the minimum sentences.’ ” *State v. Israel*, Miami App. No. 09-CA-47, 2010-Ohio-5044, ¶ 35. “The Supreme Court of Ohio has further held, in *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912, ¶ 26, that a reviewing court, ‘must

examine the sentencing court's compliance with all the applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.' ” Id. “If the court of appeals finds under the test set out in *Kalish* that the sentence is not clearly and convincingly contrary to law, then it must proceed to the second prong of the test, whether there was an abuse of discretion by the court made during sentencing.” Id. An abuse of discretion “implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 38} The State admits that the sentence imposed by the trial court was within the permissible statutory range of six to eighty-four years. Furthermore, the State notes that there was no agreement on sentencing. The State claims that the sentence constitutes an abuse of discretion because of the seriousness of the offense, which was Justice's third felony conviction, and the fact that Justice was on post-release control at the time of this offense. Finally, the State contends that the trial court's statement that no one was injured demonstrates that the court was mistaken about the facts of the case, given that two of the victims suffered abrasions and cuts from having been pistol-whipped.

{¶ 39} First, from our reading of the trial court's decision, we conclude that when discussing injury, the trial court was not trying to imply that no one suffered injuries; rather, the trial court was merely noting that no one had suffered a gunshot wound. Thus, we do not conclude that the trial court was mistaken about the facts

surrounding this case.

{¶ 40} Next, we cannot say that the trial court abused its discretion by imposing a sentence that was only one year longer than the minimum possible sentence. The court stated that it had considered the facts before it and had determined that a seven-year sentence was appropriate. While we may have acted differently, we will not substitute our judgment for that of the trial court. Accordingly, the State's sole assignment of error is overruled.

V

{¶ 41} Both of Justice's assignments of error and the State's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., concurs.

GRADY, J., dissenting:

{¶ 42} I respectfully dissent from the majority's decision overruling the assignment of error presented by the State in its cross-appeal.

{¶ 43} Defendant engaged in a home invasion, along with two other men. All three were armed and forced their way inside at gunpoint. The purpose of the invasion was robbery. One of the perpetrators threatened to rape the occupants' daughter if she didn't reveal where the money they wanted was kept.

{¶ 44} Defendant was twenty-three years of age at the time. He had been sentenced in 2005 to three years in prison for a prior armed home invasion. Defendant was also sentenced for a drug offense that same year. Defendant was

on post-release control at the time of his offenses in the present case.

{¶ 45} Defendant entered pleas of no contest to nine serious felonies that, together, subjected Defendant to possible maximum prison term of eighty-four years and a minimum term of six years. The trial court sentenced Defendant to seven years, which is but one year more than the minimum.

{¶ 46} The purposes and principles of felony sentencing, R.C. 2929.11, and the seriousness and recidivism factors the court must apply, R.C. 2929.12, compel a conclusion that the seven years sentence the court imposed was unreasonably lenient. Defendant is prone to engage in violent crimes, is a dangerous person, and his criminal conduct in the present case is deserving of a much longer term of incarceration.

{¶ 47} The trial court abused its discretion when it imposed a seven-year sentence. We should reverse the sentence the court imposed, per *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, and remand the case for resentencing.

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