

IN THE COURT OF APPEALS OF IOWA

No. 5-372 / 94-769

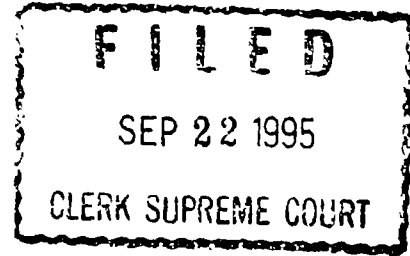
STATE OF IOWA,

Plaintiff-Appellee,

vs.

**MATEO GONZALES TORRES, a/k/a
MATTHEW TORRES,**

Defendant-Appellant.



Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh,
Judge.

Mateo Torres appeals the judgment and sentence entered upon his convictions,
following a jury trial, of first-degree robbery, first-degree theft, and going armed with
intent in violation of Iowa Code sections 711.1, 711.2, 714.1, 714.2(1) and 708.8
(1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Angelina M. Smith, Assistant Attorney
General, Thomas S. Mullin, County Attorney, and Clinton L. Spurrier, Assistant
County Attorney, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Around midnight on November 1, 1994, James Eppler was walking to a store near his apartment to purchase cigarettes. He noticed a person walking towards him from across the street. The person, who Eppler thought was a teenage boy, asked Eppler for a cigarette. Eppler told the boy "no" because he thought the boy was underage. The boy again asked for a cigarette and Eppler again told him "no". The boy then walked a few feet in front of Eppler, turned around, and pulled a gun from his pocket. The boy demanded a cigarette. Eppler handed him a few cigarettes and a lighter. The boy told Eppler to lie on the ground and demanded money. Eppler placed \$52 on the ground. The boy threatened to shoot Eppler and Eppler saw him raise his gun. The second time the boy raised his gun Eppler jumped up, grabbed the boy's gun hand, pushed him backwards, and ran away.

Eppler immediately contacted the police. He described his assailant to Officer Houchin as a seventeen-year-old Native American, possibly Hispanic male, wearing a white hat, a black Raiders starter jacket, and possibly dark pants.

As Eppler was sitting in Houchin's patrol car, Officer Larson radioed that he had seen someone who matched Eppler's description of the suspect, but the person had run away. Houchin drove to the area where a suspect had been spotted. Eppler observed the defendant walk by the patrol car and informed Houchin. Houchin proceeded to do a felon takedown of the suspect and placed him in handcuffs. Eppler

then walked over to the suspect and positively identified him as the person who robbed him.

Nineteen-year-old Mateo Torres was charged with first-degree robbery, first-degree theft, going armed with intent, and assault while participating in a felony. The State later dismissed the charge of assault while participating in a felony.

Torres filed a motion to suppress the evidence of Eppler's identification of him alleging the identification procedures were impermissibly suggestive. At the hearing on the motion, Officer Houchin testified that he pointed Torres out to Eppler as he walked by the patrol car and asked Eppler if Torres was the person who had robbed him. Eppler testified that he first observed Torres and informed Houchin. The court denied the motion.

At trial Eppler testified that he had been drinking beer throughout the day prior to his encounter with Torres. He stated he had four beers over an eight or nine hour period; he consumed the last beer about an hour before he left for the store.

Evidence was presented that when Torres was apprehended he was wearing a black Miami Dolphins starter jacket and light blue jeans. He had a shell casing, nineteen cents, and a lighter in his possession. In the area where Officer Larson had seen the suspect flee, police found a revolver and a white hat.

The jury found Torres guilty as charged. Torres filed a motion for new trial again alleging the identification evidence should have been suppressed. The motion was denied.

Torres appeals.

On appeal, Torres's sole contention is the district court erred in failing to grant the defendant's motion to suppress identification testimony by the victim. Our review of identification issues is de novo. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993); *State v. Thornton*, 506 N.W.2d 777, 779 (Iowa 1993).

In considering Torres's claim of undue suggestiveness, we employ a two-part analysis.

First, we must decide whether the identification procedure was in fact impermissibly suggestive. Second, if we find that the procedure was impermissibly suggestive, then we must determine whether, under the totality of the circumstances, an identification adhered by the witness at the time of trial is irreparably tainted.

State v. Webb, 516 N.W.2d 824, 829 (Iowa 1994) (citing *State v. Birch*, 479 N.W.2d 284, 286 (Iowa 1991)). Since the above is an if/then analysis, we do not reach the second step if we find the procedure was not impermissibly suggestive.

Generally, one-on-one confrontations or "show-ups" between an accused and an eyewitness are inherently suggestive. *State v. Salazar*, 213 N.W.2d 490, 493 (Iowa 1973); *State v. Jackson*, 387 N.W.2d 623, 631 (Iowa App. 1986). It does not, however, aid a defendant's claim to say the confrontation was "suggestive." *Salazar*, 213 N.W.2d at 493. Rather, the confrontation must be unnecessarily suggestive. *Id.* at 493-94.

The question that remains is whether the procedure was impermissibly suggestive. Eppler made two confrontation identifications. The first was from the

police car.¹ The second was when, without solicitation from a police officer, Eppler exited the police car and walked over to where the defendant was in custody.² "The presence of police officers is a usual and necessary element in the ordinary identification confrontation. It cannot be said they convert the situation to one 'unnecessarily suggestive.'" *Salazar*, 213 N.W.2d at 494. In fact, prompt on-the-scene identifications are encouraged because they "promote fairness by assuring reliability." *Id.* at 495. We find neither identification to be impermissibly suggestive.

Upon consideration of the arguments raised on appeal, we affirm the decision of the district court.

AFFIRMED.

¹ This identification was not initiated by a police procedure. Eppler testified he identified the defendant walking on the street and then told a police officer the defendant was his assailant.

² This identification was also not initiated by a police procedure. In this case, Eppler was seated in a police car one-half block away from where the defendant was being placed in custody. Without solicitation by a police officer, Eppler exited the car and walked over to where the defendant was being placed in custody. Eppler then made a positive identification