

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

**STATE OF OHIO** :  
Plaintiff : **CASE NO. 2013 CR 00706**  
vs. : **Judge McBride**  
**DYLAN SCOTT TUTTLE** : **DECISION/ENTRY**  
Defendant :

Catherine Adams, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2<sup>nd</sup> Floor, Batavia, Ohio 45103.

Lawrence R. Fisse, assistant public defender for Dylan Scott Tuttle, 10 S. Third Street, Batavia, Ohio 45103.

This cause is before the court for consideration of a motion to suppress filed by the defendant Dylan Scott Tuttle.

The court scheduled and held a hearing on the motion on January 16, 2014. The hearing was then continued in progress to January 21<sup>st</sup> to allow counsel to investigate a potential piece of video evidence. Due to the fact that it was determined that the surveillance video no longer existed, the parties went forward on January 21<sup>st</sup> with closing arguments, and the court took the issues raised by the motion under advisement at that time.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral arguments of counsel, and the applicable law, the court now renders this written decision.

## **FINDINGS OF FACT**

On October 21, 2013, Emily Hill was working at the Sprint store on Beechmont Avenue. When a man she has since identified as the defendant Dylan Tuttle entered the store, Hill greeted him from a few feet away and asked if he had any questions. When he replied in the negative, she walked away. Hill observed that this man had some facial hair ("a 5 o'clock shadow"), weighed between 140 and 155 pounds, was around 5'8" tall, and had brown hair. He was wearing a grey hoodie with the hood up initially but he put the hood down when he entered the store.

A short time later, Hill saw that the defendant had his back to her and was "fiddling with a phone." Hill walked past the defendant to look over his shoulder to see what he was doing and, when she did so, the defendant put that phone back down. Hill then saw that the defendant began to look at an iPhone 5 and he then quickly cut the cord with a pocket knife and ran out of the store.

Hill, who was approximately fifteen feet away with a clear view of the defendant, ran after him out to the parking lot. She saw the defendant get into the front passenger side of a black or blue Volkswagen vehicle, the front of which was facing toward Hill. The defendant did not close the passenger door and Hill, who was now standing in front of the vehicle, heard him tell the driver to hit her. The driver drove the car forward,

forcing Hill onto the hood of the vehicle, and began to drive around with Hill still on the hood. Hill was facing toward the front windshield with her face approximately six inches from the windshield and she was able to clearly observe the defendant in the vehicle.

Ultimately, although the vehicle never came to a stop, Hill was able to get off of the hood and the police were called to the scene. Hill gave a description of the man she saw to Officer Hathorn, the responding officer, although she could not recall at the hearing precisely what she told Officer Hathorn regarding the specific identifiers. Officer Hathorn's report stated that Hill gave a description of a white male, 5'8" to 5'10" tall, in baggy jeans and a hooded sweatshirt. A license plate number was also given to the officer. Based on the license plate number and the description given by Hill, Officer Hathorn was able to develop the defendant as a suspect.

Detective Todd Taylor of the Union Township Police Department was assigned this case on October 22, 2013. He had been given the defendant's name as a suspect by Officer Hathorn. With that name and another specific identifier, such as date of birth or a social security number, Detective Taylor was able to look up the defendant's driver's license photograph and information in OLEG (Ohio Law Enforcement Gateway), which is what Detective Taylor used to create the photo lineup. Once Detective Taylor retrieved the defendant's photo and information in OLEG, he then used the "Lineup Wizard" option in OLEG, which retrieves and provides photographs of persons with descriptions matching the "seed," which, in the present case, was the photograph and descriptors of the defendant Dylan Tuttle.

On October 23<sup>rd</sup>, Detective Taylor spoke with Hill and set up a time for the next day for a photo lineup at her place of employment. On October 24, 2013, Sergeant

Mike White, also of the Union Township Police Department, was asked by Detective Taylor to report to the Sprint store on Beechmont Avenue at the designated time to serve as the blind administrator for a photo lineup. Sergeant White had no involvement in investigating the case and had no information about the case or any suspect that had been developed. Detective Taylor provided Sergeant White with ten numbered small manila folders and also provided him with the six photographs and four blank photographs that were to be placed in those folders. Detective Taylor put the first picture in the folder marked #1 and Sergeant Taylor placed the rest of the photographs in the other folders.<sup>1</sup> Sergeant Taylor did not shuffle the photographs before putting them in the folders.

After initial introductions were made at the store, Sergeant White and Emily Hill went into Hill's office at the Sprint store to conduct the photo lineup. Detective Taylor was also in the room but did not participate in administering the photo lineup and was not in the vicinity of the view. Sergeant White read Hill the language verbatim that is at the top of the Photographic Lineup Form, which states as follows:

"You will be asked to look at a group of photographs located in folders. The fact that the photographs are shown to you should not influence your judgment. You should not conclude or guess that the photographs contain the picture of the person who committed the crime. You are not obligated to identify anyone. The alleged perpetrator may or may not be in the lineup and the administrator does not know who the alleged perpetrator is. It is just as important to free innocent person (*sic*) from suspicion as to identify guilty parties. Please do not discuss the case with other witnesses nor indicate in any way that you have identified someone. Please take your time, as you will only be allowed two viewings of this lineup.

---

<sup>1</sup> State's Exhibit 2.

PLEASE IDENTIFY THE PERSON BY FOLDER NUMBER ONLY.”<sup>2</sup>

Sergeant White then presented Hill with each folder individually in numerical order. During this first viewing, Hill was just looking at each photo and chose not to say anything. Hill testified that when she saw the defendant’s photo, which was in folder #4, she knew it was him but chose to remain silent during the first viewing because she was nervous and was being cautious. After the first viewing was complete, she asked if she could see one of the folders again and Sergeant White explained that she would have to go through the entire lineup again. Sergeant White then presented Hill with each folder individually again in the same numerical order as the first lineup. When Hill was presented with folder #4, she indicated that “it’s this one” and they continued through the rest of the lineup. Hill did not indicate during the lineup her level of confidence as to each photo.

At the end of the second viewing, the lineup form was completed to indicate that Hill identified photograph #4 as the perpetrator, and under the total number of viewings, it was indicated on the form that this was the second viewing. Hill wrote in the form that her level of confidence was 75% and she signed the form. When asked at the hearing why she wrote that she was only 75% confident about the identification, Hill stated that she was scared of being wrong and was being cautious. She also indicated during her testimony that she stared the defendant in the eyes when she was on the hood of the vehicle and that she can’t forget his face.

---

<sup>2</sup> State’s Exhibit 1.

## LEGAL ANALYSIS

R.C. 2933.83 states in pertinent part the following:

“(A)(6) ‘Folder system’ means a system for conducting a photo lineup that satisfies all of the following:

(a) The investigating officer uses one ‘suspect photograph’ that resembles the description of the suspected perpetrator of the offense provided by the eyewitness, five ‘filler photographs’ of persons not suspected of the offense that match the description of the suspected perpetrator but do not cause the suspect photograph to unduly stand out, four ‘blank photographs’ that contain no images of any person, and ten empty folders.

(b) The investigating officer places one ‘filler photograph’ into one of the empty folders and numbers it as folder 1.

(c) The administrator places the ‘suspect photograph’ and the other four ‘filler photographs’ into five other empty folders, shuffles the five folders so that the administrator is unaware of which folder contains the ‘suspect photograph,’ and numbers the five shuffled folders as folders 2 through 6.

(d) The administrator places the four ‘blank photographs’ in the four remaining empty folders and numbers these folders as folders 7 through 10, and these folders serve as ‘dummy folders.’

(e) The administrator provides instructions to the eyewitness as to the lineup procedure and informs the eyewitness that a photograph of the alleged perpetrator of the offense may or may not be included in the photographs the eyewitness is about to see and that the administrator does not know which, if any, of the folders contains the photograph of the alleged perpetrator. The administrator also shall instruct the eyewitness that the administrator does not want to view any of the photographs and will not view any of the photographs and that the eyewitness may not show the administrator any of the photographs. The administrator shall inform the eyewitness that if the eyewitness identifies a photograph as being the person the eyewitness saw the eyewitness shall

identify the photograph only by the number of the photograph's corresponding folder.

(f) The administrator hands each of the ten folders to the eyewitness individually without looking at the photograph in the folder. Each time the eyewitness has viewed a folder, the eyewitness indicates whether the photograph is of the person the eyewitness saw, indicates the degree of the eyewitness's confidence in this identification, and returns the folder and the photograph it contains to the administrator.

(g) The administrator follows the procedures specified in this division for a second viewing if the eyewitness requests to view each of the folders a second time, handing them to the eyewitness in the same order as during the first viewing; the eyewitness is not permitted to have more than two viewings of the folders; and the administrator preserves the order of the folders and the photographs they contain in a facedown position in order to document the steps specified in division (A)(6)(h) of this section.

(h) The administrator documents and records the results of the procedure described in divisions (A)(6)(a) to (f) of this section before the eyewitness views each of the folders a second time and before the administrator views any photograph that the eyewitness identifies as being of the person the eyewitness saw. The documentation and record includes the date, time, and location of the lineup procedure; the name of the administrator; the names of all of the individuals present during the lineup; the number of photographs shown to the eyewitness; copies of each photograph shown to the eyewitness; the order in which the folders were presented to the witness; the source of each photograph that was used in the procedure; a statement of the eyewitness's confidence in the eyewitness's own words as to the certainty of the eyewitness's identification of the photographs as being of the person the eyewitness saw that is taken immediately upon the reaction of the eyewitness to viewing the photograph; and any additional information the administrator considers pertinent to the lineup procedure. If the eyewitness views each of the folders a second time, the administrator shall document and record the statement of the eyewitness's confidence in the eyewitness's own words as to the certainty of the eyewitness's identification of a photograph as being of the person the eyewitness saw and

document that the identification was made during a second viewing of each of the folders by the eyewitness.

\* \* \*

(C) For any photo lineup or live lineup that is administered on or after the effective date of this section, all of the following apply:

(1) Evidence of a failure to comply with any of the provisions of this section or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section shall be considered by trial courts in adjudicating motions to suppress eyewitness identification resulting from or related to the lineup.”

“When a witness identifies a defendant prior to trial, due process requires a court to suppress evidence of the witness's prior identification upon the defendant's motion if the confrontation was unduly suggestive of the defendant's guilt and the identification was unreliable under the totality of the circumstances.”<sup>3</sup> “In other words, before identification testimony may be suppressed, the trial court must find that the procedure employed was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification.”<sup>4</sup> “It is this likelihood of misidentification that violates a defendant's right to due process.”<sup>5</sup>

“If a defendant meets [his] burden to show that the identification procedure was unduly suggestive, the court must then consider whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character.”<sup>6</sup>

“Factors to be considered in evaluating reliability include the prior opportunity of the

---

<sup>3</sup> *State v. Ward-Douglas* (Sept. 4, 2012), 12<sup>th</sup> Dist. No. CA2011-05-042, 2012-Ohio-4023, ¶ 13, citing *State v. Murphy*, 91 Ohio St.3d 516, 534, 2001-Ohio-112, called into doubt by rule on other grounds, 98 Ohio St.3d 354, 2003-Ohio-1325.

<sup>4</sup> *Id.* at ¶ 14, citing *Neil v. Biggers* (1972), 409 U.S. 188, 198-199, 93 S.Ct. 375.

<sup>5</sup> *Id.*, citing *Biggers* at 198.

<sup>6</sup> *Id.* at ¶ 15, citing *State v. Andrews* (Jan. 19, 2010), 12<sup>th</sup> Dist. No. CA2009-02-052, 2010-Ohio-108.

witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.”<sup>7</sup> “If no impermissibly suggestive procedure has been employed by the state, however, a court need not reach the second step of the process regarding the reliability of the identification.”<sup>8</sup>

“The failure to strictly comply with R.C. 2933.83 does not render the pretrial identification procedure per se impermissibly suggestive.”<sup>9</sup> “Rather, all facts and circumstances must be considered.”<sup>10</sup>

In the case at bar, there was not strict compliance with several subsections of R.C. 2933.83(A)(6). Sergeant White did not shuffle the five folders in which he placed photographs and did not number the folders himself.<sup>11</sup> During the first lineup, Emily Hill did not indicate as to any photograph whether it was of the man she saw nor did she indicate her degree of confidence.<sup>12</sup> Sergeant White did not document or record the results of the view prior to Hill viewing the lineup a second time.<sup>13</sup> While Detective Taylor was present in the same room, his name was not documented as an individual present during the lineup.<sup>14</sup> Finally, it is unclear whether Sergeant White instructed Hill that he did not want to see any of the photographs, that he would not view any of the photographs, and that Hill was not to show him any of the photographs.<sup>15</sup>

---

<sup>7</sup> Id. at ¶ 17, citing *Biggers*, supra, 409 U.S. at 199.

<sup>8</sup> Id. at ¶ 16, citing *Andrews*, supra.

<sup>9</sup> *State v. Shaw* (Oct. 31, 2013), 7<sup>th</sup> Dist. No. 12-MA-95, 2013-Ohio-5292, ¶ 54.

<sup>10</sup> Id., citing *Murphy*, supra, 91 Ohio St.3d at 534.

<sup>11</sup> R.C. 2933.83(A)(6)(c).

<sup>12</sup> R.C. 2933.83(A)(6)(f).

<sup>13</sup> R.C. 2933.83(A)(6)(h).

<sup>14</sup> Id.

<sup>15</sup> R.C. 2933.83(A)(6)(e).

However, none of these examples of technical non-compliance with the statute demonstrates that the photo lineup was suggestive, let alone unduly suggestive. There is no indication under the totality of the circumstances that the administration of this photo lineup in any way suggested that the defendant's photo should be chosen or that folder #4 contained a photograph of the suspect. Emily Hill's testimony demonstrates that she made a positive identification without feeling pressured to do so or being given a suggestion as to which photograph, if any, she should identify. There was no suggestive nature of this identification which would give rise to a very substantial likelihood of misidentification.

As a result, the pretrial identification of the defendant by Emily Hill shall not be suppressed. While the court need not reach the second prong of the test articulated above, the court notes for the record that the identification was reliable. Emily Hill had an unimpeded view of the defendant at the time of the crime and was focused on him, especially when she was staring straight at him while she was on the hood of the car. Only three days passed between the incident and the time of the identification. Hill's physical description of the suspect was consistent with the defendant's descriptors. Although Hill indicated that she was only 75% certain of her identification, she explained in her testimony that she was trying to be cautious and that she could not forget the defendant's face.

Therefore, the photographic lineup at issue in the case at bar was reliable and not unduly suggestive and, as such, suppression is not warranted.

**CONCLUSION**

The defendant's motion to suppress the pre-trial identification by Emily Hill is not well-taken and is hereby denied.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

\_\_\_\_\_  
Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 4th day of February 2014 to all counsel of record and unrepresented parties.

\_\_\_\_\_  
Administrative Assistant to Judge McBride

