UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

No. 1175
September Term, 2014

TAVON BATTLE
v.
STATE OF MARYLAND

No. 1348
September Term, 2014

DERRICK WALKER
v.
STATE OF MARYLAND

Wright,
Hotten,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: November 20, 2015

Appellants, Tavon Battle and Derrick Walker, were jointly tried and convicted by a jury in the Circuit Court for Baltimore City. Their separate appeals were consolidated in this Court. On October 20, 2013, they and a third person had robbed Joshua Lee at the point of a gun wielded by Battle. Walker removed valuables from Lee's person. Battle was convicted of armed robbery, Walker of robbery. Each was convicted of related offenses. Each was sentenced to twenty years confinement, with all but twelve years suspended, and three years probation on release.

Each appellant challenges the denial by the trial court of his motion to suppress an identification made by the victim at a showup. Walker phrases the question presented as follows:

> "Whether the trial court erred in denying appellant's motion to suppress an impermissibly suggestive and unreliable show up identification and the resulting in-court identification in violation of his right to Due Process?"

Battle raises the same issues.

We shall affirm because, as hereinafter explained,

(1) the showup was necessary, and

(2) reliability, vel-non, is a question for the jury and not for the court when, at a suppression hearing, the identification is found not to be unnecessarily suggestive.

The Evidence

When reviewing the ruling at a suppression hearing, we look only to the record at that hearing. *Wallace v. State*, 219 Md. App. 234, 243, 100 A.3d 1173, 1178 (2014). Here, there were two witnesses at the hearing, first the victim, Lee, and then the investigating officer, Dexter Nazareno. The defense conducted direct examination of the witnesses, and the State cross-examined, because the defense had the burden of showing, *prima facie*, a constitutional violation. *See Smith & Samuels v. State*, 6 Md. App. 59, 68, 250 A.2d 285, 291, *cert. denied*, 254 Md. 720, 255 Md. 743 (1969), *cert. denied*, 397 U.S. 1057, 90 S. Ct. 1402 (1970).

These facts were not controverted. At about 8:50 a.m. Lee saw three black males standing at a bus stop when he, as a pedestrian, left the Douglas Projects to cross Caroline Street in order to buy cigarettes at the store on the corner of Caroline and Fayette Streets. He had also seen them around the Douglas Projects once before. After Lee returned from the store and had reentered the projects, the three men robbed him at gunpoint. The one, who pointed a handgun in his face and did the talking, wore a black North Face jacket and something orange. The second man, who wore orange pants, went through Lee's pockets. The third man stood there. The robbery took about five minutes. When the robbers fled further into the projects, Lee went to a security guard station at Johns Hopkins Hospital on the northwest corner of the 400 block of Broadway. He gave the guard a description of the three men. The guard called 9-1-1.

Officer Nazareno responded within five minutes. He took Lee to the emergency room because Lee was "shooken up." Officer Nazareno broadcast on his police radio. About ten minutes after the officer used the radio, he took Lee to an outdoor basketball court.

From a distance of about seventy-five feet, while seated in the police cruiser, Lee observed two men, seated on the ground with their hands behind their backs. At least two police officers were present, with a police cruiser. There were no drawn guns. The two men had sweatshirt hoodies on. Lee could see their faces, but not their eyes. Lee responded to a question from Officer Nazareno. The State's position is that an extra-judicial identification took place at that time.

About two months later, Detective Joy Pegues telephoned Lee to arrange to take a statement from him. Lee told her that the police had locked up the wrong persons.

On direct examination by the attorneys for the appellants, Lee said that he did not recall giving Officer Nazareno at the hospital a description of the robbers, other than that they were black men. Lee said that, when he was taken to the basketball court, Officer Nazareno asked if the two men "looked familiar," and he replied, "Yes." He disclaimed recollection of saying anything else while identifying the men. Lee said that he told Detective Pegues the wrong men were locked up because that was the fact of the matter.

On cross-examination by the State, Lee initially disclaimed a recollection of describing the robbers to Officer Nazareno. After having been shown his written statement,

he recalled that the gun wielder wore a black North Face jacket and that the frisker wore orange pants. He said that the frisker had on a ski mask. Although he did not know their names, he had seen the three men in the neighborhood once before. He agreed that he had given those descriptions to Officer Nazareno. After testifying on cross that he said the two men at the basketball court were familiar and denying that they were the robbers, Lee was asked: "And, you said to Officer Nazareno: 'Those are the guys who robbed me.'?" Over objection he replied, "Yes." With respect to telling Detective Pegues that the appellants were the wrong men, Lee said that he had done that because he had been threatened. His cross-examination concluded:

> "Q. So, in fact, you did identify the people who robbed you on October 20th, correct?
>
> "A. Yes."

Officer Nazareno testified that when he encountered Lee at the guard station, the victim was quite upset. Lee described the gunman as wearing a North Face jacket, with an orange hoodie inside, and jeans and one of the others as wearing bright orange pants and a big gold watch on his left wrist. Lee made no mention of a ski mask. Outside the emergency room, Lee described the third robber as having dreads, a black jacket and New Balance sneakers. Officers Duck and McMillian had also responded in a single cruiser and were on the scene when Officer Nazareno was talking to Lee. Once Lee had given any

further descriptions, Officers Duck and McMillian canvassed for suspects. Officer Nazareno put the descriptions on the air so that other units would also know.

While Lee and Officer Nazareno were at the emergency room, one or the other of Officers Duck and McMillian "called out" to report that they had two possible suspects at an outdoor basketball court about three blocks from the emergency room. Officer Nazareno told Lee that "we have two guys that are possibly the suspects. All I'm going to need you to tell me is if it's – you know, if it's them." At the basketball court, Lee had an unobstructed view of the appellants from the back seat of the cruiser. Officer Nazareno asked Lee, "Is it them." He replied, "Yes."

At oral argument on the motion to suppress, counsel for appellant Battle submitted that the elapsed time from the robbery to the identification was "15, 20, 30 minutes." The State argued that the interval was "approximately 15 to 20 minutes."

The Ruling

The court denied the motion to suppress in an opinion from the bench on the morning following the hearing. It ruled after doing "a little bit more thorough research" on the issues. The judge found that Officer Nazareno "gave a credible [ac]count of what transpired." The suppression court noted that the Johns Hopkins Hospital campus is adjacent to where the robbery took place. The judge found as a fact that "within a half an hour of the original assault[ive] conduct," Officer Nazareno was alerted that two suspects were being detained.

He found that Lee identified the two suspects as being two of the robbers. It was "unclear" whether handcuffing was apparent to Lee.

The court concluded that the instant showup did not violate the Due Process Clause of the United States Constitution. Further, the court ruled that it did not have to engage in an analysis of reliability under the factors outlined in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972).

Following conviction by a jury, at a trial at which Lee testified for the State, and the imposition of sentence by the court, these appeals were noted.

Standard of Review

In reviewing on appeal a trial court ruling on a motion to suppress, including a motion to suppress based upon an allegedly, impermissibly suggestive, extra-judicial identification, we grant "'great deference to the fact finding of the suppression hearing judge with respect to determining the credibilities of contradicting witnesses and to weighing and determining first-level facts.'" *McDuffie v. State*, 115 Md. App. 359, 366, 693 A.2d 360, 363 (1997) (quoting *Perkins v. State*, 83 Md. App. 341, 346, 574 A.2d 356, 358 (1990). Here, the suppression court found that Officer Nazareno's account of what transpired was credible while Lee's testimony, the court found, made it "difficult to discern, really, where his mind is at." The court pointed out that sometimes Lee said, "Yeah, I made the identification because that's who did it" and, at other times, he said, "I failed to make any

identification because I've been threatened." We consider the first level facts to be those described by Officer Nazareno.

Discussion

Suggestiveness

A suggestion of guilt, to a degree, is inherent in any showup. Implicit in arranging a showup is that the police have some reason for conducting it. But, all showups are not, for that reason, unconstitutional.

> "The admissibility of an extrajudicial identification is determined in a two-step inquiry. [*Gregory*] *Jones* [*v. State*], 310 Md. [569,] 577, 530 A.2d [743,] 747 [(1987)]. 'The first question is whether the identification procedure was impermissibly suggestive.' *Id.* If the procedure is not impermissibly suggestive, then the inquiry ends. If, however, the procedure is determined to be impermissibly suggestive, then the second step is triggered, and the court must determine 'whether, under the totality of circumstances, the identification was reliable.' *Id.* If a *prima facie* showing is made that the identification was impermissibly suggestive, then the burden shifts to the State to show, under a totality of the circumstances, that it was reliable. [*Kevin*] *Jones v. State*, 395 Md. 97, 111, 909 A.2d 650, 658 (2006)."

Smiley v. State, 442 Md. 168, 180, 111 A.3d 43, 50 (2015).

An impermissible suggestion has also been called an unnecessary suggestion. "[D]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Moore v. Illinois*, 434 U.S. 220, 227, 98 S. Ct. 458, 464 (1977) (quoted in *Jones v. State*, 310 Md. 569, 577, 530 A.2d 743, 747 (1987), and in *Webster v. State*, 299 Md. 581, 599-600, 474 A.2d 1305, 1314-15 (1984)).

In a recent decision involving a one-on-one showup at the scene of the crime, the Supreme Court said:

> "Synthesizing previous decisions, we set forth in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and reiterated in *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), the approach appropriately used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement. The Court emphasized, first, that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. *Id.*, at 107, 109, 97 S. Ct. [at 2249]; *Biggers*, 409 U.S., at 198, 93 S. Ct. [at 382]. Even when the police use such a procedure, the Court next said, suppression of the resulting identification is not the inevitable consequence. *Brathwaite*, 432 U.S., at 112-113, 97 S. Ct. [at 2252]; *Biggers*, 409 U.S., at 198-199, 93 S. Ct. [at 382].
>
> "A rule requiring automatic exclusion, the Court reasoned, would 'g[o] too far,' for it would 'kee[p] evidence from the jury that is reliable and relevant,' and 'may result, on occasion, in the guilty going free.' *Brathwaite*, 432 U.S., at 112, 97 S. Ct. [at 2252]; see *id.,* at 113, 97 S. Ct. [at 2252] (when an 'identification is reliable despite an unnecessarily suggestive [police] identification procedure,' exclusion 'is a Draconian sanction,' one 'that may frustrate rather than promote justice')."

Perry v. New Hampshire, ____U.S.____, 132 S. Ct. 716, 724 (2012). *See also Russell v. United States*, 408 F.2d 1280, 1284 (D.C. Cir. 1968), *cert. denied*, 395 U.S. 928, 89 S. Ct. 1786 (1969) (stating the issue in a prompt showup case to be whether the confrontation in that case "'was so unnecessarily suggestive and conducive to irreparable mistaken identification that (appellant) ... was denied due process[.]'") (quoting *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972 (1967)).

Without regard to labels, it is clear that "[t]he practice of presenting single suspects for the purpose of identification is not *per se* prohibited." *Green v. State*, 79 Md. App. 506, 514, 558 A.2d 441, 445 (1989). *Green* cited *Foster & Forster v. State*, 272 Md. 273, 323 A.2d 419, *cert. denied*, 419 U.S. 1036, 95 S. Ct. 520 (1974).

In *Foster*, two men robbed a husband and wife at night, outside of their home, and fled on foot. The victims furnished the police, by telephone, a general description of the perpetrators. The police stopped an automobile, occupied by two men and a woman. Within two minutes of the robbery, the police had the male victim confront the subjects, with four police cars parked in the vicinity. The victim later gave a written statement and ultimately testified that he had been able to identify one of the subjects at the time of the confrontation.

Rejecting a contention that the showup was unnecessarily suggestive, the Court of Appeals said:

> "'There is no prohibition against a viewing of a suspect alone in what is called a "one-man showup" when this occurs near the time of the alleged criminal act; such a course does not tend to bring about misidentification but rather tends under some circumstances to insure accuracy ....'"

Id. at 293, 323 A.2d at 429 (quoting *Bates v. United States*, 405 F.2d 1104, 1106 (D.C. Cir. 1968) (footnote omitted)).

In the case before us, appellant Walker argues that the showup was unnecessarily suggestive because the police could have taken the appellants to a police station for a line-up

or photographic array. *Foster*, however, explains why a showup near the time of the crime is not impermissibly suggestive.

> "'... (T)here was no "substantial likelihood of irreparable misidentification." To the contrary, the police action in returning the suspect to the vicinity of the crime for immediate identification in circumstances such as these fosters the desirable objectives of fresh, accurate identification which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is fresh. *Wise v. United States*, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967), *cert. denied*, 390 U.S. 964, 88 S. Ct. 1069, 19 L. Ed. 2d 1164 (1968); *Walker v. United States*, No. 20, 309 (D.C. Cir., June 17, 1968).'"

Foster v. State, 272 Md. at 293, 323 A.2d at 429 (quoting *Bates v. United States*, 405 F.2d at 1106 (D.C. Cir. 1968) (footnote omitted)).

See also N. Sobel, D. Pridgen, L. Vogelman and D. Ruoff, *Eyewitness Identification: Legal and Practical Problems*, at § 3:9 (2nd ed. 2015), where the authors state that "[a]nother category of showups that are routinely upheld against due process challenges are prompt, on-the scene confrontations."

We agree with the suppression court's implicit conclusion that the showup here was not impermissibly suggestive.

Reliability

The appellants emphasize in their arguments the internally conflicting testimony by Lee at the suppression hearing. They seek to blend consideration of Lee's credibility or reliability as a witness into the consideration of the permissibility or necessity of the suggestion inherent in the showup. In this way, they argue that the suppression court should

have reached in its analysis the second step in the *Jones* (310 Md. 569, 530 A.2d 743) test that was reaffirmed in *Smiley*, 442 Md. 168, 111 A.3d 43. The argument fails factually and legally.

Factually, the circumstances of the showup were found by the court to be as described by Officer Navareno, not as described at times by Lee. The inherent suggestion the showup was no more than that the appellants conformed to the general description that Lee had already given. Officer Navareno's comments to Lee about the showup were neutral.

Further, as a matter of law, the reliability of the identification is a question for the jury at trial where, as here, the showup is not impermissibly suggestive.

Without the benefit of latter Supreme Court authority, the *Foster* court presaged this rule when it said:

> "'This conclusion [that a prompt showup was constitutional] does not rest on a determination that McCann's (the witness) identification was in fact especially reliable. It rests instead on a general rule that it is not improper for the police immediately to return a freshly apprehended suspect to the scene of the crime for identification by one who has seen the culprit minutes before.'"

Foster, 272 Md. at 294, 323 A.2d at 430 (quoting *Russell v. United States*, 408 F.2d at 1284).[1]

In *Perry v. New Hampshire*, ____ U.S. ____, 132 S. Ct. 716 (2012), the Court rejected an argument that, on judicial review of a showup, reliability of the identification

[1]The conclusion in *Russell* was that a prompt showup did not violate the right to counsel. *Foster* applied the language to a due process challenge.

was a required finding in order to find that there was an absence of impermissible suggestion. The argument was based on a statement in *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977), that "reliability is the linchpin in determining the admissibility of identification testimony[.]" The Court explained:

> "[T]he *Brathwaite* Court's reference to reliability appears in a portion of the opinion concerning the appropriate remedy *when the police use an unnecessarily suggestive identification procedure*. The Court adopted a judicial screen for reliability as a course preferable to a *per se* rule requiring exclusion of identification evidence whenever law enforcement officers employ an improper procedure. The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct. The very purpose of the check, the Court noted, was to avoid depriving the jury of identification evidence that is reliable, *notwithstanding* improper police conduct. 432 U.S., at 112-113, 97 S. Ct. [at 2252].
>
> "Perry's contention that improper police action was not essential to the reliability check *Brathwaite* required is echoed by the dissent. *Post*, at 731-733. Both ignore a key premise of the *Brathwaite* decision: A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances, the Court said, is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place. See 432 U.S., at 112, 97 S. Ct. [at 2252]. Alerted to the prospect that identification evidence improperly obtained may be excluded, the Court reasoned, police officers will 'guard against unnecessarily suggestive procedures.' *Ibid*. This deterrence rationale is inapposite in cases, like Perry's, in which the police engaged in no improper conduct."

Perry, 132 S. Ct. at 725-26 (footnote omitted).

This Court made the same point in 1977 in *Conyers v. State*, 115 Md. App. 114, 691 A.2d 802, where we said:

> "Until a defendant establishes impermissive suggestiveness in the first instance as a basis for presumptive exclusion, therefore, a court does not even inquire, by looking at the suggested reliability factors, into whether the State is entitled to an exemption from that presumptive exclusion."

Id. at 120, 691 A.2d at 805-06.

See also State v. Hailes, 217 Md. App. 212, 267-70, 92 A.3d 544, 576-78 (2014).

For the foregoing reasons, we affirm.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED.

COSTS IN NO. 1175-'14 TO BE PAID BY THE APPELLANT, TAVON BATTLE. COSTS IN NO. 1348-'14 TO BE PAID BY APPELLANT, DERRICK WALKER.