

COMMONWEALTH OF PENNSYLVANIA vs.
ROBERT RANDAL BRATCHER, Defendant, C.P.
Franklin County Branch, Criminal Division, No. 1539-
98, Criminal Action

Commonwealth v. Bratcher

unreasonable delay between incident and filing of charges; unreliable identification by undercover agent

1. Delay of just over one year between the commission of the offense and arrest does not violate defendant's due process rights where the delay did not cause substantial prejudice to defendant's right to a fair trial.
2. Defendant's argument that due to the delay he has lost his ability to recall where he was at the time of the offense, thereby making it impossible to determine if he had an alibi, is mere speculation and is therefore not a sufficient ground for a finding of actual prejudice.
3. Identification of defendant by undercover agent by viewing one picture shown to her by fellow agent who asked her if that was the guy she had bought drugs from, was suggestive procedure.
4. Use of suggestive identification procedure does not necessarily require its exclusion; rather, court must look at whether totality of the circumstances indicates that the identification was reliable and did not involve a substantial likelihood of misidentification.
5. In looking at the totality of the circumstances, court must consider the following factors: (1) opportunity of witness to view the criminal; (2) witness's degree of attention; (3) accuracy of witness' prior description; (4) level of certainty demonstrated at identification; and (5) the time between crime and confrontation.
6. In this case, agent had good opportunity to view defendant for 15 minutes from close by; as a trained police officer on duty, she had great degree of attention; and she was certain of her identification; however, these factors are outweighed by the long time that elapsed between incident and identification (5 or 6 months) and by the fact that the description given immediately after the drug buy was so vague it could have fit hundreds of black men, including defendant.
7. Looking at the totality of the circumstances, the identification was not reliable and must be suppressed.

*Jill A. McCracken, Assistant District Attorney, Attorney for
the Commonwealth*
Michael J. Toms, Esquire, Attorney for the Defendant

OPINION AND ORDER

WALKER, P.J., May 7, 1999:

Factual and Procedural Background

This case involves charges stemming from an undercover drug operation performed by agents of the Attorney General's Office. Agent Donna Dellarciprete was assigned to work in the Chambersburg area. On October 1, 1997, she went to a room at the Carlton Motel, in the presence of an informant, seeking to buy drugs from Janet Small. Ms. Small was not interested, but a man who had previously been introduced as "Grant" said that he could get her what she wanted. During the negotiation of the deal, Agent Dellarciprete was within one foot of "Grant" and, because the motel room was very small, she was never further than four to five feet away from him. Agent Dellarciprete spent approximately fifteen minutes inside the well lit room. "Grant" left the room for approximately two minutes while he was getting the drugs. Immediately following the drug buy (an amount of cocaine purchased for \$150), Agent Dellarciprete wrote down a description of "Grant," which stated that he was a black male, had a thin build, long bushy black hair and an extensive description of the clothing he was wearing.

Approximately five or six months later, Agent Dellarciprete was in Chambersburg, together with Agent Mohn, working undercover on a different case. They stopped at the police station where Agent Mohn got out of the car. He returned a short time later with a photograph. He asked Agent Dellarciprete whether this was a picture of "this guy Grant she had bought drugs from." She testified that she immediately recognized the man on the picture as "Grant." The picture (introduced into evidence as Commonwealth's exhibit 1) is that of Defendant Robert Bratcher. Officer McDonald of the Chambersburg police testified that Agent Mohn had requested a picture of Mr. Bratcher by name. It is unknown, since the

Commonwealth failed to call Agent Mohn as a witness, how Agent Mohn obtained defendant's name.

Despite the fact that Agent Dellarciprete was in Franklin County numerous times working on another case, she did not file charges against defendant until October 22, 1998. She testified at the hearing that the only reason for the delay was the lack of manpower due to the fact that she was working on another big case which was very time consuming, as well as several other cases.

Defendant filed an omnibus pre-trial motion seeking to have the charges against defendant dismissed due to the unreasonable delay from the incident to the filing of charges. Defendant further seeks to have all identifications of defendant suppressed based on the suggestive identification made by Agent Dellarciprete. A hearing on defendant's motion was held on April 20, 1999.

Discussion

1. Motion to dismiss - unreasonable delay

Defendant argues that the period of just over one year between the incident and the filing of the charges was an unreasonable delay, thereby violating defendant's constitutional right to due process. Due process is violated by pre-indictment delay only if it is shown that the delay caused substantial prejudice to the defendant's right to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. *Commonwealth v. Daniels*, 480 Pa. 340, 354, 390 A.2d 172 (1978), citing *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed. 2d 468, 481 (1971). Furthermore, an inquiry into the prosecution's reasons for the delay is not required until a claim of prejudice to the accused is made out. The United States Supreme Court's decision in *Marion* establishes that "proof of actual prejudice makes a due process claim concrete and ripe for adjudication." *Daniels*, 480 Pa. at

354, citing *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed 2d 752, 759 (1977).

Thus, it must first be established whether defendant has shown he incurred actual prejudice as a result of the delay in bringing charges against him. Defendant argues that he has incurred such prejudice because he has now lost the ability to recall where he was at the time and place of the crime, thus making it impossible to determine if he had an alibi for the incident. In *Daniels*, the defendant claimed he incurred prejudice because either insanity or alibi defenses might have been available to him had his arrest come sooner. *Daniels*, 480 Pa. at 357. The Pennsylvania Supreme Court found that these assertions were no more than speculation and held that the defendant had not established prejudice. *Id.* In the absence of any other Pennsylvania cases factually on point, this court also found persuasive a holding by the United States District Court for the Eastern District of Pennsylvania. *United States v. Heldon*, 479 F. Supp. 316 (1979). In *Heldon*, the defendants sought to have their case dismissed based on a five-year delay between offense and arrest. Defendants claimed prejudice because they were now unable to account for their whereabouts during the time of the incidents, to locate other witnesses who could provide exculpatory testimony, and to locate alibi witnesses. *Heldon*, 479 F. Supp. at 320. The court held as follows:

Except for the unadorned allegation of dimmed memories, defendants do not specify what exculpatory evidence eludes them, the names of material witnesses who cannot now be located and the substance of their testimony. Reliance on the possibility of dimmed memories, inaccessible witnesses and lost evidence without any specific factual information by which to judge whether defendants can receive a fair trial will not justify dismissing the indictment.

Heldon, at 320.

The court found that the allegations by the defendants were mere speculation, which could not serve as grounds for a finding of actual prejudice. *Id.*

Similarly, in the underlying case, defendant's argument that he lost his ability to recall where he was at the time and place of the crime, thereby making it impossible to determine if he had an alibi for the incident, is nothing more than speculation as to the existence of any alibi witnesses. This cannot serve as a sufficient ground for a finding of actual prejudice. Since defendant has not been able to establish that he incurred actual prejudice, this court need not inquire into the reasons for Agent Dellarciprete's delay in filing the charges, although this court wants to express its dismay that she did not take any action on this case sooner. This court does not believe that she did not have time to file charges earlier due to her workload, especially since she was working in the Chambersburg area and thus was in close proximity. This court finds it especially upsetting that even after Agent Dellarciprete finally identified defendant, she waited another six months before filing charges. However, in the absence of actual prejudice, defendant's motion to dismiss must be denied.

2. Motion to suppress - suggestive photo identification

Defendant seeks to have all identifications of defendant suppressed based on the suggestive photo identification made by Agent Dellarciprete. In the underlying case, Agent Dellarciprete identified defendant when she was shown a single picture by a fellow agent who asked her if this was "that guy Grant" who had sold her drugs. The practice of showing a single photograph or the suspect alone to a witness has been held to be unnecessarily suggestive and the practice has been "widely condemned." *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed. 2d 140, 147 (1977), citing *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d at 1199 (1967).

This court finds that the single photo identification used to identify defendant was such a suggestive procedure. Agent Dellarciprete could have looked through photo books at the Chambersburg Police Station (where this photo had been kept) to identify defendant's picture rather than merely viewing just one picture. However, the use of a suggestive procedure by itself does not mean that the identification must be excluded. The United States Supreme Court has rejected a per se approach whereby any identification obtained through the use of a suggestive procedure must be excluded. *Manson*, 53 L.Ed. 2d at 151-154. Rather, where the totality of the circumstances indicates that the identification was reliable and did not involve a substantial likelihood of misidentification, such identification need not be excluded. *Manson*, 53 L.Ed. 2d at 154. In determining whether the totality of the circumstances indicates the reliability of the identification, the court must look at the following factors: (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 at the identification; and (5) the time between the crime and the confrontation. *Manson*, 53 L.Ed.2d at 154, citing *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972); see also *Commonwealth v. Buehl*, 510 Pa. 363, 508 A.2d 1167 (1986).

Manson, like the underlying case, involved the single photograph identification made by an undercover agent. Applying the factors set forth above, the United States Supreme Court came to the conclusion that the identification was reliable. *Manson*, 53 L.Ed. 2d at 154-155. The court found that the agent had had a good opportunity to view the defendant for several minutes at a distance of two feet. With respect to the witness' degree of attention, the court noted that it involved a police officer who was not a casual observer but a trained law enforcement on duty who was expected to pay scrupulous attention to detail. The court further noted that the officer's description, which was written down immediately

after the drug buy and included the offender's race, height, build, color and style of hair, and facial features, was accurate. In addition, the officer had been absolutely certain that the picture was of the person he had bought drugs from. Lastly, the identification had taken place only two days after the drug buy. The court specifically noted that it did not involve a case where there was a "passage of weeks or months between the crime and the viewing of the photograph." *Manson*, 53 L.Ed. at 154-155. Similarly, in other cases involving the photo identification by trained, undercover police officers where the identification was held to be reliable, the identification took place within several days of the encounter. See *United States v. Butts*, 535 F. Supp. 608 (1982); *United States v. Williford*, 729 F. Supp. 1077 (1989).

Applying the factors set forth above to the underlying case, this court first notes that Agent Dellarciprete had a good opportunity to view the person she bought drugs from. She spent approximately fifteen minutes with him at a distance of no more than four to five feet. Similarly to the situation in the cases cited above, she was a trained law enforcement officer on duty and thus could be expected to pay attention to detail. She furthermore testified that as soon as she looked at the picture, she was certain it was the person who had sold her the drugs. All these factors support a finding that Agent Dellarciprete's identification of defendant was reliable. However, two other factors do not support such a finding. First, this court notes that her description of the person who had sold her drugs, made immediately after the drug transaction had taken place, was very vague. She merely described him as a "black male, with a thin build, and long bushy hair." It did not include any characterizations such as weight, height, or facial features. The description was so general that it could have fit hundreds of black men. Thus, it was not surprising that defendant's picture matched the description.

Secondly, this court considered the period of time between the incident and the identification. Five or six months had

elapsed before Agent Dellarciprete made the identification. In all that time, she had had no other contact with the man who had sold her the drugs on October 1, 1997, and she had been working under cover on other cases. This period of five to six months is a very long time, making the possibility of a reliable identification very small.

This court finds that the vagueness of the description and the long period of time that passed before Agent Dellarciprete made her identification are important factors which outweigh all the other factors. Looking at the totality of the circumstances, this court finds that the single photo identification made by Agent Dellarciprete was not a reliable identification. Because there was a substantial likelihood of misidentification, the photo identification must be excluded. In addition, because Agent Dellarciprete's in court identification does not have a reliable independent basis, any further identifications by her must also be excluded.

ORDER OF COURT

May 7, 1999, after consideration of defendant's omnibus pre-trial motion, this court finds as follows:

1. Because defendant failed to establish that he incurred actual prejudice due to the one year delay in filing charges, defendant's motion to dismiss is denied.
2. Because this court finds that the identification made of defendant by Agent Dellarciprete was unreliable, defendant's motion to suppress all identifications is granted.