

2017 IL App (1st) 150488-U

No. 1-15-0488

Order filed December 26, 2017

First Division

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 14408
	)	
TIMOTHY KIMBLE,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE SIMON delivered the judgment of the court.  
Presiding Justice Pierce and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant failed to demonstrate counsel rendered ineffective assistance during a hearing on his motion to suppress.

¶ 2 Following a bench trial, defendant Timothy Kimble was convicted of aggravated vehicular hijacking with use of a firearm (720 ILCS 5/18-4(a)(4) (West 2010)), and sentenced to 22 years' imprisonment. On appeal, he contends that trial counsel was ineffective for failing to properly litigate a pretrial motion to suppress evidence of the victim's lineup identification of defendant. For the following reasons, we affirm.

¶ 3 Because defendant does not challenge the sufficiency of the evidence, we recite only those facts necessary to our disposition. Defendant was charged with aggravated vehicular hijacking while being armed with a firearm, among other offenses, for stealing Reginald Forbes's vehicle at a gas station. His co-defendant, Charles Lofton, was tried in a separate but simultaneous bench trial for his role in a subsequent police chase involving Forbes's vehicle.<sup>1</sup>

¶ 4 Prior to trial, defendant filed a motion to suppress the lineup identification. At the motion hearing, Chicago police department detective Daniel Freeman testified that on August 6, 2011, he was assigned a robbery and hijacking case and spoke with the victim, Forbes. While defendant was in custody, Freeman called Forbes to the police station to view a lineup. The lineup was conducted at 5:10 p.m. that day. In conducting the lineup, Freeman obtained "fillers," who are people in custody that match the description of the suspect. The fillers in this particular lineup matched the description that Forbes gave of the offender. There were four people in the lineup, including defendant. Freeman explained the lineup procedure to defendant, and defendant chose to stand in position two in the lineup.

¶ 5 Freeman had Forbes sign a lineup advisory form. He stood in the viewing room with Forbes, and did not show him any photographs prior to the lineup, nor did he point out defendant prior to the lineup. The lineup participants were initially seated, but Forbes could not recall if they eventually stood up. Forbes identified defendant. Following the identification, an evidence technician took a photograph of the lineup.

¶ 6 The photograph showed defendant wearing a white T-shirt with a red spot, dark pants, and gray shoes. Defendant also "appear[ed]" to have a bandage on his arm, while no one else had

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<sup>1</sup> Lofton was found guilty and is not a party to the instant appeal.

a bandage. The first filler wore a blue shirt with dark pants and white shoes; the second filler wore a red shirt, dark pants, and dark shoes; and the third filler wore a white T-shirt, blue shorts, and dark shoes. Freeman could not recall whether he later learned that the red spot on defendant's shirt was blood.

¶ 7 On cross-examination, Freeman testified that the lineup advisory form that Forbes signed stated that a suspect may or may not be in the lineup, the witness was not required to make an identification, and the witness should not assume that the person conducting the lineup knows who the suspect is. Freeman testified that the fillers had medium to dark complexions and braids and were of similar age, height, and weight as defendant. Defendant was 20 years old at the time of the lineup and the fillers were 19 or in their 20s. Defendant was 5'10" tall and the fillers were 5'7", 5'10", and 5'8" tall. Defendant was 170 pounds and the fillers were 157, 140, and 145 pounds. Both defendant and another individual in the lineup were wearing white T-shirts.

¶ 8 Following Freeman's testimony, the State moved for a directed finding on defendant's motion to suppress. Defense counsel argued that the identification should be suppressed because the lineup was suggestive. Specifically, counsel argued that defendant was the only individual with blood on his shirt and a bandage on his arm, which tainted Forbes's identification. Counsel further argued that not all of the individuals were wearing white T-shirts. The court granted the State's motion for a directed finding, noting that Freeman had attempted to find fillers who looked similar to defendant. The court stated,

“Much has been made of the bloodstain that's on the shirt of the defendant. Let [m]e indicate it's about a nickel size in the center of his sternum, not quite that noticeable.

As to the bandage on the arm, when he's standing, you could see the entire bandage. It's about a one-and-a-half inch piece of gauze that is taped to his elbow. When he is seated the cuff of his shirt covers a portion of that. The officer indicated the lineup was done when the individuals were seated in question [*sic*].

This is a very fair lineup as I look at the photo, and this is about among the fairest I've ever seen as concerns the composition of the lineup. The individuals are all within two inches of height, the weights are quite similar, proportional to their heights. The hair is fairly close as to all these individuals. I find nothing presented at this point that would shift the burden in this matter. I don't find that the lineup was suggestive as to violate the defendant's constitutional rights."

¶ 9 At trial, the evidence established that, on August 6, 2011, around 4:15 a.m., Forbes was getting gas for his white 2004 Ford Taurus at a Mobil station on 55th and Wells Streets. As he pumped gas, a man, who he identified in court as defendant, stepped around the gas pump and said, "Give me your keys and your wallet." The man had a "big gun," made of black steel with a wooden handle. Forbes was familiar with weapons, and testified that there was "no doubt in [his] mind" that the gun was authentic because it was too big to be a BB gun.

¶ 10 Defendant had startled Forbes, and he fell to the ground and threw his wallet. Defendant stood over Forbes and instructed him to stand up and continue pumping gas and asked for his wallet. Forbes retrieved his wallet from the ground and gave it to defendant, along with "everything in his pockets" because defendant had pointed a gun at him. When Forbes handed defendant his belongings, defendant was sitting in Forbes's car. Defendant thereafter closed the car door and drove away. The gas station was well-lit and nothing was obstructing defendant's

face. Forbes had no trouble seeing defendant's face and the weapon. Shortly thereafter, Forbes contacted police and described the offender and the incident. Forbes narrated a surveillance video from the gas station for the court, which corroborated his testimony.

¶ 11 In the evening of August 6, 2011, Forbes viewed a lineup at the police station. He signed a lineup form, which informed him that the suspect may or may not be in the lineup and he was not required to make an identification. He identified defendant in the lineup. Forbes identified a photograph of the lineup, which the court later admitted into evidence.

¶ 12 On cross-examination, Forbes testified that the entire incident took approximately one minute and, he had never before seen the man who stole his vehicle prior to that day. His description to police of the offender was a young black man with long hair who was approximately 5'10" and 150 pounds. He also told the police the offender had a gun and was wearing a hat, and described his clothing. He did not describe whether the offender had tattoos.

¶ 13 Chicago police officer Brennon McCreary testified that on August 6, 2011, at approximately 9 a.m., he was in uniform in a marked patrol car with his partner. He observed a white Ford Taurus driving the wrong way down Harvard Street approaching 76th Street. Co-defendant Lofton was driving the vehicle and defendant, who had turned to look at the police car, was in the passenger seat. It was daylight and nothing was obstructing the defendants' faces. McCreary's partner activated the emergency lights and sirens to curb the vehicle, but the Taurus took off at an increased speed and did not pull over. The Taurus did not stay in its lane and continued driving down several streets at approximately 60 miles per hour. The car eventually hit a light pole, but continued driving.

¶ 14 When the car drove to 77th Street, it slowed down and defendant got out of the vehicle. McCreary observed defendant get out of the car from approximately 25 feet away. Defendant looked in the direction of the police, and ran to a nearby yard. McCreary and his partner continued after the Taurus, and eventually arrested Lofton after he hit a second light pole and fled from the vehicle on foot.

¶ 15 McCreary subsequently received a radio transmission from Officer Williams, who stated that he had defendant in custody nearby. McCreary could see Williams, who was approximately two blocks away, when he received the radio transmission regarding defendant. He observed defendant was the individual in custody.

¶ 16 On cross-examination, McCreary testified that, when the passenger exited the vehicle, he did not follow the passenger and did not see exactly where he went. McCreary identified defendant as the passenger in the Taurus. He was not aware of a gun or wallet being inventoried in defendant's case.

¶ 17 Following arguments, the court found defendant guilty of aggravated vehicular hijacking. The court found that, although the weapon was not recovered, Forbes's testimony was credible concerning the use of a gun. The court further noted that it could not specifically identify defendant in the surveillance video, but that the lineup identification combined with the fact that defendant was later located in Forbes's vehicle proved he was guilty beyond a reasonable doubt.

¶ 18 Following trial, defendant moved for a new trial, arguing that the court erroneously denied defendant's pretrial motion to suppress. At the motion hearing, defense counsel argued that Forbes's identification was unreliable because his description of the offender to police did not include a facial scar, and defendant had a scar on his face. The court denied the motion and

subsequently sentenced defendant to 22 years' imprisonment, which included a 15-year firearm enhancement. This appeal followed.

¶ 19 On appeal, defendant asserts that counsel rendered ineffective assistance for failing to properly litigate his motion to suppress the lineup identification. Defendant asks us to remand for a new hearing on his motion to suppress.

¶ 20 To demonstrate ineffective assistance of counsel, defendant must show that (1) his attorney's performance was deficient and fell below an objective standard of reasonableness, and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 21 In a motion to suppress identification testimony, the burden is on the defendant to prove that a pretrial identification was impermissibly suggestive. *People v. Love*, 377 Ill. App. 3d 306, 311 (2007). “ ‘Only where a pretrial encounter resulting in an identification is ‘unnecessarily suggestive’ or ‘impermissibly suggestive’ so as to produce ‘a very substantial likelihood of irreparable misidentification’ is evidence of that and any subsequent identification excluded by law under the due process clause of the 14th amendment.’ ” *Id.* (quoting *People v. Moore*, 266 Ill. App. 3d 791, 796-97 (1994)). The court must consider the totality of the circumstances surrounding the identification to determine whether due process is violated. *People v. Johnson*, 149 Ill. 2d 118, 147 (1992).

¶ 22 In this case, the photograph of the lineup shows that it included three other men of the same approximate age and skin tone as defendant. The four men were all seated with their arms

in their laps and all had similar hairstyles. Defendant wore a white T-shirt with dark pants and was seated between two men who wore a blue shirt and a red shirt, respectively. The other “filler” wore a white T-shirt with shorts. While defendant’s shirt had a small red stain and he wore a bandage, the trial court found these details unnoticeable and the record supports that finding. “The law does not require that lineups shown to a witness include near identical or look-alikes of the witness’s descriptions,” (*People v. Gabriel*, 298 Ill. App. 3d 332, 348 (2010)), and here, the lineup participants shared many similar physical and facial features.

¶ 23 Defendant argues that counsel should have presented evidence that he was the only person in the lineup wearing clothes matching what the offender wore and that Forbes did not mention the offender having a facial scar, although defendant had a scar on his face. Thus, defendant contends that counsel was ineffective for failing to “present the court with all evidence favorable” to defendant at the motion hearing. We first note that which arguments to make and what evidence to present are matters of trial strategy that are generally immune from claims of ineffective assistance of counsel. See *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. Moreover, a defendant is entitled to reasonable, not perfect, representation. *Id.*

¶ 24 Nevertheless, we do not find that presentation of this evidence would have altered the outcome of the motion hearing, and therefore defendant cannot establish prejudice. See *People v. Bew*, 228 Ill. 2d 122, 128-29 (2008) (To establish the prejudice prong of an ineffectiveness claim in the context of a motion to suppress, the defendant must demonstrate that the trial court would have granted the motion, and the outcome of the trial would have been different had the court suppressed the evidence.).



¶ 25 At the motion hearing, defense counsel argued that the lineup identification was suggestive based on defendant's clothing. Thus, in denying defendant's motion to suppress, the trial court specifically considered defendant's clothes at the lineup, and found that the clothes did not render the lineup suggestive. While counsel did not specifically argue that defendant's clothes matched the offender's clothes, there is nothing to indicate that the white shirt and dark pants that defendant wore made the lineup unduly suggestive to Forbes, who testified he had a clear view of defendant. Although a lineup may be suggestive where "only the suspect was required to wear distinctive clothing which the culprit allegedly wore" (see *United States v. Wade*, 388 U.S. 218, 233 (1967)), here, there was nothing distinctive about the common white shirt and dark pants that defendant wore. As noted above, one of the fillers in the lineup also wore a white shirt.

¶ 26 Additionally, defendant wore his own clothing to the lineup. Although he argues this was not his choice because he was arrested in those clothes, it cannot be said that the police chose his clothing or required him to wear specific clothes. See *Johnson*, 149 Ill. 2d at 147 (noting that a lineup procedure may be prejudicial where "[t]hrough some specific activity on the part of the police, the witness is shown an individual who is more or less spotlighted by the authorities.") To the contrary, nothing in the lineup photograph indicates defendant was in any way "spotlighted by the authorities." Rather, as noted above, Freeman specifically chose fillers who shared similar physical characteristics with defendant, and one other filler wore a similar shirt to defendant. Without more, defendant has failed to show that the police improperly influenced the lineup, and that his clothing "spotlighted" him to the witness. Accordingly, we find that the lineup procedure was not unduly suggestive, and the outcome of the motion hearing would not have been different

had counsel argued defendant wore the same clothes as the offender. Defendant, therefore, was not prejudiced by counsel's litigation of the motion to suppress, and cannot demonstrate that counsel was ineffective. See *People v. Wilkerson*, 2016 IL App (1st) 151913, ¶ 46 (If an ineffectiveness claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient.).

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.