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Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001371-MR

JOSEPH WILLIAM PARKER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 09-CR-00516-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT AND THOMPSON, JUDGES.

LAMBERT, JUDGE: Joseph William Parker has appealed from the final judgment of the Fayette Circuit Court entered June 28, 2010, convicting him of first-degree robbery and second-degree fleeing or evading police, and sentencing him to a total of eleven-and-a-half years' imprisonment. In his appeal, Parker contests the trial court's ruling on his pretrial motion to suppress evidence related

to the identification procedure used by the police officers as well as a possible violation of *Brady v. Maryland*. Based upon our review of the record and the parties' arguments, both below and in their respective briefs, we reverse.

Parker and his codefendant, Justin Dwayne Masengale, were indicted by the Fayette County grand jury on March 31, 2009, and were charged with first-degree robbery in connection with a purse-snatching incident outside of a Lexington Target store the previous month. In addition to the robbery charge, Parker was also indicted for fleeing/evading police in the first degree and for tampering with physical evidence.

Because this appeal focuses on Parker's pretrial motion to suppress, we shall focus on the facts established during the suppression hearing upon which the trial court based its ruling. On the evening of February 5, 2009, Susan Martin was in the Target parking lot when a person later identified as Parker grabbed her purse from her. As the two struggled over the purse, Parker punched her in the face and Ms. Martin fell to the ground. He and Masengale ran from the parking lot on foot and entered a nearby subdivision. Ms. Martin entered the store and immediately sought the assistance of Target employees, who called the police. She gave a description of her attackers to store manager Rodney Branham. The asset protection supervisor, Shavon Johnson, recognized the description as matching two individuals she had noticed in the store earlier. She and Mr. Branham viewed the store's security footage and printed out still shots of the two men seen in the store who fit the description Ms. Martin provided. By this time, officers from the

Lexington Police Department had arrived. Mr. Branham took the still photos to show the police, and then showed them to Ms. Martin, who identified the men in the photographs as her attackers. Target also received a telephone call from a customer who had witnessed the purse-snatching. This witness had a child with him, so he was not able to get involved with the altercation. However, he saw the two men run into his neighborhood and alerted the store. Officers immediately went to the location and stopped Masengale. Another officer took Ms. Martin to the location to see if she could identify Masengale as one of the assailants. She immediately recognized him. Officers arrested Masengale, and he named Parker as the other person with him in the Target parking lot. Parker was later arrested with Ms. Martin's cellular phone and iPod in his possession.

Masengale moved to suppress the out-of-court identification by Ms. Martin due to taint by the Target employee and a *Brady* discovery violation by the Commonwealth. He stated that discovery provided to him included a report from Detective Van Brackel, which stated that the detective prevented a member of the Target staff from showing the photographs to Ms. Martin. However, Masengale stated that his private investigator had found security video from the store that clearly showed an employee presenting the photographs to Ms. Martin.

Accordingly, Ms. Martin's identification was tainted because she was shown photographs of her alleged attackers prior to being asked to identify them. Parker joined in this motion and requested that the fruits of the out-of-court identification be suppressed as well, including Masengale's statement to police.

The court held a suppression hearing on April 22, 2010, where the parties presented testimony from Mr. Branham (the Target manager), police officers, and Masengale's private investigator. The Commonwealth did not present any testimony from Ms. Martin, the victim. During the hearing, Detective Iddings testified about a statement he made in his report ("Also at that time the Target store personnel came out with surveillance photos and were attempting to show them to the victim so I requested that they not do that which would taint the identification.") in light of the video surveillance showing Target personnel doing just that. He admitted in his testimony that he made an error in the statement in his report, and he clarified that he did not believe he asked personnel not to show the photographs and that he did not know the victim had already been shown the photographs.

The day following the hearing, the trial court issued a ruling from the bench and made extensive findings of fact and conclusions of law. Based upon the factual circumstances surrounding the show-up, the court concluded that the pre-show-up procedure was inherently suggestive in that Ms. Martin was shown photos and told that the person the officers wanted her to identify fit the description of one of her assailants. The court then considered the five *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), factors to decide whether under the totality of the circumstances, the identification was reliable. In making this ruling, the court was clearly disturbed that the Commonwealth had not called Ms. Martin to testify and, accordingly, made several conclusions without the benefit of her

testimony, but inferred what she would have testified to based upon other testimony that had been admitted. The court ultimately found that the *Neil v. Biggers* factors had been satisfied and determined that the identification was reliable.

The court issued a written order signed on May 4, 2010, and entered a few days later memorializing its oral ruling, and the matter proceeded to trial on May 6, 2010. At the conclusion of the trial, the jury found Parker guilty of first-degree robbery and fleeing or evading police, but acquitted him on the tampering with physical evidence charge. The court then imposed the recommended concurrent sentences of eleven-and-one-half years' imprisonment on the robbery conviction and twelve months on the fleeing or evading conviction. Masengale was acquitted of the robbery charge. This appeal by Parker follows.

On appeal, Parker argues that the trial court committed reversible error in denying his motion to suppress Ms. Martin's identification because it was secured by highly suggestive means and because of the Commonwealth's discovery violation in failing to turn over the Target surveillance footage. He also argues that the cumulative effect of these errors supports his claim that his conviction should be reversed and that he is entitled to a new trial.

Parker's first argument addresses whether Ms. Martin's identification was tainted by suggestive procedures utilized following the robbery. The Commonwealth contends that Parker does not have standing to make this argument because the show-up was concerning Ms. Martin's identification of Masengale, not

him. We agree with Parker that the Commonwealth is precluded from making this argument because it was not raised before the trial court. “It has long been this Court's view that specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal.” *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011), reh'g denied (Oct. 27, 2011), as modified (Sept. 20, 2011). Our review of the suppression hearing reveals that while the Commonwealth Attorney did object to Parker’s attorney questioning Detective Iddings, the basis for the objection was that Ms. Martin was not going to be making an in-court identification at trial. It does not appear that there was a more general objection to Parker’s standing to move to suppress the identification. Accordingly, we agree with Parker that the issue is waived. “[L]ack of standing is a defense which must be timely raised or else will be deemed waived.” *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010). Therefore, we shall consider the merits of this argument.

Our standard of review from a denial of a motion to suppress is as follows: First, we must determine whether the findings of fact are supported by substantial evidence. If so, those findings are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). If not, the factual findings must be overturned as clearly erroneous. *Farmer v. Commonwealth*, 169 S.W.3d 50, 53 (Ky. App. 2005). For purposes of identification testimony, the Supreme Court of Kentucky has stated that:

A trial judge's ruling as to the admissibility of evidence is reviewed under an abuse of discretion standard. *Cf. Goodyear Tire & Rubber Co. v. Thompson*, Ky., 11 S.W.3d 575 (2000). An abuse of discretion occurs when a "trial judge's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 581 citing *Commonwealth v. English*, Ky., 993 S.W.2d 941 (1999).

King v. Commonwealth, 142 S.W.3d 645, 649 (Ky. 2004).

The trial court in this case properly relied upon *King* for its statement of the applicable law in this area:

The determination of whether identification testimony violates a defendant's due process rights involves a two-step process. *Dillingham v. Commonwealth*, Ky., 995 S.W.2d 377, 383 (1999) quoting *Thigpen v. Cory*, 804 F.2d 893, 895 (6th Cir. 1986), cert. denied sub nom. *Foltz v. Thigpen*, 482 U.S. 918, 107 S.Ct. 3196, 96 L.Ed.2d 683 (1987); and *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968). "First, the court examines the pre-identification encounters to determine whether they were unduly suggestive." *Id.* If not, the analysis ends and the identification testimony is allowed. "If so, 'the identification may still be admissible if under the totality of the circumstances the identification was reliable even though the [identification] procedure was suggestive.'" *Id.* quoting *Stewart v. Duckworth*, 93 F.3d 262, 265 (7th Cir. 1996) and *Neil*, supra.

Determining whether under the totality of the circumstances the identification was reliable requires consideration of five factors enumerated by the United States Supreme Court in *Neil*. The five factors are: 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 his prior description of the criminal; 4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and confrontation.

This Court has previously adopted these factors in *Savage v. Commonwealth*, Ky., 920 S.W.2d 512 (1995).

King, 142 S.W.3d at 649.

Under the test set forth in *Neil v. Biggers*, *supra*, the trial court first found that the pre-identification procedures in this case were unduly suggestive. Despite the Commonwealth's argument to the contrary, we must agree with this ruling, since Ms. Martin was shown photographs of the suspected assailants and was told she was going to be asked to identify an individual who met the description she provided. The court then went on to examine the five factors to determine whether the identification was reliable under the totality of the circumstances, despite being unduly suggestive. Because the trial court based its conclusions on several factors on its assumption of what Ms. Martin might have testified to, we must hold that the trial court abused its discretion in denying the motion to suppress.

Of the five factors, several specifically address what the witness experienced. In this case, the witness was Ms. Martin, whom the Commonwealth did not call to testify at the suppression hearing. With regard to the first two factors, Ms. Martin's opportunity to view the criminal at the time of the crime and her degree of attention, the trial court noted that there was no testimony admitted to establish either factor. However, the court ruled that because Ms. Martin was able to give a general description and because "common sense" would support the idea that a victim would be at full attention, those factors were met. Regarding the fifth

factor, the length of time between the crime and the confrontation, the court again noted that no testimony had been presented to establish this time line. It went on to reconstruct the time line based upon the testimony that had been admitted and estimated that between fifteen and twenty minutes had elapsed. Despite the lack of proof offered on any of these three factors, the trial court found that Ms. Martin's identification was reliable.

We agree with Parker that because the Commonwealth failed to offer any testimony or evidence from Ms. Martin herself, or from anyone else, addressing these three factors, the trial court committed reversible error in determining that her identification of Masengale was reliable. None of the witnesses testified specifically about Ms. Martin's opportunity to view her assailants, her degree of attention, or the length of time that had elapsed. This left the trial court in the position of having to make assumptions as to what that testimony might have been when considering those three factors. Therefore, we hold that the trial court's ruling violates Parker's rights under the United States and Kentucky Constitutions, was an abuse of discretion, and must be reversed.

Because we have determined that Ms. Martin's identification of Masengale must be suppressed, we need not address Parker's second argument that the Commonwealth committed a discovery violation in failing to turn over the surveillance footage showing the Target employee showing Ms. Martin the photographs.

For the foregoing reasons, the judgment of the Fayette Circuit Court is reversed, and this matter is remanded for a new trial excluding the evidence obtained as a result of the show-up identification.

TAYLOR, CHIEF JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS.

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