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IN THE COURT OF APPEALS OF IOWA, CLERK SUPREME COURT

STATE OF IOWA,	)	
Appellee,	)	Filed May 31, 1978
vs.	)	
CHARLES HENRY HOPKINS,	)	484
Appellant.	)	60793

Appeal from Linn District Court - John L. Hyland and Louis W. Schultz, Judges.

Defendant appeals his conviction of robbery without aggravation, in violation of § 71L.3, The Code (1975), contending that the victims of the robbery of which he was accused should not have been permitted to identify him at trial because a pretrial showup and photographic identification procedure were unnecessarily suggestive and tainted the in-court identification. **AFFIRMED.**

Henry E. Nathanson, of Cedar Rapids, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, Raymond D. Sullins and Thomas A. Evans, Jr., Assistant Attorney Generals, and Harold L. Denton, Assistant Linn County Attorney, counsel for appellee.

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

DONIELSON, J.

Defendant-Charles Henry Hopkins appeals his conviction of robbery without aggravation, in violation of § 711.3, The Code (1975). He contends that the trial court erred in allowing the victims of the robbery of which he was accused to identify him as the robber at trial because a pretrial showup and photographic identification procedure were unnecessarily suggestive and tainted any subsequent in-court identification.

Defendant was accused of robbing Arnold Volkmann, his wife, and her brother as they sat in lawn chairs on the front lawn of the Volkmann residence at 9:00 p.m. on August 24, 1976. After being charged with robbery with aggravation, Hopkins filed a motion to suppress "all identification testimony or evidence" by either Mr. or Mrs. Volkmann because of the procedures employed by police with respect to the pretrial showup and photographic identification.

At the hearing on defendant's motion, Mr. Volkmann testified that on September 16, 1976, he was called to the police station and was shown a group of six or eight photographs of different individuals, including one of defendant, who he identified as one of the robbers. However, he did indicate at the time that the hair on the person in the photograph was longer than that of the robber. Mr. Volkmann also testified that he subsequently returned to the police station with his wife, at which time they simultaneously observed defendant alone in an adjoining room through a one-way mirror and positively identified him as the robber.

The police officer who conducted the investigation of the robbery testified that in preparing the photographic display for Mr. Volkmann, he selected photographs of seven or eight other individuals to be shown along with the picture of Hopkins. The detective also stated that although he could not recall specifically what pictures were shown to Mr. Volkmann, he knew that at least six of the photographs were randomly selected from a file categorized by "age, color, size, that type of thing" containing over 100 photographs of individuals whose physical characteristics were similar to those of defendant. The photos were given to Mr. Volkmann in a stack.

In its ruling on the motion to suppress, the trial court concluded that the one-on-one out-of-court confrontation through the one-way mirror was an improper identification in the absence of exigent circumstances and the failure of the State to preserve

the evidence of the photographic identification procedure rendered the evidence obtained as a result of such procedure inadmissible at trial. However, the court ruled that the State had met its burden of showing that the in-court identification of defendant by the Volkmanns had an independent origin "back to the night of the crime rather than to the identification of photos and the one-on-one identification at the police station."

Since *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); and *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) and the Iowa cases interpreting the *Wade-Gilbert-Stovall* trilogy,¹ the law has been settled that (1) an out-of-court identification which is unnecessarily or impermissibly suggestive and which presents the likelihood of irreparable misidentification is a denial of due process and such evidence may not be used at a later trial; (2) despite the fact that a pretrial identification may not be used because of the illegal procedure by which it was obtained, the same witness may nevertheless identify a defendant at trial if such identification has an independent origin and is not "tainted" by the illegal procedure; (3) each case must be decided on its own facts and by a consideration of the totality of circumstances disclosed by the evidence; and (4) the State has the burden to show by clear and convincing evidence that the identification made in court does have an independent origin and is not based upon--tainted by--the illegal identification procedure prior to trial. *State v. Ash*, 244 N.W.2d 812, 814 (Iowa 1976), cert. denied, 430 U.S. 918, 97 S.Ct. 1334, 51 L.Ed.2d 597 (1977); see *State v. Washington*, 257 N.W.2d 890, 893-894 (Iowa 1977).

In *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) and more recently in *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the United States Supreme Court delineated several factors to be considered in determining whether under the totality of the circumstances an out-of-court identification is reliable even though the confrontation procedure utilized was suggestive. The

¹ See the cases cited in *State v. Ash*, 244 N.W.2d 812, 814 (Iowa 1976), cert. denied, 430 U.S. 918, 97 S.Ct. 1334, 51 L.Ed.2d 597 (1977).

Court indicated that in evaluating identification testimony, we should consider (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 his 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. Although the cases in which these factors were considered involved out-of-court identification problems, we believe that these factors are equally relevant in the in-court identification context as well. See State v. Washington, supra, at 894. Applying these factors to the instant case, we agree with the conclusion of the district court.

At the suppression hearing, both Mr. and Mrs. Volkmann testified that on the evening in question, the part of the street on which their residence is located was well illuminated. The evidence was also uncontradicted that Mr. Volkmann had the opportunity to observe defendant for at least one minute. According to testimony, Hopkins stood right ahead of Mr. Volkmann about a foot away at the time Volkmann observed him.

Further, the Volkmanns were unequivocal in their identification of defendant. This degree of certainty was best exemplified by Mr. Volkmann's statement that "[When] a man holds an iron bar over your head and threatens your life, you don't forget that face, very easy." Mrs. Volkmann also indicated that at the time of the robbery, she concentrated on looking at defendant's face and never took her eyes off of it. On the night in question, the Volkmanns described the robber as a black man, five feet seven inches, having closely cropped hair and wearing a white T-shirt.

A review of the foregoing factors convinces us that a sufficient independent origin existed for the in-court identification of defendant by the Volkmanns. A weaker set of circumstances than the one in the instant case was found to provide the requisite independent origin in State v. Ash, supra.

Further, throughout their many examinations under oath, the testimony of the Volkmanns never wavered. On each occasion, they testified unequivocally that they could identify defendant. It was also clearly established that their identification was independent of the photo identification and showup. The fact that they testified in the same manner on several occasions is of some significance. See State v. Ash, supra, at 315.

- 4 -

Upon a review of all of the circumstances, we hold that the trial court was correct in finding that there was an independent origin for the Volkmanns' in-court identification of defendant. Consequently, the testimony was properly admitted at trial. The judgment of the district court is affirmed.

AFFIRMED.