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Commonwealth v. Thompson

COMMONWEALTH OF PENNSYLVANIA vs. DEANDRA THOMPSON, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 665 - 2000

Post Sentencing Motion Pursuant to Pa.R.Crim. P. §1410(B);

Testimony Regarding the Use of Photographs for Identification Purposes

1. A photographic array is permissible to provide direct corroboration and confirmation of a police officer's identification when the identification is based on information provided by local law enforcement and a confidential informant, the transactions were conducted for brief time periods and several months lapsed between the initial contact and the time of trial.
2. When the crux of defendant's case rests on misidentification, the police officer's direct testimony regarding the use of a photo array to positively identify defendant after initial contact was permissible.
3. Testimonial reference at trial to photographs is not prejudicial per se when the source of the photographs was not revealed to the jury, the photographs were not admitted into evidence nor reviewed by the jury at trial.
4. Mere reference to a photographic array does not give rise to an assumption that the photograph is a "mug shot," especially when testimony offered at trial presented the jury with an alternative source for the photographs.

Appearances:

David W. Rahauser, *Assistant District Attorney*

Karl E. Rominger, Esq., *Counsel for Defendant*

OPINION

Van Horn, J., February 12, 2001

Background

Petitioner, DeAndra Thompson, (Defendant), was tried and convicted on two counts of delivery of cocaine and one count of criminal use of a communications facility on November 16, 2000. Defendant was sentenced to a period of incarceration on December 20, 2000. A timely Post Sentencing Motion was filed by Defendant pursuant to Pa.R.Crim. P. §1410(B). The matter was listed for oral argument by Order of this Court dated January 4, 2001.

During the trial, Defendant's attorney made a motion for mistrial based upon the fact that police officers referred to identification photographs.^[1] According to defense counsel, the police officers' references to a photo array tainted the jury and allowed them to infer that Defendant had a prior criminal

record.^[2] Therefore, the jury based the conviction on the knowledge that Defendant had prior contact with the police and/or a prior criminal record.

The Commonwealth contends that the photo array was used during the direct examination of Officer Jenkins for identification purposes only in an effort to corroborate the identification of

the individual from whom he had just purchased drugs. The photo array was not shown to the jury and was simply identified as consisting of individual photographs at trial.

The Commonwealth claims that the references to the photographs during trial were necessary for the purpose of identification for the following reasons:

1. Officer Jenkins is employed by the City of Harrisburg as a narcotics investigator. Although he had been coming into the Chambersburg area since August 1999, this was the first time he purchased drugs as an undercover operative in Chambersburg. His only familiarity with Defendant was the information provided by local enforcement agencies and a confidential informant. Therefore, direct corroboration and confirmation of Officer Jenkins' identification was necessary.
2. The transactions between Mr. Thompson and Officer Jenkins were for brief periods of time. As defense counsel elicited on cross examination of Officer Jenkins, each transaction took approximately five minutes. Furthermore, Officer Jenkins' contact was with a person using the name "Man-Man," not Thompson.
3. The Commonwealth was also concerned about the time lapse (eleven months) between Officer Jenkins' initial contact with Defendant and the date of trial. Almost a year had passed between the incidents in question and Defendant's trial.

Furthermore, the Commonwealth contends that the source of the photographs was not mentioned nor was the term "mug shots" used during trial. The Commonwealth argues that a reference to photographs, without indication as to the source of the photographs, does not put the defendant's criminal record at issue.

Counsel for Defendant and counsel for the Commonwealth presented their arguments on February 1, 2001. This matter is now ripe for disposition.

Discussion

As properly stated by defense counsel, "The prosecution may not introduce evidence of the defendant's prior criminal conduct as substantive evidence of his guilt of the present charge . . . The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty, and thus effectually to strip him of the presumption of innocence." Commonwealth v. Clark, 453 Pa. 449, 452, 309 A.2d 589, 590 (1973), quoting, Commonwealth v. Allen, 448 Pa. 177, 181-182, 292 A.2d 373, 375 (1972).

In Allen, the Supreme Court stated that the test for determining whether statements made by witnesses are prejudicial is that the testimony must convey to the jury the fact of a prior criminal offense either expressly or by reasonable implication. Id. at 453. Defendant urges the Court to utilize this test in determining whether Officer Jenkins' testimony regarding the photo array rises to the level of a reasonable implication of a prior criminal offense thereby stripping him of the presumption of innocence.

Defense has also cited Commonwealth v. Bruno, 215 Pa. Super 407, 258 A.2d 666 (1970), for the proposition that where the existence of a prior mug shot has been telegraphed by witnesses, a new trial is required. Like this Court, the trial court in Bruno did not allow the photos to be admitted, but did allow witnesses to inform the jury over defense counsel's objections that the identification of the defendant was obtained from photographs presented by the police. In Bruno, the Superior Court found that the testimony relating to photographic identification was irrelevant in light of the victim's ability to identify the defendant and the fact that the victim's identification testimony was not shaken on cross examination. A new trial was ordered due to the prejudicial effect of the victim's and two lay witnesses' testimony regarding the victim's identification of the defendant from a group of photographs supplied by the police.

While the Court recognizes the similarities between the case at bar and Bruno, supra., there are also factual distinctions between these cases that cannot be ignored.

In the case at bar, we are dealing with an undercover operative who is unfamiliar with the Defendant. Officer Jenkins did not have any contact with the Defendant prior to the initial drug transaction which took place at night within a five-minute time period. Officer Jenkins could only identify the Defendant

by his alias, "Man-Man."^[3] Therefore, it was necessary for local law enforcement to present a photo array for Officer Jenkins' review in an effort to positively identify the Defendant.

It would be difficult for the Defendant to argue that Officer Jenkins' photographic identification was superfluous in light of fact that the crux of Defendant's case rested on misidentification. On cross examination, defense counsel had the Defendant stand so Officer Jenkins could positively identify him. Defense counsel solicited the amount of time that Officer Jenkins saw the Defendant close-up during the two transactions in question and Officer Jenkins admitted that each transaction only took five minutes. He also asked Officer Jenkins if he could tell the difference between the Defendant and a man sitting in the courtroom.^[4] Defense counsel also requested that the Defendant and the man stand side by side and questioned Officer Jenkins' ability to positively distinguish one man from the other.

At argument, defense counsel stated that these tactical maneuvers were necessary due to Officer Jenkins' reference to a "photo array" during direct examination and the Court's denial of defense's motion for a mistrial.

The Court finds this argument unpersuasive. According to the Court's recollection and notes, Officer Jenkins made reference to a photo of Defendant on direct by stating that he had seen a photo of the Defendant prior to the first transaction. He then stated that a photo array was viewed to place a name to the individual he knew only as "Man-Man." At this point, defense counsel moved for a mistrial which was denied. Officer Jenkins then identified the Defendant sitting in the courtroom as the individual with whom the first drug transaction occurred. The Court had previously ruled that no mention of the Defendant's prior criminal record would be permitted nor would the jury be permitted to view the pictures constituting the photo array.

In light of the sequence of the identification process revealed through the testimony presented in this matter, Officer Jenkins' identification of the Defendant followed a logical progression. Therefore, the Commonwealth was justified in presenting the testimony of Officer North who assembled the photo array and Officer Leydig who ordered the assembly of the photo array. The Commonwealth did not elicit any testimony regarding the contents of the photo array or the source of the photos. Any question regarding the neutrality of the assembly was evoked by defense counsel on cross-examination of these witnesses in an effort to assert a defense based largely on misidentification.

The facts in this matter are not analogous to those in *Bruno*, supra, but are more akin to the facts in the case cited by the Commonwealth, *Commonwealth v. Reiss*, 503 Pa. 45, 468 A.2d 451 (1983), in which the Supreme Court found that three references to the photographs used to identify the defendant did not constitute reversible error. Citing *Allen*, supra., the Supreme Court found that "every testimonial reference at trial to photographs is not per se prejudicial." The Supreme Court also held that the question to be determined is "whether or not a juror could reasonably infer from the facts that the accused had engaged in prior criminal activity." A mere reference to photographs that do not give rise to an inference of prior criminal activity does not invalidate the proceedings since the reference has no prejudicial effect.

The photographs in this case were not viewed by the jury. The source of the photographs was not revealed through either direct or cross examination of Officer Jenkins, Officer North, or Officer Leydig. The only inference that can be drawn from this testimony is that the police were in possession of a photograph of the Defendant.

While Defendant argues that any lay person would automatically assume that the police would not have a photograph of an individual unless the photograph was a mug shot, thereby insinuating that the individual has a prior criminal record, the Court is not convinced by the Defendant's bold assumptions.

The Defendant would require this Court to read the minds of the jurors to determine whether or not they even considered the source of these photographs during their deliberations. Assuming arguendo that the jurors questioned the source of the photographs, the testimony in this case offered the jurors an alternative source for the Defendant's photograph.

Officer North testified that he regularly patrolled the Third Ward of Chambersburg and his initial role in this investigation was surveillance. Any layperson is aware that surveillance includes watching a targeted area and documentation including photographing activities in the area. It was through Officer North's testimony that an aerial photograph of a portion of the Third Ward depicting the locations of the two transactions in this case was submitted into evidence. The jury knew that photographs had been taken of the geographic location of the transactions. They could also assume that a photograph of a principal party to the transaction had been taken at a time when Officer North was conducting a surveillance of the Third Ward.

The Supreme Court in *Reiss*, supra., stated that a mere reference to a photograph that does not give rise to an inference of prior criminal activity will not invalidate a proceeding because the reference has

no prejudicial effect.

Officer Jenkins' innocuous statement that he had seen a photograph of the defendant prior to the first transaction does not infer the Defendant's participation in prior criminal activity nor does the reference have a prejudicial effect on the jury in this case.

This statement was elicited merely for identification purposes. Officer Jenkins was not local or familiar with the area and almost one year had passed from the time of the incident to trial. The Commonwealth presented evidence to explain the identification process immediately following the transaction in an effort to assure the jury that Officer Jenkins had identified and the police had arrested and charged the correct Defendant.

The references to the photographs made by Officer North and Officer Leydig are equally as harmless as the references made by Officer Jenkins. On direct examination, Officer North merely stated that he had assembled a photo array consisting of six pictures, while Officer Leydig testified that he ordered the assembly of the photo array. The mere assembling and existence of a photo array does not give rise to an inference of past criminal conduct nor could the Court find that this testimony had a prejudicial effect on the jury.

For these reasons, the Court will not grant Defendant's Post Sentencing Motion and stands by its original ruling in this matter, namely the refusal to grant a mistrial due to Officer Jenkins' testimony regarding the Defendant's photograph.

ORDER OF COURT

And now this 12th day of February, 2001, the Post-Sentence Motion of the above-captioned Defendant is denied.

^[1] The Court does not have the benefit of a transcript as Defendant did not order a transcript in this case. Any factual assertions are based on the Court's recollection of the proceedings and notes taken during trial. Defense counsel made two motions for mistrial during the trial, one immediately following the testimony of Officer Jenkins, the officer from whom Defendant purchased cocaine regarding the use of photographs to identify Mr. Thompson after both the initial and subsequent purchases. This motion was denied. However, the Court ruled that the photo array would not be admitted into evidence nor shown to the jury. The second motion was made during defense counsel's cross examination of Officer Jenkins. The Court denied the second motion because defense counsel elicited the response.

^[2] While petitioner's brief references the term, "mug shots", the Court recalls only the use of the term, "photo array." It is the Court's recollection that the only reference to the term, "mug shots" was made by defense counsel during closing arguments.

^[3] On cross-examination Officer Jenkins stated that the confidential informant introduced the Defendant to him and used the nickname, "Man-Man."

^[4] The gentleman in the courtroom was later identified by defense counsel as the Defendant's brother, Terrance Thompson.