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FILED
COURT OF APPEALS
DIVISION II
2015 JAN 20 AM 9:07
STATE OF WASHINGTON
BY [Signature]
DEPUTY

No. 45099-2-11

conced. w/ 45367-3-II

Court of Appeals Division II COURT
OF THE STATE OF WASHINGTON

The State of Washington Respondent,
v.
Brian D Thompson Petitioner,

FILED
FEB 10 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
E [Signature]

MOTION FOR DISCRETIONARY REVIEW

-PRV-

Brian D Thompson
[Name of petitioner]

Brian D Thompson #94912
Airway heights Correction Center
Po Box 2049
Airway heights, Wa.
[Address] 99001

Filed
Washington State Supreme Court
FEB - 3 2015
Ronald R. Carpenter
Clerk

A. Identity of Petitioner

Brian D Thompson [Name] asks this court to accept review of the decision designated in Part B of this motion.

B. Decision

[Statement of the decision or parts of decision petitioner wants reviewed, the court entering or filing the decision, the date entered or filed, and the date and a description of any order granting or denying motions made after the decision such as a motion for reconsideration.]

On 09/10/13 Petitioner's Personal restraint Petition # 45367-3-11, On 11/05/13 Commissioner order Consolidated P R P to direct appeal State V. Thompson # 45099-2-11
On 10/09/14 Ruling Affirming Judgment and Sentence. On 10/27/14 Motion to Modify Court Commissioner's Ruling Affirming Judgment and Sentence
On 12/17/14 Order Denying Motion to modify

A copy of the decision [and trial court memorandum opinion] is in the Appendix.

C. Issues Presented for Review

[Define the issues which the court is asked to decide if review is granted.]

Timothy McCormick Show up Identification and Testimony And The Court Allowed Larry Wood to Testify About Destroyed Video Surveillance tape at his bussness Woods and Woods Storage.

My entire Personal restraint Petition #45367-3-11.

Petitioner's Counsel did not put in Motion for 3.5. hearing to Suppress Timothy McCormick Identification of Thompson for trial. ✓

D. Statement of the Case

[The statement should be brief and contain only material relevant to the motion.]

Timothy McCormick was living in a Storage unit on 02/13/13 Woods and Woods Storage in Cowlitz Co. When he was awaked by his dog Spike, at 2:00 am going to eat an Intruder. McCormick exited his unit to get Spike, McCormick noticed a White Male in a Green hat no Facial hair 5.10. McCormick grabbed Dog went back in his unit to get Dog leash and then went back out to Chase Intruder. When he came back to his unit the police had Detained Brian Thompson a white male Black hat and facial hair. Timothy McCormick watched through the fence get searched Arrested for D.O.C. Warrant hand Cuffed later McCormick I.D. Thompson as Intruder. Thompson repeatedly Denied entering Woods & Woods and repeatedly asked for Surveillance tape. on 03/26/13 Judge Steven. Warning told Procureur to get Copy of tape. But tape got Destroyed Larry Woods Testified D.V.R is a Three Week loop of Recording Capacity

E. Argument Why Review Should Be Accepted

[The argument should be short and concise and supported by authority.]

Timothy McCormick Testified he was in and out of his unit 4 or 5 Times. Larry Woods, owner of Storage facility testified his bussness is Security, and that he watched this particular footage numerous times. He clearly saw a guy enter Timothy McCormicks unlocked unit. Then he said Its Interesting to me that it didnt show the intruder coming out of Timothy McCormicks unit. What happend was Timothy McCormick comes out on his Phone this shows that Timothy McCormicks earlier testimony is untrue he only exited unit once. There was no Confrontation with his Dog Spike. and McCormick never Chased the intruder with Dog.

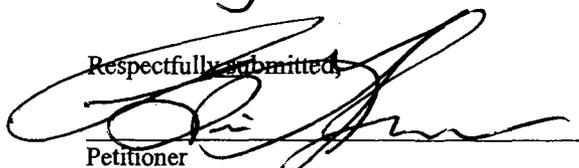
F. Conclusion

[State the relief sought if review is granted.]

Timothy McCormick lied on the Witness Stand Re-Mand for New trial 3.5. hearing to Supress Timothy McCormick Testimony The Intruder Never exited McCormicks Storage Unit Thank You

DATED this 14 day of January, 2015.

Respectfully submitted,


Petitioner

APPENDIX

FILED
COURT OF APPEALS
DIVISION II

DECLARATION OF SERVICE BY MAIL

2015 JAN 20 AM 9:07

I, Brian D Thompson # 911912, declare that
this 14 day of January, 2015 I deposited the foregoing documents:

STATE OF WASHINGTON
BY [Signature]
DEPUTY

Motion For Discretionary Review

or a copy thereof, in the internal legal mail system of

Airway heights Correction Center
11919 W Sprague
Po Box 20419
Airway heights, Wash.
99001

And made arrangements for postage, addressed to: (name & address of court or other party.)

Court of Appeals Div II
950 Broadway Suite 300
Tacoma Wash.
98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Airway heights Washington on 01/14/15
(City & State.) (Date)

[Signature]
Signature

Brian D Thompson # 911912
Type / Print Name

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON,

Respondent,

v.

BRIAN DAVID THOMPSON,

Appellant.

Consol. Nos. 45099-2-II
45367-3-II

RULING AFFIRMING
JUDGMENT AND SENTENCE

FILED
COURT OF APPEALS
DIVISION II
2014 OCT -9 PM 11:51
STATE OF WASHINGTON
BY DEPUTY

Brian Thompson appeals from his convictions for second degree burglary, first degree criminal impersonation, possession of a stolen vehicle, and possession of burglary tools. He argues that his due process right was denied by the show-up identification process used by the police and that he received ineffective assistance of counsel when his counsel did not object to the show-up identification. He raises additional issues in his Statement of Additional Grounds (SAG). This court considered his appeal as a motion on the merits under RAP 18.14. Concluding that he fails to demonstrate manifest error in the identification process, that he has not shown he received ineffective assistance of counsel, and that his additional issues lack merit, this court affirms Thompson's judgment and sentence.

On February 13, 2013, Timothy McCormack and his dog Spike were residing in a storage unit at Wood & Wood Storage with the permission of the owner. At approximately 2 A.M., he awoke to the sound of the door to the unit being opened. Spike ran out of the

unit and McCormack followed him. When he got outside, Spike and a man were staring at each other from about five feet away. He saw that the man was skinny, about five feet ten inches tall, with a really white complexion and he was wearing a dark stocking cap. He stared at the man for about four seconds. When McCormack grabbed Spike, the man ran behind the units, where McCormack noticed a hole in the fence that had not been there before. McCormack called 911 and provided a description of the man.

Longview Police Officer Tory Shelton received the report of McCormack's call, including the description. He saw a man across the street from Wood & Wood Storage who matched the description. The man gave Officer Shelton the identification of a man named John Gehring. There was an outstanding warrant for Gehring, so Officer Shelton arrested the man and placed him in his patrol car.

Within five minutes, Officer Shelton arrived at McCormack's storage unit with a man in his patrol car. He had the man get out of the car so McCormack could look at him. McCormack identified the man, who was eventually identified as Thompson, as the man he had seen outside the storage unit.

The State charged Thompson with second degree burglary, first degree criminal impersonation, possession of a stolen vehicle, and possession of burglary tools. McCormack and Officer Shelton testified as described above. The jury found Thompson guilty as charged.

First, Thompson argues that the show-up identification process that Officer Shelton used violated his right to due process because it was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *State v. Hilliard*, 89 Wn.2d 430, 438, 573 P.2d 22 (1977) (quoting *Simmons v. United States*, 390 U.S.

377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)). But Thompson's trial counsel did not object to the testimony regarding the identification process. For this court to review the issue for the first time on appeal, Thompson must show that the identification was a "manifest error affecting a constitutional right." RAP 2.5(a).

To show a due process violation, the defendant must first show that the identification procedure was unduly suggestive. *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). Show-up identifications are not per se impermissibly suggestive. *State v. Birch*, 151 Wn. App. 504, 514, 213 P.3d 63 (2009), *review denied*, 168 Wn.2d 1004 (2010). Show-up identifications are generally permissible when the identification is made shortly after a crime and during the course of a prompt search for a suspect. *State v. Springfield*, 28 Wn. App. 446, 447, 624 P.2d 208, *review denied*, 95 Wn.2d 1020 (1981), *overruled in part on other grounds by State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). Even having the defendant stand next to a police car in handcuffs is not sufficient to show that the identification was unduly suggestive. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 336, 734 P.2d 966, *review denied*, 108 Wn.2d 1027 (1987).

Thompson fails to show that the show-up identification was unduly suggestive. The man brought to the show-up matched the description that McCormack had given, except for the slight facial hair that Thompson had. The show-up occurred within minutes of McCormack's encounter with the man. While Thompson asserts that McCormack's identification followed watching the police search for Thompson and finding wire cutters in Thompson's possession, McCormack testified that those events occurred after he had identified Thompson as the man he saw outside his storage unit. Because Thompson

does not show an unduly suggestive identification procedure, the inquiry into a due process violation ends. *Vickers*, 148 Wn.2d at 118.

Next, Thompson argues that he received ineffective assistance of counsel because his trial counsel did not object to the testimony about Officer Shelton's identification procedure. To establish ineffective assistance of counsel, Thompson must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that as a result of that deficient performance, the result of his case probably would have been different. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This court presumes strongly that trial counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

Thompson contends that there is no legitimate reason for his trial counsel not to have objected. But as described above, there was no evidence that Officer Shelton's identification procedure was unduly suggestive, so it was reasonable for counsel not to have objected to the testimony. Thompson fails to demonstrate ineffective assistance of counsel.

Finally, Thompson raises two issues in his SAG. He contends that Officer Shelton should not have been allowed to testify because he had been at counsel table during the other witnesses' testimony. But the State is permitted to have an investigating officer at counsel table, even if that officer later testifies. *State v. Grant*, 77 Wn.2d 47, 54, 459 P.2d 639 (1969). Second, he argues that the owner of Wood & Wood Storage should not have been allowed to testify that he saw a video of a man in the storage facility during the time of McCormack's encounter with Thompson, but that by the time the police asked for the

video, it had been recorded over. Thompson suggests that the video might have exculpated him. But the owner did not identify the man on the video. And Thompson's trial counsel did not object to the testimony, so as discussed above, Thompson must show a manifest error affecting a constitutional right. This Thompson does not do. The issues Thompson raises in his SAG lack merit.

Because Thompson's appeal raises issues that are clearly controlled by settled law, it is clearly without merit under RAP 18.14(e)(1). Accordingly, it is hereby

ORDERED that the motion on the merits to affirm is granted and Thompson's judgment and sentence are affirmed. He is hereby notified that failure to move to modify this ruling terminates appellate review. *State v. Rolax*, 104 Wn.2d 129, 135-36, 702 P.2d 1185 (1985).

DATED this 9th day of October, 2014.


Eric B. Schmidt
Court Commissioner

cc: Peter B. Tiller
Eric Bentson
Hon. Michael Evans
Brian D. Thompson