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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000688-MR

CALVIN L. PARRISH

APPELLANT

APPEAL FROM CHRISTIAN CIRCUIT COURT
v. HONORABLE JOHN L. ATKINS, JUDGE
INDICTMENT NO. 02-CR-00454

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: GUIDUGLI, McANULTY, and MINTON, Judges.

MINTON, Judge: Following the entry of a conditional guilty plea, Calvin Parrish appeals the denial by the circuit court of his motion to suppress an identification of him as the perpetrator of a robbery, which he alleges was the result of an unduly suggestive show-up identification procedure. The question on appeal is whether, considering the totality of the circumstances surrounding the challenged identification, it is so unreliable that it must be suppressed.

In July 2002, "The Pantry," a convenience store in Hopkinsville, was robbed by an African-American. Cathy Gibbs, the cashier working at the time of the robbery, was the only witness to the crime. Approximately thirty minutes after the robbery, Gibbs was taken to the police station and was told by a detective that she "was going to identify the man that robbed her." Gibbs did not immediately identify Parrish as the robber and remained equivocal even after being shown the store's surveillance video. Gibbs said that Parrish wore shoes and shorts similar to the robber's. He also had a consistent haircut and face shape. Testifying in court during the suppression hearing, Gibbs still was equivocal in her identification of Parrish; the most she would say was that his face was familiar.¹

Parrish and the Commonwealth agree that this case must be analyzed using the factors enumerated in Neil v. Biggers² and its Kentucky counterpart, Savage v. Commonwealth.³ Biggers enumerates five factors to be considered in determining whether,

¹ Indeed, an argument could be made that Gibbs never truly identified Parrish in that she never definitively stated that he committed the robbery. However, her statements were treated as amounting to an identification by the circuit court, so we will as well.

² 409 US 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

³ Ky., 920 S.W.2d 512 (1996).

under the totality of the circumstances, a show-up identification is so suggestive that the witness would make an irreparable misidentification.⁴ The five so-called "Biggers 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 the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.⁵

Gibbs testified that although the robber spent several minutes in the store before committing the robbery, she did not pay any special attention to him. In fact, she testified that she did not look much at his face during that time. The first two factors in the Biggers analysis, therefore, weigh against admission in that Gibbs did not have much opportunity to view the criminal before the crime; and to the extent that she did, she did not pay him a high degree of attention.

There is no indication in the record, through Gibbs' testimony or otherwise, that she gave a prior description of the robber. The Commonwealth cites Commonwealth v. Thompson⁶ in an

⁴ Savage, *supra*, at 513, *citing* Wilson v. Commonwealth, Ky., 695 S.W.2d 854, 857.

⁵ Biggers, *supra*, 409 US at 199, 34 L.Ed.2d at 411.

⁶ Ky., 697 S.W.2d 143 (1985).

attempt to persuade us that we, as an appellate Court, must assume that the missing information supports the circuit court's decision in the absence of evidence in the record on this point. However, such is a gross distortion of the holding of Thompson. Thompson simply stands for the proposition that if part of the circuit court's record is missing on appeal and the appellant has taken inadequate steps to preserve that record, we interpret the missing section of the record as supporting the circuit court's decision. Were we to extend the holding of Thompson as the Commonwealth suggests, it would destroy the presumption of innocence by eliminating the Commonwealth's burden of proof of every element of a crime beyond a reasonable doubt. In a case wherein a defendant is convicted of a crime following a total failure by the Commonwealth to put on proof of one element, under the theory advanced by the Commonwealth today, we would be forced to affirm the conviction despite a lack of evidence. Such a proposition is contrary to our fundamental system of justice.

Accordingly, we will not assume that Gibbs provided an accurate prior description of the robber. Every indication in the record is that she did not provide a description of any kind prior to the show-up. The third Biggers factor weighs against admission.

The fourth Biggers factor considers the level of certainty of the witness at the time of confrontation. It is difficult to imagine an identification premised on any lower level of certainty which is still considered an identification. Gibbs was unsure upon first viewing Parrish whether or not he was the robber and, even after viewing the videotape, was not certain. Furthermore, Gibbs testified that at the time of the show-up, her recollection of the robbery was unclear. This is certainly understandable, considering the traumatic nature of the event, compounded by the fact that the assailant struck her in the head. Finally, Gibbs was uncertain in her recollection of the show-up at the suppression hearing. Even then, she was not completely certain about her identification of Parrish. Gibbs exhibited a consistently low level of certainty in her identification, which lends great credibility to the possibility that the suggestive nature of the show-up may have led her to misidentify Parrish.

Finally, the show-up was close in time to the event - approximately thirty minutes following the robbery. It is unlikely that the mere passage of time would have contributed in any significant way to the possibility of Gibbs being susceptible to the suggestiveness of the show-up. However, of the five Biggers factors, this is the only one which weighs in favor of admission.

Reviewing the totality of the circumstances, the circuit court erred in admitting Gibbs' show-up identification. While we agree that this is a close case and a good argument can be made for admitting the identification and allowing cross-examination on the points discussed above, four of the five Biggers factors weigh strongly in favor of suppressing the identification as having been the product of an unduly suggestive show-up procedure. The circuit court's order denying Parrish's motion to suppress is reversed, and the matter is remanded for further proceedings consistent with this opinion.

GUIDUGLI, Judge, CONCURS.

McANULTY, Judge, CONCURS IN RESULT AND FILES SEPARATE OPINION.

McANULTY, Judge, CONCURRING IN RESULT: After setting forth that an African-American male robbed the convenience store and being informed that we have the man who did it, the victim was ultimately only able to state that the defendant's face was similar to the perpetrator's. Although I agree with the majority's conclusion that the show-up identification was erroneously admitted, I believe the characterization that "this is a close case and a good argument can be made for admitting the identification and allowing cross-examination on the points discussed above . . ." is at best charitable.

BRIEF FOR APPELLANT:

Emily Holt
DEPARTMENT OF PUBLIC ADVOCACY
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
ATTORNEY GENERAL

Courtney J. Hightower
ASSISTANT ATTORNEY GENERAL
Frankfort, Kentucky