

FILED

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CLERK SUPREME COURT
IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Plaintiff-Appellee,)

Filed October 21, 1980

vs.)

PAUL RAY HULSING,)

0-249

62933

Defendant-Appellant.)

Appeal from Black Hawk District Court - Dennis D. Damsgaard, Judge.

Defendant appeals conviction and sentence on charge of second degree burglary in violation of 713.3, Supplement to the Code 1977, alleging 1) that identification testimony should have been suppressed because it was obtained by suggestive line-up procedure and because the identification was the result of an illegal seizure and 2) that the trial court erred in sentencing him to serve a term of not less than ten years in prison and in refusing his request for probation. CONVICTION AFFIRMED; REMANDED FOR RESENTENCING.

W. H. Gilliam of Rapp & Gilliam, Waterloo, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Shirley Ann Steffe, Assistant Attorney General, and David Correll, Black Hawk County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendant, Paul Ray Hulsing, appeals from conviction and sentence on charge of second degree burglary in violation of section 713.3, Supplement to the Code 1977. He alleges that identification testimony should have been suppressed because it was obtained through use of suggestive line-up procedures and because the identifications were obtained as the result of an illegal seizure. Defendant also contends that the trial court erred in imposing a sentence for a term not to exceed ten years at the Men's Reformatory in Anamosa and in refusing to grant him probation. We affirm defendant's conviction but remand to the trial court for resentencing.

Our review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

In July, 1978, defendant was charged with and convicted of second degree burglary in violation of section 713.3, Supplement to the Code 1977. Following a jury trial, defendant was sentenced to a term of not less than 10 years in prison, after which he brought this appeal.

Prior to trial, defendant moved to suppress the pre-trial and in-court identifications of the defendant by witness Mehus. Defendant asserted that Mehus' identification was obtained at a suggestive pre-trial confrontation at which defendant had not yet been arrested and was not represented by counsel. Defendant's motion was resisted by the State.

At hearing on the motion to suppress, Stanley Stout testified that on the night of the burglary, he had seen a man fitting defendant's description hanging around the house of his neighbor Kate Porter at 6:30 p.m. and again at 10:30 p.m. and that his wife had called the police. Reg Mehus testified that he chased a man he saw running from Porter's house and that after he had briefly caught up with the man, whom he identified as defendant, the man got away. Mehus then described the man to the police and, after about thirty minutes, a man fitting the radioed description was spotted five or six blocks from Porter's house. This man was the defendant. He was stopped but not arrested, and informed that he matched the description of a break-in suspect. When asked if he would accompany the police back to the scene, defendant answered that he would and that he had nothing to hide. He was then taken by police car to where witnesses Stout and Mehus were waiting and was positioned in front of the car headlights. There is conflicting testimony as to whether defendant was in handcuffs at

this point. Stout and Mehus were then asked if they could identify him, and both witnesses responded that defendant was the man they had seen, at which point the police proceeded to place him under arrest.

The trial court overruled defendant's motion to suppress Mehus' identification testimony, but did not rule with respect to the testimony given by Stout, since defendant had not included that testimony in his motion to suppress. At trial, both Mehus and Stout identified the defendant as the man they had seen on the night of the burglary.

II.

Defendant first contends that the trial court erred in denying his motion to suppress the identification testimony given by witnesses Mehus and Stout. In support of his position, defendant alleges that the identifications were obtained by suggestive police procedures and were the result of an illegal seizure of defendant's person. We affirm the trial court's ruling as to admissibility of the identification testimony given by Stout and Mehus.

Our review of the record indicates that at no time prior to this appeal did defendant object to admission of Stout's identification testimony. Defendant's pre-trial motion to suppress and the trial court order that overruled it referred only to the testimony of Mehus. Defendant does not explain his failure to object to Stout's testimony, but the record suggests that it may have been due to the fact that defendant was unaware when he moved to suppress Mehus' testimony that Stout had also been present on the night of the burglary and had identified the defendant. Nevertheless, defendant learned during the suppression hearing that Stout had also been present for the on-the-street identification and thus he had ample time to amend his motion to suppress to include Stout. We conclude that by his failure to timely object to admission of Stout's identification testimony, defendant has waived his right to have the evidence suppressed. State v. Washington, 257 N.W.2d 890, 895 (Iowa 1977), cert. denied, 435 U.S. 1008, 98 S. Ct. 1881, 56 L. Ed. 2d 390 (1978); State v. Bash, 214 N.W.2d 219, 221 (Iowa 1974); State v. Boose, 202 N.W.2d 368, 369 (Iowa 1972). Furthermore, matters not raised below cannot be effectively asserted for the first time on appeal. Washington, 257 N.W.2d at 895; State v. Pardock, 215 N.W.2d 344, 347 (Iowa 1974). Thus, we do not address the issue of the admissibility of the identification testimony given by Stout.

Mehus' identification testimony was correctly admitted into evidence by the trial court. Defendant contends that the out-of-court identification was obtained by the use of suggestive line-up procedures and is inadmissible as violative of due process under Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

We make two points in response to defendant's contention. First, after comparing the procedure used in the instant case with that used in State v. Salazar, 213 N.W.2d 490 (Iowa 1973), where a suspect in handcuffs was identified at night while standing next to a squad car in the presence of approximately twelve police officers and it was held that the police had not used an unnecessarily suggestive procedure to obtain the identification, we are not convinced that the circumstances surrounding Mehus' identification of defendant were unnecessarily suggestive. Second, even if the circumstances were unnecessarily suggestive, the identification testimony will be admissible if, despite the suggestive aspect, the totality of the circumstances reveal that the out-of-court identification is reliable and there is no substantial likelihood of irreparable misidentification. Brathwaite, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154. Washington, 257 N.W.2d at 894; State v. McManus, 263 N.W.2d 556, 558 (Iowa Ct. App. 1977). After viewing the entire set of circumstances surrounding the identification by witness Mehus on the night of the burglary, we find that the identification is reliable and therefore admissible. We base this conclusion on consideration of five factors relevant to a determination of reliability: 1) opportunity of the identifying witness to view the suspect at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the description given by the witness; 4) the witness' level of certainty in making the identification; and 5) time elapsed between the crime and the confrontation. Brathwaite, 432 U.S. at 114-15, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154-55; Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 396, 405 (1979); State v. Hicks, 277 N.W.2d 889, 892-93 (Iowa 1979); McManus, 263 N.W.2d at 558-59. Mehus' testimony indicates that he had a very good opportunity to view the defendant, because defendant had fallen to the ground when Mehus caught up with him. Mehus stood over the defendant and looked right into his face and even carried on a short conversation with him. The area was lit by a street light and the light from a porch. Mehus undoubtedly looked at the defendant with a high degree of attention, since he suddenly found himself face-to-face with the man he had been chasing. Mehus accurately described the defendant to the police as being of a certain height and

weight, having red hair that was combed back, and wearing deck shoes and a dark-colored sports jersey with white sleeves. It was on the basis of this description that the police stopped the defendant several blocks away from the scene of the crime. Mehus was absolutely certain when he made the identification that the defendant was the man he had chased and caught up with. He testified that the police officers did not encourage him to identify the defendant as the man he had seen. Mehus identified defendant within about forty-five minutes of the time he had been chasing him. For these reasons, we hold that Mehus' identification of defendant was reliable, not subject to substantive likelihood of irreparable misidentification, and properly admitted into evidence.

Defendant also contends that the identification testimony of Stout and Mehus should have been suppressed because it was the fruit of the illegal seizure of defendant's person. Again, we do not discuss the admissibility of Stout's testimony because defendant failed to object to it in a timely fashion. With regard to Mehus' testimony, we find no merit in defendant's argument.

Defendant alleges that his being stopped by the police and asked to return to the scene of the crime constitutes an illegal seizure of his person. It is unclear that the stop constituted a seizure of defendant's person and even less clear that it was illegal if in fact it was a seizure. A "seizure" in the fourth amendment sense has occurred only when a police officer has restrained an individual's freedom to walk away through the use of physical force or a show of authority. Terry v. Ohio, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16, 20 L. Ed. 2d 889, 905 n.16 (1968). See also Brown v. Texas, 443 U.S. 47, 50, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357, 361 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S. Ct. 2574, 2578, 45 L. Ed. 2d 607, 614 (1975). The test is whether, in light of all the circumstances, a reasonable person would have believed that he or she was not free to leave. United States v. Mendenhall, ____ U.S. ____, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980). Assuming the officers' request that defendant accompany them back to the scene constituted a seizure of the defendant's person, we do not believe that it was an illegal seizure within the meaning of the fourth amendment.

The fourth amendment applies to all seizures of the person, including those that involve only brief detentions short of traditional arrest, Brignoni-Ponce, 422 U.S. at 878, 95 S. Ct. at 2578, 45 L. Ed. 2d at 614, and a seizure of the person violates the

fourth amendment only if it is unreasonable. Brown, 443 U.S. at 50, 99 S. Ct. at 2640, 61 L. Ed. 2d at 361 (1979); Brignoni-Ponce, 422 U.S. at 878, 95 S. Ct. at 2578, 45 L. Ed. 2d at 614; State v. Johnson, 232 N.W.2d 477, 479 (Iowa 1975). The reasonableness of such a seizure depends on a balance between the public interest and the individual's right to be secure from arbitrary interference by law officers. Brignoni-Ponce, 422 U.S. at 878, 95 S. Ct. at 2579, 45 L. Ed. 2d at 614-15; United States v. Palmer, 603 F.2d 1286, 1289 (8th Cir. 1979). To assure that the individual's reasonable expectation of privacy is not subject to such arbitrary invasions, "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual . . ." Brown, 443 U.S. at 51, 99 S. Ct. at 2640, 61 L. Ed. 2d at 362; Palmer, 603 F.2d at 1289. We find that the officers who stopped defendant and asked him to return to the scene of the crime did so on the basis of specific and objective facts. They knew that a crime had been committed in the area and they had a fairly detailed description of the person they were looking for. That description was provided by Stout, Mehus, and an officer who had seen the person in question running out of the Porter house, and each of the three gave essentially the same description. The defendant fit this description very closely and was breathing rapidly and perspiring when the police talked to him. Defendant was not arrested at this point; he was merely detained for questioning and possible identification. For these reasons, we do not think the stop was unreasonable and we reject defendant's argument that Mehus' identification testimony should have been suppressed as the fruit of an illegal seizure.

III.

Defendant also contends that the trial court erred and abused its discretion by sentencing him to a term not to exceed ten years and by refusing his request for probation. Defendant bases this assignment of error on, among other things, an allegation that the court did not state on the record its reasons for selecting this particular sentence as required by Iowa R. Crim. P. 22(3)(d). We agree, and remand for resentencing.

If the sentence imposed is within the statutory maximum, this court will interfere with the sentencing decision of a trial court only where the defendant has shown an abuse of discretion in selection of the sentence. State v. Luedtke, 279 N.W.2d 7, 8 (Iowa 1979). With its requirement that the reasons for choosing a particular sentence be

on the record, Rule 22(3)(d) is intended to reveal any such abuse in discretion by the sentencing court. State v. Hildebrand, 280 N.W.2d 393, 397 (Iowa 1979); Luedtke, 279 N.W.2d at 8. The State contends that certain remarks made to counsel by the trial court during the pre-sentence hearing indicate that the court adequately stated its reasons for selecting the sentence it did. We find the court's remarks insufficient to satisfy Rule 22(3)(d).

Following defense counsel's attempt to refute information contained in the pre-sentence report, the trial court asked defense counsel how he could "make those statements in the face of the fact that defendant has previously been convicted, been placed on probation, and had a revocation of that probation." Additionally, the trial court announced the sentence to be imposed with the remark that it had "considered the information offered relative to the question of sentencing, including the statements made by the defendant and counsel in mitigation of punishment" We do not think that either of these comments adequately reveal the specific reasons that motivated the trial court in selecting the sentence. The first remark made by the court merely reveals acknowledgement on the part of the judge that the defendant had previously had an unsuccessful experience with probation; it is not a specific statement made by the court that it considered this fact in sentencing. The second remark made by the court is entirely too vague to indicate precisely what information was considered in selecting the appropriate sentence. In Hildebrand, the sentencing judge stated that "I have the policy that when there is an accident involved, I do not and will not grant a deferred sentence." Hildebrand, 280 N.W.2d at 395. This was in response to defense counsel's question whether "the only reason that deferral is being denied [is] the fact that there was an accident involved." Id. This exchange, unlike the one in the present case, clearly reveals the court's reason for refusing the sentence requested. Because we agree with defendant that the requirement of Iowa R. Crim. P. 22(3)(d) has not been satisfied here, we remand for resentencing.

CONVICTION AFFIRMED; REMANDED FOR RESENTENCING.