Circuit Court for Baltimore City
Case No. 117011010

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 441

September Term, 2018

ABOU GOLOKO

v.

STATE OF MARYLAND

Wright,
Graeff,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: March 14, 2018

The appellant, Abou Goloko, was convicted in the Circuit Court for Baltimore City by a jury, presided over by Judge Edward R. K. Hargadon, of sexual assaults in the 1st, 2nd, 3rd, and 4th degrees, of attempted burglary, and of attempted home invasion. On this appeal, the appellant contends

> 1. that both an out-of-court identification of him from a photographic array and a subsequent in-court identification of him by the crime victim should have been excluded; and
>
> 2. that, as a minor at the time of the crime, jurisdiction over his case should have been waived to the juvenile court.

The crimes occurred on November 18, 2016, at approximately 3:00 p.m. Victoria Parilla was biking back to her apartment from her classes at the Maryland Institute College of Art. As she was entering her apartment building, she was grabbed from behind and pushed into the vestibule by two young men. They initially asked her for her money, for condoms, and for her cell phone. They began looking through her backpack and asked for her keys.

The first assailant then began to assault the victim sexually, pulling down her pants and sliding his fingers into her vagina. The second assailant, who was the appellant, stood behind the victim during that sexual attack, putting his hand over her mouth while he groped her buttocks. When the victim began to scream, neighbors from the third floor heard her and began to come out of their apartments. At that point, the two assailants fled.

When the police arrived at the scene, they took the victim to the hospital for sexual assault medical screenings. The victim, who was an art student, sketched out pictures of her two assailants. She also worked with a police sketch artist. A day after the crime, the victim was shown a photographic array. We are told simply that the victim did not identify "the

officer's suspect" but identified "one of the fillers." That recitation tells us very little. We have no idea who "the officer's suspect" was. We have no idea whether a photograph of the appellant was in the array. We don't know whether a photograph of the other assailant was in the array. We don't know whether photographs of both of them were in the array. It is an alleged fact that really does not tell us anything.

In any event, the victim came down to the police station on December 19, 2016, to look at two photographic arrays. The first did not involve the appellant and is not pertinent to the issue now before us. The second array, consisting of six photographs, did involve the appellant. The victim picked out the photograph of the appellant, the second of the six photographs in the array, as one of her assailants. That single photographic array of December 19, 2016, consisting of six pictures from which the victim selected the photograph of the appellant, is our exclusive focus as we look at the merits of the appellant's trial.

This appeal is in a sense unusual in that the major part of the appellant's well-reasoned and well-articulated argument turns out to be totally irrelevant.

In Jones v. State, 395 Md. 97, 109, 909 A.2d 650 (2006), the Court of Appeals explained what is sometimes a two-step inquiry.

> [T]he inquiry for due process challenges to extra-judicial identifications is a two step inquiry. The first is whether the identification procedure was impermissibly suggestive. If the answer is "no," the inquiry ends and both the extra-judicial identification and the in-court identification are admissible at trial. If, on the other hand, the procedure was impermissibly suggestive, the second step is triggered, and the court must determine whether, under the totality of the circumstances, the identification was reliable.

(Emphasis supplied; citations and footnote omitted). See also Smiley v. State, 442 Md. 168, 180–81, 111 A.3d 43 (2015).

Much of the appellant's argument concerns what the controlling law would be **IF** that second stage had been reached. In this case, the second stage was never reached. The appellant analyses at some length the various reliability factors of Neil v. Biggers, 409 U.S. 188, 199–200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), and argues that they would not suffice to render this out-of-court identification reliable if it had earlier been ruled to be impermissibly suggestive. In this case, however, it had never been ruled to be impermissibly suggestive, and the reliability factors were irrelevant.

The appellant also analyses at length the Maryland cases of Hubbard v. State, 395 Md. 73, 78, 909 A.2d 270 (2006), and Cook v. State, 8 Md. App. 243, 247, 259 A.2d 326 (1969), and points out that no independent reliability factors would satisfy the taint hearing necessary to overcome an earlier finding of impermissible suggestiveness and to admit a subsequent in-court identification. There having been no such earlier ruling, there was no taint hearing. All of the taint-hearing law was irrelevant.

With respect to the photographic array of December 19, 2016, the appellant moved to have that out-of-court identification suppressed on October 31, 2017. A hearing was held on November 27, 2017. At that hearing, the appellant kept jumping ahead to reliability factors but the trial judge kept his eye on the proper threshold issue.

> [DEFENSE COUNSEL]: Your Honor, there is testimony here about, one of the issues, one of the questions that Your Honor will have to consider is her level of certainty. And whether, and where this certainty came from.
>
> THE COURT: Not unless I get past, I've got to get past the first prong. The first prong is whether or not the procedure was permitted or not. If the procedure is fine, I don't even get to that issue.
>
> [DEFENSE COUNSEL]: Right, Your Honor. And I didn't know if Your Honor, if Your Honor is spacing that out in terms of me having to --
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> THE COURT: I'm doing this bifurcated. I want the first issue addressed first, which is the, whether the procedures were unduly suggestive. I don't even reach that second issue unless I get past the first issue.
>
> [DEFENSE COUNSEL]: I understand, Your Honor.
>
> THE COURT: No, I don't want it all lumped together, if that's what your question is.
>
> [DEFENSE COUNSEL]: Okay. Okay.

(Emphasis supplied).

The appellant offered no suggestion of any sort that the police procedure in conducting the photographic array was in any sense suggestive. The entire claim is based on the allegedly inherent suggestiveness of the photographic array itself. The appellant's argument is based exclusively on the fact that the appellant is wearing a jacket whereas the other five subjects are wearing t-shirts. On the other hand, only the third subject is wearing a white shirt, only the fifth subject is wearing a sporty colored shirt, and only the sixth subject has considerably more hair. Smiley v. State upheld the non-suggestiveness of a photographic array, noting:

> We shall affirm and shall hold that the elongation of the face and torso of four of the photographs in the photo array did not render the array impermissibly suggestive.

442 Md. at 179.

Bailey v. State, 303 Md. 650, 663, 496 A.2d 665 (1985), had noted that a photo array "'to be fair need not be composed of clones.'" (Citation omitted).

In ruling that the photographic array was not impermissibly suggestive, the court observed:

> I mean, I just don't see how just saying there's a jacket on generally is something that is going to be so unduly suggestive and in this case it's really what the procedures were used.
>
> I don't really have any evidence in front of me in this case in terms of the process by which Detective Davis formed all of the pictures and maybe that would shed some light on what this issue is. But given the fact that it's the defense burden in order to prove that the procedures were unduly suggestive, I don't think the defense has done that and I'm going to deny the motion at this time.

(Emphasis supplied).

We have looked at the photographic array evidence and we hold that the hearing judge did not abuse his discretion.

The appellant moved to have this case removed to the juvenile court. After holding a hearing, Judge Hargadon denied the motion, finding that four of the five relevant factors either weighed against transfer or were neutral. Maryland Code, Criminal Procedure Article, Sect. 4–202(d) provides that in determining whether to transfer jurisdiction, the court "shall consider":

(1) the age of the child;

(2) the mental and physical condition of the child;
(3) the amenability of the child to treatment in an institution, facility, or program available to delinquent children;
(4) the nature of the alleged crime; and
(5) the public safety.

The decision is committed to the discretion of the trial court and will not be disturbed unless that discretion has been abused. King v. State, 36 Md. App. 124, 128, 373 A.2d 292, cert. denied, 281 Md. 740 (1977). With respect to the age factor, Judge Hargadon found:

> With respect to the age of Abou was 17 years and five months old at the time these allegations arose in November of last year. He is now 18 years and one month old, past the age of 18, and I agree, [the State] is correct, the case law, while the understanding of adolescent brain development is changed the factor is a factor of age and the reality is his age straddles 17-1/2 at the time of the charge which would be itself argue in favor of transfer, and 18 years and one month, which would argue against it, as he has reached the age of majority in that respect.
>
> It is in my view neutral with regard to the I have had an opportunity and I know in other cases I have where there was a straddle of ages around 18 I have in some cases said narrowly supports transfer and narrowly opposes transfer, but on re-reading the cases that deal with this factor I think it's true that the age alone is what is to be considered and in this case weighing that case law the factor is neutral.

As to "mental and physical condition" the court concluded that that factor favored transfer.

> With respect to mental and physical condition Defendant is 5'10" tall, weight approximately 120 pounds, age appropriate in his appearance. Tall, he is thin, he appears to be a young person of his stated age. He was living at home dependent on his family, not attending school, and not employed, physical condition is more that of a juvenile than that of an adult in Factor 2 in my view with regard to his cognitive abilities and I think frankly there is as between the low average and the results of the testing there is, if you combine that with Abou's success in school, in Hickey and also here, there

is very good reason to be optimistic about the abilities Abou brings to his education and ultimately his employment and to his life, as Dr. Stefano said, are understated by the results of much of the testing.

But on balance as to mental and physical condition on this record I think that factor weighs in favor of transfer.

The "amenability to treatment" factor strongly suggested non-transfer.

With respect to Factor 3, unfortunately this juvenile record beginning in 2013 and particularly focusing on the contacts in this court, that is the two burglary firsts that were facts sustained August 8, 2016, for which he was committed on October 7, 2016, and the two probations, one for attempted unauthorized use in March of 2016 resulting in a probation of July of 2016, and another burglary first in December of 2015 resulting in a probation of July 29, 2016.

Abou's recidivism, the calculated nature of these charges, burglary first is not an impulsive snatching of a cell phone on the street, it is a breaking and entering into a person's residence for the purpose of stealing, and with respect to all of the probations and with the exception of paying restitution there was a failure of compliance with absolutely everything that were extended as services, a lack of amenability, an unwillingness to be engaged in any of the services over a 4-year period with an escalation of the charges and their seriousness that in my view, notwithstanding what has happened while there was no alternative and in detention, demonstrates a lack of amenability to juvenile services, and on that record I have no alternative but to find that Factor 3 weighs against transfer.

The "nature of the charges" factor and the "public safety factor" also argued against transfer.

With respect to Factor 4 the nature of these charges and Abou's alleged involvement in these charges it is sadly hard to imagine, short of a capital offense, crime more serious with respect to the effects on the alleged victim, on the community, than what is described on the transfer report and elsewhere on this record.

Factor 4 in my view weighs very strongly in favor of denying the transfer as does Factor 5. Stefano's testimony itself conceded, as I think must be conceded, that Abou is a serious threat to the community, a safety threat,

> and, unfortunately, to some degree in the seven aggressive assaults while in detention indicate that that threat at that level has not changed and the entire record, and, indeed, Defendant's own expert concedes that that is a factor that weighs in favor of transfer. Excuse me, weighs against transfer of jurisdiction to the juvenile system.

Finding that three of the five factors weighed against transfer, one was neutral, and one favored transfer, Judge Hargadon concluded:

> Weighing all five of the factors as I must do this motion for transfer is denied.

We see no abuse of discretion.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.