

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ALAN WILLIS,

Defendant-Appellant.

UNPUBLISHED

July 5, 1996

No. 171381

LC No. 92-001584-FH

Before: Smolenski, P.J., and Holbrook, Jr. and F.D. Brouillette,* JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to a term of two years' imprisonment for the felony-firearm conviction, such term to be followed consecutively by concurrent terms of life in prison without the possibility of parole for the first-degree murder conviction and life in prison for the armed robbery conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that the pretrial identification procedures were unduly suggestive and that the trial court's denial of defendant's motion to quash the identification testimony was clearly erroneous. We disagree. Pretrial identification procedures constitute a denial of due process when they are so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable misidentification. *People v McElhaney*, 215 Mich App 269, 286-288; 545 NW2d 18 (1996); *People v Townsend*, 60 Mich App 204, 207; 230 NW2d 378 (1975). The determination whether identification procedures constitute a denial of due process is made in light of the totality of the circumstances surrounding the pretrial identification. *McElhaney, supra* at 287. Once it is determined that a pretrial identification is tainted by improper procedure or is unduly suggestive, an independent basis must be established for an in-court identification. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

* Circuit judge, sitting on the Court of Appeals by assignment.

In the present case, the identification witnesses were asked by the Eastpointe police to look through stacks of photographs which consisted of approximately ten to thirty photographs. Defendant argues that this procedure was unduly suggestive because the witnesses were repeatedly exposed to the stacks of photographs containing multiple pictures of defendant. We disagree.

In *People v Richmond*, 84 Mich App 178, 181; 269 NW2d 521 (1978), this Court held that a photo array was not unduly suggestive when, of the five to seven photographs displayed, as many as three of the photographs were of the defendant. Furthermore, in the present case, there was no testimony indicating that any of the stacks of photographs contained more than one picture of defendant. Detective John Calabrese testified that there was only one picture of defendant in each stack, and James Berlin and James Hillier both testified that they did not see more than one photograph of each person in the stacks. In addition, none of the witnesses identified defendant from the stacks of photographs.

Defendant next argues that the pretrial identification procedures were unduly suggestive because defendant was the only person who appeared in the stacks of photographs and in the corporeal lineup. We disagree. In *People v Currelley*, 99 Mich App 561, 568; 297 NW2d 924 (1980), this Court held that the fact that a defendant is the only individual to appear in both a photo array and a subsequent lineup does not render the lineup procedure improper.

Defendant next argues that the pretrial identification procedures were unduly suggestive because defendant's photograph was published by the media in relation to the present offense, and on Crime Stoppers¹ posters in relation to other, unrelated crimes. We disagree.

The publication of photographs of a defendant does not taint a subsequent lineup where the witnesses' identifications are not unduly influenced by the published photographs. *People v Kurylczyk*, 443 Mich 289, 313 (Griffin, J., with Mallett, J., concurring), 318 (Boyle, J., with Riley, J., concurring); 505 NW 2d 528 (1993). James Berlin testified that, although he saw the Crime Stoppers poster posted in a store on one occasion, he did not read the newspaper or watch the news on television, and that he did not know what defendant looked like before the lineup. Robert Tanalski testified that he did not see defendant's face in the media or on a Crime Stoppers poster before the lineup. James Hillier testified that he saw defendant's face on television once or twice before the lineup, but never saw the Crime Stoppers poster. Michael Crafard testified that he saw defendant's picture on television approximately five to seven times, and knew defendant was a suspect in the case before viewing the lineup. However, Crafard did not positively identify defendant in the lineup. All of the witnesses, with the exception of Michael Crafard, testified that their identifications of defendant were based on the events of January 20, 1992, and were not based on any photographs of defendant they may have seen before the lineup.

Looking at the totality of the circumstances, it does not appear the pretrial identification procedures were unduly suggestive. The witnesses, especially James Berlin and James Hillier, had ample opportunity to observe the perpetrator. Furthermore, the descriptions the witnesses gave of the

perpetrator on the night of the crime comport with defendant's actual description. Under these circumstances, we can not say that the trial court's denial of defendant's motion to quash the identification testimony was clearly erroneous.

Defendant next argues that the trial court abused its discretion by refusing to admit into evidence a North Carolina driver's license purportedly issued to defendant in the few weeks before the present offense, and which depicts defendant with short hair. We disagree.

MRE 803(8) provides a hearsay exception for:

[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624; MSA 9.2324.

A driver's license does not qualify for MRE 803(8)(A) because it does not set forth the activities of any office or agency. A driver's license does not satisfy the requirements of MRE 803(8)(B) because it does not set forth matters observed pursuant to a duty imposed by law to which there was a duty to report. Furthermore, even if a record meets the literal requirements of MRE 803(8)(B), the circumstances under which the record was prepared must indicate the record's inherent trustworthiness if the record is to be admissible under the exception. See e.g., *Attorney General v John A. Biewer Co, Inc*, 140 Mich App 1, 17; 363 NW2d 712 (1985).

In the present case, the driver's license was issued to defendant under a different name, and, although the license may have been issued to defendant on January 10, 1992, there is no indication of the date on which the photograph of defendant was taken. Furthermore, because several witnesses testified at trial that defendant had short hair at the time of the present offense, any error that may have resulted from the trial court's refusal to admit the driver's license into evidence was harmless. *People v Fortson*, 202 Mich App 13, 18; 507 NW2d 763 (1993).

Because the driver's license was inadmissible under the hearsay rule, this Court need not determine whether the driver's license qualifies for self-authentication under MRE 902(1). *People v Jenkins*, 450 Mich 249, 260; 537 NW2d 828 (1995).

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Francis D. Brouillette

¹ Crime Stoppers is an organization of businesses, members of the public, and several neighboring police departments, including the St. Clair Shores, Roseville, and East Detroit police departments, who cooperate to solve crimes committed in those communities.