

NO. 63959-5-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

BRIAN LANE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable John Meyer, Judge
The Honorable Michael Rickert, Judge

RESPONDENT’S BRIEF AND CROSS-APPEAL

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I. SUMMARY OF ARGUMENT

Brian Lane was convicted of Theft in the First Degree. Mr. Lane claims that the show-up identification evidence against him should have been suppressed for purposes of trial. Mr. Lane asserts that the show-up procedure was unduly suggestive. To support his assertion Mr. Lane contends that the presence of the suspect vehicle, police officers and police cars as well as other suspects at the show-up caused the show-up identification to be unduly suggestive. In Washington State, show-ups are not necessarily suggestive even if the suspect is handcuffed and standing near a patrol car or surrounded by police officers, therefore the procedure used in the instant case should not be deemed unduly suggestive and Mr. Lane's request for reversal should be denied.

On cross-appeal the State contends that the trial court erred when it awarded Mr. Lane credit on the instant case for time he was serving on a felony offense out of Whatcom County. Mr. Lane's sentencing date on the instant case should have commenced on July 15, 2009, and not on February 19, 2009. Mr. Lane's case should be remanded for re-sentencing before the trial court.

II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. Whether the trial court erred in allowing evidence regarding a show-up identification in at trial.

II. CROSS-APPELLANT'S ASSIGNMENT OF ERROR

The trial court erred when it declined to follow RCW 9.94A.505(6) and allowed Mr. Lane to receive credit for time on the instant case when he was serving a 22 month prison sentence on an entirely separate offense out of a separate county.

III. STATEMENT OF THE CASE

1. Statement of Procedural History

¹On May 18 and 19, 2009, Brian Lane, was tried for Theft in the First Degree before the Honorable Michael Rickert. Prior to trial, defense counsel for Mr. Lane brought a motion to suppress show-up identification evidence against Mr. Lane. CP 6-33. At the motion hearing before the Honorable John Meyer, the defense argued that the show-up was unduly suggestive and that the identification evidence should be suppressed. 4/22/2009 RP 3. Judge Meyer

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number.

disagreed with the defense's contention and denied the motion.

Judge Meyer stated the following in his ruling:

"The defense raises the issues of a number of officers being present, four suspects being lined up, and that the vehicle was present at the scene, and that the altering of appearance as being factors that under the totality of the circumstances and the show-up identification were unduly suggestive. I don't even have to reach the second aspect...so I will deny the motion."
4/22/2009 RP 23.

Judge Meyer found that the defense had failed to meet the burden of establishing that the show-up was unduly prejudicial but continued with his analysis:

Were an appellate court to find that they disagreed with my finding, that the procedure was unduly suggestive, I have further considered the factors set forth in case law and do not feel that any suggestiveness created a substantial likelihood of irreparable misidentification. The witnesses had an opportunity to view the suspects at the time of the crime. There is nothing to indicate that they did not pay attention. The accuracy of the prior identification of the suspect was certainly not wildly off. You're talking about a bunch of people whose complexions are darker than, let us say, the average Caucasian. I see nothing to indicate that there was a lack of certainty at the show-up. And I do not find that two

hours was a particularly long period of time between incident and show-up.
4/22/2009 RP 23-24.

At trial, Mr. Lane was found guilty of Theft in the First Degree.

CP 75.

On July 15, 2009, Mr. Lane came before Judge Rickert to be sentenced for Theft in the First Degree. 7/15/2009 RP 25-56. Mr. Lane was serving a 22 month prison sentence for a Theft in the Second Degree conviction out of Whatcom County at the time of the trial in the instant case. 7/15/2009 RP 27-28. Mr. Lane had requested from prison to be transferred back to Skagit County in order to deal with his pending felony charge. 7/15/2009 RP 27-28. On February 10, 2009, Mr. Lane arrived in Skagit County via Department of Corrections' transportation and stayed in the Skagit County Jail pending trial until July 21, 2009, when he was sent back to prison.² Mr. Lane left the Skagit County Jail with approximately 15 months left to serve on his Whatcom County conviction at the time of sentencing here. 7/15/2009 RP 51-52. At sentencing, the trial court was made aware of RCW 9.94A.505(6) and the requirement that a sentencing court shall give credit for time served before sentencing if

² DPA Melissa Sullivan spoke with Arrol Dayton, DOC records management, who confirmed that Mr. Lane was in Skagit County Jail from 2/10/2009 until 7/21/2009 and received credit toward his Theft

that confinement was solely in regard to the offense for which the offender is being sentenced. 7/15/2009 RP 44. The trial court sentenced Mr. Lane to 57 months in prison and decided to give Mr. Lane credit beginning on February 19, 2009, the date of his arraignment on the Theft in the First Degree charge. 7/15/2009 RP 54.

On July 15, 2009, Mr. Lane filed a timely notice of appeal. CP 121-122. The State timely filed notice of cross-appeal. CP_ (Notice of Cross-Appeal to Court of Appeals filed 7/24/2009, Sub. No. 60, Supplemental Designation of Clerk's Papers pending).

2. Statement of Facts

On August 8, 2008, at approximately 12:54 p.m. Burlington Police Department received a report that a theft had just occurred at the Sears Department store located at the Cascade Mall. CP 12. Two Sears employees, Jonathan Haberly and Belinda Richards had witnessed the theft. CP 12-16. According to the police report, the suspects were identified as being two Hispanic males and two Hispanic females. One male had a short Mohawk style haircut and the other male had longer, shaggier, hair. CP 12. The two witnesses saw the two male subjects leave the store where a vehicle was

Second conviction for the duration of the stay. Mr. Dayton also confirmed that Mr. Lane received credit for

waiting for them outside while carrying armloads of clothing that were still on the hangers. CP 12. Haberly and Richards followed the suspects and saw them get into a red Isuzu Rodeo with license plate 932 WLT. CP 12. Richards saw a female in the SUV climbing from a rear passenger seat into the front passenger seat. CP 31.

In addition to the two employee eye-witnesses, a Sears customer by the name of Andy M. Brown witnessed two individuals matching the same description given by the Sears employees run out of the department store with armloads of clothing. CP 17.

In a written statement taken on the day in question, Jonathan Haberly described the individuals he saw running from the store as being two males, both with dark complexions. CP 32-33. There is no reference to Hispanic males in Haberly's witness statement.

Less than two hours after the theft at Sears, officers located the suspect vehicle at an AM/PM on College Way in Mount Vernon. CP 30. Four individuals were located with the vehicle, two males and two females. CP 21. All four individuals are Native American. CP 21. The individuals were: Brian Lane, Reynold James, Marie Washington and Bridgett Finkbonner. CP 21. All individuals were detained pending the investigation. CP 21. Mr. Lane was wearing a

that same time period for the instant offense due to Judge Rickert's sentencing order.

hat at the time of the contact with police officers. CP 25. Officer Zimmer noticed that Mr. Lane had a partially shaved head prior to removing the hat; once the hat was removed he could see that Mr. Lane had a Mohawk. CP 25. Mr. Lane was not wearing a hat at the time of the theft. CP 31-33.

Officer Kramer brought the two Sears employees over to the scene of the stop to see if they could identify any of the individuals detained as being associated with the theft. CP 19. Present at the show-up were the detained suspects, two police cars and six officers. CP12-17. At the show-up, Haberly identified Mr. Lane as being the same individual he saw in the store with the Mohawk and Richards identified Reynold James as being the individual she saw with longer, shaggy brown hair. CP 31-33. Richards also identified Finkbonner as being the woman she saw switch seats in the get-away vehicle. CP 31-33.

At the motion hearing the defense argued that the show-up was unduly suggestive and that the identification evidence should be suppressed. 4/22/2009 RP 3. Judge Meyer disagreed with the defense's contention and denied the motion. Judge Meyer found that the defense had failed to meet the burden of establishing that the show-up procedure was unduly suggestive. 4/22/2009 RP 23.

At trial, Mr. Lane was found guilty of Theft in the First Degree. CP 75. Mr. Lane was sentenced on July 15, 2009. CP 111-120. The State argued that Mr. Lane should not receive concurrent time for the time he was housed in the Skagit County Jail pending trial because he was currently serving a sentence at the Department of Corrections and he was receiving credit for that time period already. The trial court declined to follow the State's request and allowed Mr. Lane to receive credit for the Theft in the First Degree starting on February 19, 2009, the date of his arraignment on the charge.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED EVIDENCE OF A SHOW-UP IDENTIFICATION IN AT TRIAL.

Courts of appeal generally review the trial court's decision regarding admissibility of identification evidence for abuse of discretion. *State v. Kinard*, 109 Wn. App. 428, 431-32, 36 P.3d 573 (2001). The test is whether there are tenable grounds or reasons for the trial court's decision. *Id.* A trial court's findings of fact are reviewed for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994). Substantial evidence means evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. *Hill*, 123 Wn.2d at 644.

To establish a due process violation, a defendant must show the identification procedure used was unduly suggestive. *State v. Linares*, 98 Wn.App. 397, 401, 989 P.2d 591 (1999). Show up identifications are not per se impermissibly or unduly suggestive. *State v. Guzman-Cuellar*, 47 Wn.App. 326, 335, 734 P.2d 966 (1987). Generally, a show-up identification held shortly after a crime and in the course of a prompt search for the suspect is permissible. *State v. Springfield*, 28 Wn.App. 446, 447, 624 P.2d 208 (1981). Further, show-ups are not necessarily suggestive even if the suspect is handcuffed and standing near a patrol car or surrounded by police officers. *State v. Shea*, 85 Wn. App. 56, 60, 930 P.2d 1232 (1997), *overruled on other grounds by State v. Vikcers*, 107 Wn. App. 960, 29 P.3d 752 (2001).

An out-of-court show-up identification meets due process requirements if it is not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999); *State v. Vaughn*, 101 Wn.2d 604, 682 P.2d 878 (1984). A defendant asserting that a police identification procedure denied him due process has the burden of showing that the procedure was unnecessarily suggestive. *Foster v. California*, 394 U.S. 440, 442, 89

S.Ct. 1127, 1128, 22 L.Ed.2d 402 (1969); *State v. Traweek*, 43 Wn. App. 99, 103, 715 P.2d 1148 (1986); *State v. Booth*, 36 Wn. App. 66, 70, 671 P.2d 1218 (1983). If the defendant fails to meet this burden, the inquiry ends and any uncertainty or inconsistency in the identification goes to the weight of the evidence. *State v. Vaughn*, 101 Wn.2d 604, 610, 682 P.2d 878 (1984). If the defendant is able to meet his burden, the court must determine whether, considering the totality of the circumstances, the suggestiveness created a substantial likelihood of irreparable misidentification. *State v. Vaughn*, 101 Wn.2d 604, 682 P.2d 878 (1984); *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140 (1977); *State v. Traweek, supra*, 43 Wn. App. at 103, 715 P.2d 1148. Currently, courts typically consider: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. *State v. Maupin*, 63 Wn. App. 887, 897, 822 P.2d 355 (1992).

Currently, Washington case law supports that a show-up is not impermissibly suggestive when a suspect is handcuffed, standing by a police car and surrounded by police officers. In *State v. Guzman-*

Cuellar, the defendant was handcuffed and stood approximately fifteen feet away from a police car during the show-up where eye-witnesses identified him as the assailant in a murder. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 335-36, 734 P.2d 966 (1987). The court in *Guzman-Ceullar* found that the aforementioned circumstances were not were insufficient to demonstrate unnecessary suggestiveness. *Id.*

Washington State is replete with cases in which show-up identifications have been deemed admissible. See *State v. Shea*, 85 Wn. App. 56, 930 P.2d 1232 (1997) (identification of suspects in custody permitted despite poor lighting at the time suspects were observed breaking into vehicle); *State v. Rogers*, 44 Wn. App. 510 722 P.2d 1349 (1986) (identification of suspect being escorted by police despite show-up four to six hours after the incident); *State v. Springfield*, 28 Wn. App. 446, 624 P.2d 208 (1981) (17 hour delay after face to face confrontation of six minutes was not unduly long).

In the instant case, Mr. Lane has failed to meet the threshold burden of establishing that the show-up identification was unduly suggestive. On the day in question, two eye-witnesses and Sears employees, Belinda Richards and Jonathan Haberly witnessed two individuals load clothing on their arms and run out of the well-lit

department store during daytime business hours. Haberly noted that both males had a dark complexion and one of the suspects had a short brown Mohawk. Both witnesses observed the get-away car as being a red Isuzu Rodeo with license plate 932 WLT. A third eye-witness, Andy Brown, also saw two males with dark complexions in their 20's load up their arms with 10-15 pairs of shorts and t-shirts. He too saw the suspects leave in the same red Isuzu Rodeo with the same license plate.

Less than two hours later and just a few miles away the suspect vehicle was located and four individuals believing to be involved were detained. One of the individuals detained was Mr. Lane. At the time of making contact with Mr. Lane he was wearing a hat. Officers removed his hat and saw that he had a short, brown Mohawk. The eye-witnesses were brought by the scene in order to participate in a show-up identification. The appellant was identified as being one of the individuals involved. Like the appellant in *Guzman-Ceullar*, Mr. Lane was detained and in close proximity to police cars and police officers during the show-up; this procedure is not considered unduly suggestive, nor should this Court consider it as such.

In addition, Mr. Lane alleges that his hat was removed prior to the show-up in order to make him look more like the description given by witness Haberly. Neither suspect was wearing a hat at the time of the theft, thus removing an item of clothing that arguably was being used as a disguise *prior* to the witnesses even arriving for the show-up is not unduly suggestive.

In the instant matter, the trial court found that the show-up identification was not unduly suggestive given the facts and circumstances and denied Mr. Lane's motion. This Court should find that the trial court did not err in making such a finding, thus allowing the show-up identification evidence in at trial.

However, if this Court were to find that the show-up identification was unduly suggestive, this Court should find that any suggestiveness did not create a substantial likelihood of irreparable misidentification.

In evaluating whether any suggestiveness created a substantial likelihood of irreparable misidentification this Court considers the factors as set forth in *Neil v. Biggers* which are as follows: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level

of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); See also *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *State v. Maupin*, 63 Wn. App. 887, 897, 822 P.2d 355 (1992). Here, these factors weigh in favor of reliability.

First, the eye-witnesses had ample opportunity to view Mr. Lane at the time of the crime. Two of the eye-witnesses saw two individuals pile armloads of clothes onto their person before rushing out of the department store. These witnesses also were able to get a good look at the get-away vehicle complete with vehicle make, model and license plate description. While the exact amount of time may not be clear in this case, the eye-witnesses had more than a fleeting glimpse of the suspects because they followed these individuals outside to see them jump into a waiting vehicle.

Second, there is nothing in the record to support the contention that the eye-witnesses were not attentive at the time of the crime. In fact, quite to the contrary, two of the three eye-witnesses worked at the department store, one in management. These employees were on the clock and immediately aware of the theft

being perpetrated in their line of sight. The likelihood that stress or fear impeded their attentiveness is slight given the fact that they were working and they followed the men outside to get a look at where they were heading.

Third, the descriptions provided of the appellant were accurate and did match the suspects detained. The suspects were described as males with dark complexions, one with a brown, short, Mohawk, the other with longer, shaggy brown hair. One of the witnesses, Mr. Haberly, apparently described the suspects as being Hispanic to a police officer, although his witness statement is devoid of such description. The appellant and his co-defendant, Reynold James Jr., are Native American and not Hispanic. However, both men have tan complexions and would not be accurately described as being Caucasian. Furthermore, the appellant did have a short brown Mohawk at the time of his arrest, which further substantiates that the eye-witnesses gave accurate descriptions.

Finally, less than two hours of time had elapsed from the time of the crime and the show-up. Two hours is not considered a delay under any stretch of the imagination. In *State v. Springfield*, there was a 17 hour delay and the court found that that amount of time was

not unduly long. *State v. Springfield*, 28 Wn. App. 446, 624 P.2d 208 (1981).

This is a case where there was a positive identification of Mr. Lane based upon an in-person identification under two hours after the crime was alleged to have been committed. Under the totality of the circumstances, the in-person identification of Mr. Lane while being detained by police and next to police vehicles was not impermissibly suggestive to the point that there was a substantial likelihood of irreparable misidentification. Furthermore, the trial court did not abuse its discretion in allowing in such identification evidence, thus the appellant's request for reversal should be denied.

V. ARGUMENT REGARDING CROSS-APPEAL

A. The trial court erred when it declined to follow RCW 9.94A.505(6) and allowed Mr. Lane concurrent time while he was still serving time on a separate felony offense.

This Court reviews issues of statutory interpretation de novo. *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). Where the meaning of statutory language is plain on its face, courts must give effect to that plain meaning as an expression of legislative intent. *Koenig v. City of Des Moines*, 158 Wn.2d 173, 181, 142 P.3d 162 (2006).

RCW 9.94A.505(6) states: "The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced. (emphasis added). This language indicates that the appellant in the instant case should be given credit only for presentence time that he has actually served on the charged offense. Mr. Lane was serving 22 months in custody with the Department of Corrections for a Theft in the Second Degree out of Whatcom County (cause number 08-1015451) when he requested to be transferred from prison to face the charge in the instant case. Mr. Lane arrived at the Skagit County Jail on February 10, 2009. He remained in the Skagit County Jail pending trial until July 21, 2009, when he was sent back to prison. Mr. Lane's sentencing date for the instant matter was July 15, 2009, which should be the commencement date of the instant conviction.

State v. Davis supports the State's assertion that Mr. Lane should not receive concurrent time for the instant Theft in the First Degree conviction. *State v. Davis*, 69 Wn. App. 634, 849 P.2d 1283 (1993). In *Davis*, the defendant committed a robbery in Snohomish County on September 14, 1987. *Davis*, 69 Wn. App. at 636, 849 P.2d 1283. Three days later he was arrested in Montana for another

robbery. *Davis*, 69 Wn. App. at 636, 849 P.2d 1283. On May 20, 1988, he was sentenced in Montana to 25 years in prison. *Davis*, 69 Wn. App. at 636, 849 P.2d 1283. On March 19, 1991, Davis executed a demand for final disposition of all charges against him pursuant to the Interstate Agreement on Detainers. *Davis*, 69 Wn. App. at 636, 849 P.2d 1283. He was then arraigned in Snohomish County on June 5, 1991. *Davis*, 69 Wn. App. at 636, 849 P.2d 1283. He was convicted of the Washington robbery and sentenced to 70 months in prison to run concurrently with the sentence he was serving in Montana. *Davis*, 69 Wn. App. at 637, 849 P.2d 1283.

Davis contended that he was entitled to credit on his Washington sentence for time served on his Montana sentence. *Davis*, 69 Wn. App. at 641, 849 P.2d 1283. This Court disagreed. In construing former RCW 9.94.120(14), *recodified* as RCW 9.94A.505(6), this Court concluded that the trial court did not err in granting Davis credit only for the pretrial time served on the Snohomish County charges, starting on June 5, 1991. *Davis*, 69 Wn. App. at 637, 641, 849 P.2d 1283. Davis received no credit for time served against his Washington sentence for time he served on his Montana sentence. Davis was given credit only for time served from the date he was taken into custody in Washington on the Snohomish

County robbery charge. Similarly, in *State v. Williams* this Court denied the appellant's request to award him credit for a pre-sentence detention when the appellant had received credit toward his parole violation for that same period of time. In *Williams*, this Court stated, "If we were to hold as Williams urges, it would be possible for an inmate to receive twice the amount of credit for the time he or she actually served in jail while awaiting trial and sentencing." *State v. Williams*, 59 Wn. App. 379, 381, 796 P.2d 1301, 1302 (1990). The Legislature certainly did not intend such an absurd result. "Statutes should receive a sensible construction which will effect the legislative intent and avoid unjust or absurd consequences." *Id.*; *State v. Curwood*, 50 Wn. App. 228, 231, 748 P.2d 237 (1987), quoting *In re Hoffer*, 34 Wn. App. 82, 84, 659 P.2d 1124 (1983).

By analogy, the trial court here erred when it allowed Lane to have credit for the time he was in custody from February 19, 2009 until July 15, 2009, because during that period of time Mr. Lane was serving time on a 22 month sentence out of Whatcom County. Mr. Lane's sentence for the instant matter should have commenced on July 15, 2009. Mr. Lane should not have received concurrent time for both of his felony convictions when they were separate instances

from separate counties and when Mr. Lane was already receiving credit toward one of his sentences.

Mr. Lane's sentence should be reversed and remanded for re-sentencing.

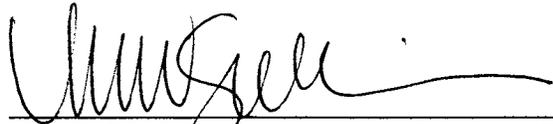
VI. CONCLUSION

The trial court did not abuse its discretion when it allowed show-up identification evidence in at trial. The show-up procedure was not unduly suggestive, thus the evidence should not be suppressed and Mr. Lane's request for reversal should be denied.

The trial court did err at sentencing in awarding Mr. Lane credit for time he was serving on a felony offense out of Whatcom County. Mr. Lane's sentencing date should have commenced on July 15, 2009 and not on February 19, 2009. Mr. Lane's case should be remanded for re-sentencing before the trial court.

DATED this 18th day of June, 2010.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
MELISSA W. SULLIVAN, WSBA#38067
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: DANA LIND, addressed as, 1908 East Madison, Seattle, Washington 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 18th day of June, 2010.



KAREN R. WALLACE, DECLARANT