

NO. 65818-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

Anthony Eugene Herod,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL C. HAYDEN, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court have deficient findings of fact?

Answer: No. However, in the alternative, should this Court find that the findings are deficient, any deficiency can easily be remedied by a hearing before the trial Judge where he clarifies any issues.

2. Was Mr. Herod's right to due process violated by Mr. Pai's and Mr. Tundo's identifications being admitted?

Answer: No.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The King County Prosecutor charged the defendant with first degree robbery, two counts. RP 2 at 1.¹ The victims' names are Matthew Tundo and Navin Pai. RP 2 at 1-5. A jury found the defendant guilty based on the testimony and evidence presented as charged and parties proceeded to sentencing on July 30, 2010. RP 7 at 2.

2. SUBSTANTIVE FACTS

Officer Ted Cablayan was working patrol in the Ballard area on April 24, 2009, at around 11 p.m. RP 4 at 12-15. There was a reported

¹ RP hereinafter refers to "Report of Proceedings." There are seven volumes of this, which will be referred to as RP 1 (February 5, February 26 and May 7, 2010 proceedings), RP 2 (March 22, April 6, May 18 and July 1, 2010 proceedings), RP 3 (July 29, 2010 proceeding), RP 4 (July 20, 2010 proceeding), RP 5 (July 21, 2010

carjacking at gunpoint in the area. RP 4 at 15-16. Mr. Herod had demanded the wallet and cellular phone of Mr. Pai and Mr. Tundo as they were walking back to Mr. Pai's car after attending the Ballard Jazz Festival that night. RP 5 at 34-38, RP 4 at 69, 70. He was armed when he made this demand. RP 4 at 32-35.

After those items were surrendered to Mr. Herod, he also demanded the keys to Mr. Pai's beloved BMW, which he got. RP 5 at 38-54. He then proceeded to drive off in the vehicle, much to the chagrin of Mr. Pai and Mr. Tundo. RP 5 at 38-54. The men borrowed a cell phone from a man who happened to be walking by in the area with his girlfriend at that time, and immediately reported to 9-1-1 what had transpired. RP 5 at 57. This information was broadcast over radio, which officers heard. *Id.*

Officer Cablayan and his partner, Officer Brian Kokesh, responded to the area of 20th Avenue and Shilshole Avenue Northwest. RP 4 at 17-20. A description of the make and model of the stolen vehicle was broadcast, and so the officers looked in the general area for the vehicle. RP 4 at 20-23. They spotted the vehicle, which turned northbound on 24th Avenue Northwest. RP 4 at 23-24. They followed it. *Id.* The vehicle stopped at a dead end and the driver exited the vehicle out of the driver's side and hopped over a fence. RP 4 at 29.

proceeding), RP 6 (July 26, 2010 proceeding), and RP 7 (July 30, 2010 sentencing proceeding) in chronological order.

The officers had a good view of the car and driver as he exited. RP 4 at 29-31. This was also captured on their in car video. Id. They determined there was no one else in the vehicle other than the driver, who was apprehended shortly thereafter, and who is Mr. Herod. RP 4 at 30-37.

Roughly 45 minutes after the robbery Mr. Pai and Tundo were taken by Seattle Police Department officers to the location where Mr. Herod was being held for a show up ID. RP 5 at 115. Prior to the show up, Mr. Pai and Mr. Tundo believe they may have been shown in car footage of the defendant fleeing the car, jumping out and scaling the fence. RP 5 at 87. Both victims independently confirmed that Mr. Herod was the man who robbed them. RP 5 at 118.

During trial both men were allowed to testify about the fact that they identified Mr. Herod at the show up, and both were allowed to identify him in court, as being the man who robbed them. RP 4 at 77, RP 5 at 45. He was convicted as charged. RP 7 at 1.

ARGUMENT

- 1. THE TRIAL COURT'S FINDINGS OF FACT ARE NOT DEFICIENT. IN THE ALTERNATIVE, SHOULD THIS COURT FIND THE FINDINGS DEFICIENT, A HEARING BEFORE THE TRIAL JUDGE WOULD ALLOW HIM TO CLARIFY ANY ISSUE.**

Where findings of fact and conclusions of law are supported by substantial but disputed evidence, the Court of Appeals and Supreme

Court will not disturb the trial court's ruling. State v. Smith, 84 Wn.2d 498, 505, 527 P.2d 674 (1974). Conversely, these Courts will vacate or reverse such findings that the evidence does not support. Id. Findings not supported by evidence is not the concern raised by counsel in this case, rather, his concern is that the findings are not complete enough in that they do not make a "final determination" of fact with regard to an issue. AB at 5-8. That issue is whether or not the victims were shown a video before or after their identifications of the defendant as being the man who robbed them and took Mr. Pai's BMW. CP 117.

The Court said that "The Court does not make findings as to when the video may have been shown to Mr. Pai and Tunda, but does make conclusions with regard to the evidence generally." CP 117. The Judge presumably did this because, as is often the case in criminal trials and motions where there is testimony from multiple witnesses, not all witnesses had identical memories of when and if the video was shown.

"Where findings are required, they must be sufficiently specific to permit meaningful review." In re LaBelle, 107 Wn. 2s 196, 218, 728 P.2d 139 (1986).

Prior to Criminal Rule 3.6 only imposed upon the trial court certain requirements regarding suppression hearings: "At the conclusion of a hearing, upon a motion to suppress physical, oral or identification evidence the trial court shall set forth in writing: (1) the undisputed facts;

(2) the disputed facts; (3) the court's findings as to the disputed facts; and (4) the court's reason for the admissibility or inadmissibility of the evidence sought to be suppressed."

CrR 3.6 was amended, effective January 2, 1997, subjecting the movant to procedural requirements as well: "Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion." It is required that the findings from any pre trial hearing be filed in a timely manner, as they were in this case. (See generally State v. Fenn, 93 Wash.App 1069, not reported in P.2d, 1999 WL 30207 Wash.App. Div 1, 1999.)

CrR 3.6(a) permits an evidentiary hearing at the court's discretion. '{I}t is within the discretion of the trial court to allow oral testimony, in addition to affidavits, when hearing a motion to suppress evidence.' State v. McLaughlin, 74 Wn.2d 301, 303, 444 P.2d 699 (1968). Generally, "the trial court has wide discretion to fashion a hearing at a stage of the proceedings where guilt is not an issue." State v. Wolken, 103 Wn.2d 823, 829, 700 P.2d 319 (1985). We review those decisions for abuse of discretion. Id.

CrR 3.6(a) requires the moving party to support a motion to suppress with an affidavit or document 'setting forth the facts the moving

party anticipates will be elicited at a hearing.' The trial court decides whether a hearing is required based on those materials together with any response. CrR 3.6(a). The judge then enters an order denying a hearing and stating the reasons. CrR 3.6(a).

The court is not required to enter findings of fact and conclusions of law on a motion to suppress unless an evidentiary hearing is held. CrR 3.6(b). Courts "therefore defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). As this court has clearly said: "We will not weigh evidence or second guess a trial court's judgment of the evidence." State v. Mewes, 84 Wn.App. 620, 622, 929 P.2d 505 (1997).

In this case, the trial judge chose to not comment on the credibility of witnesses who clearly had conflicting memory, but to make a "final judgment" on whether or not the fact that they did remember these issues differently impacted whether or not the identification should be allowed at trial. CP 117. This is allowable, as the trial court has broad discretion, and must make these weighty decisions, evaluating testimony and all evidence in an appropriate light. *See generally* Walton, Mewes.

If a panel of this Court concludes that the written findings of fact with regard to the 3.6 hearing and suppression issue are not complete to their level of satisfaction, and therefore are inadequate, it can remand

the matter to the trial court for more complete written findings that it deems sufficient to permit meaningful review.

II. MR. HEROD'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN MR. PAI AND MR. TUNDO'S IDENTIFICATIONS WERE ADMITTED AS THEY WERE NOT THE PRODUCT OF AN IMPERMISSIBLY SUGGESTIVE SHOW UP

Mr. Herod cites to Biggers in arguing that the factors require a suppression of the victims' identification of the defendant. AB at 12.

The appropriate analysis is to view the evidence with the aid of Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct 2243, 53 L.ED.2d 140 (1977). The Court examined the Brathwaite factors, and cited them in its final determination that the identification of Mr. Herod was appropriately admissible. CP 103 at 2-3.

The Court found the identification to be "sufficiently reliable" based on the totality of the evidence. CP 103 at 2. He considered the victim's "opportunity to observe the defendant, high level of attention to the incident, level of accuracy, amount of time in between the incident and show-up identification "which was short." CP 103 at 2. The judge had the opportunity to listen to a lot of testimony, and, as has been noted above in several cases, appellate courts are generally remiss to second guess a trial judge's determinations in these areas. Judge Hayden cited to roughly a

half dozen reasons why there was not impermissible suggestion on the part of officers in this identification procedure. CP 103 at 2.

In short, Judge Hayden found that the show up should be admissible and was not "impermissible suggestive." CP 103 at 2. Because of this, despite counsel's argument, Mr. Herod's due process rights were not violated.

All show up identification procedures, by their very nature, are slightly suggestive. However, law enforcement officers must decide, based on the totality of the circumstances, if a show up ID is the best option. In this case, officers made that decision. And, in this case, Judge Hayden found that, although there may have been some level of suggestibility given the entire incident and surrounding facts, the level of suggestibility did not rise to the level of tainting the ID. CP 103 at 2. It was not impermissibly suggestive, as is argued by counsel in his brief. For this reason, suppression of the identification of Mr. Herod by both victims is not appropriate. And, the jury's decision based on this evidence and all the overwhelming evidence of the defendant's guilt, should be upheld, and counsel's request denied.

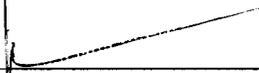
CONCLUSION

For the aforementioned reasons this Court should deny counsel's assignment of error with regard to the trial court's findings as well as any alleged violation of due process, and affirm the jury's finding of guilt of Robbery First Degree (two counts).

DATED this 21 day of APRIL 2011

RESPECTFULLY submitted,

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By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ANTHONY EUGENE HEROD, Cause No. 65818-2-I, in the Court of Appeals, Division I, for the State of Washington.

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

Betty A. Huddleston
Name

Done in Seattle, Washington

4/22/11
Date

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