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| DISTRICT COURT, LA PLATA COUNTY, COLORADO 1060 East Second Avenue Durango, Colorado 81301 | |
| THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. MARK REDWINE, Defendant | DATE FILED: October 5, 2018 3:33 PM FILING ID: 252441C1910D0 CASE NUMBER: 2017CR343 σ COURT USE ONLY σ |
| Douglas K. Wilson, Colorado State Public Defender John Moran, Attorney No. 36019 Justin Bogan, Attorney No. 33827 Deputy Public Defender 175 Mercado Street, Suite 250, Durango, CO 81301 Phone: (970) 247-9284 Fax: (970) 259-6497 E-Mail: Justin.Bogan@coloradodefenders.us Email: John.Moran@coloradodefenders.us | Case Number: 17CR343 Division: 1 |
| [D43] MOTION TO SUPPRESS UNRELIABLE AND SUGGESTIVE IDENTIFICATION | |

Mr. Redwine, by and through counsel, respectfully moves this Court for an Order suppressing the identification of _____ by Postal Worker Angela Lee. The photo of _____ was shown to Angela Lee in a suggestive manner so that she would retract her statement that she had seen Dylan Redwine after the time the prosecution says his father had caused Dylan's death. Counsel acknowledges this issue is one of first impression based on undersigned's research. Nevertheless, the same principles and pitfalls are at play in the identification of _____ by Angela Lee as are present when an accused seeks to suppress his own identification. As grounds, Mr. Redwine states:

FACTUAL BACKGROUND

1. Ms. Lee informed law enforcement she had seen Dylan Redwine walking with his friend on November 19, 2012 at about 1pm. Law enforcement came to later believe that Dylan Redwine had already disappeared or been killed by his father by that time. After multiple interviews, media bombardment, community pressure and law

enforcement challenges to her veracity Ms. Lee ultimately relented and provided a witness statement more in keeping with the theory of law enforcement.

2. In conjunction with relenting to the theory of law enforcement she was shown one photograph of _____ by the police and she agreed that was the child she had seen, not Dylan Redwine.

LEGAL ARGUMENT AND ANALYSIS

I. THE IDENTIFICATION PROCEDURE UTILIZED IN THIS CASE WAS IMPERMISSIBLY SUGGESTIVE.

5. When presented with a motion to suppress identification, a court must first consider whether the defendant has demonstrated that the array was impermissibly suggestive. *Bernal v. People*, 44 P.3d 184, 191 (Colo. 2002). If the defendant meets his burden, the burden shifts, and the state must show that the identification was nevertheless reliable under the totality of the circumstances. *Id.* Suggestive identification procedures are disapproved of because they increase the likelihood of misidentification. *Neil v. Biggers*, 409 U.S. 188, 198 (1971).

6. Although the *Bernal/Brathwaite* test is still the controlling law in Colorado, post-conviction DNA exonerations of innocent persons have highlighted the unreliable nature of eyewitness identification.¹ For this reason, some courts have altered the legal standard and placed the entire burden on the prosecution to prove that an identification procedure was reliable. *State v. Lawson*, 291 P.3d 673 (Or. 2012) (*See* Attachment D and E.) In *Lawson*, the Oregon Supreme Court granted review on the question of whether the state's existing procedure to determine the admissibility of eyewitness identification testimony ("the *Classen* test") was consistent with the current scientific research and

¹ *Identifying the Culprit: Assessing Eyewitness Identification* (http://www.nap.edu/openbook.php?record_id=18891) from the National Research Council.

understanding of eyewitness identification. The *Lawson* Court took judicial notice of the 2,000 plus studies on the reliability of eyewitness identification. The Court concluded, “the scientific knowledge and empirical research concerning eyewitness perception and memory has progressed sufficiently to warrant taking judicial notice of the data contained in those various sources as legislative facts we may consult for assistance in determining the effectiveness of our existing test for the admission of eyewitness identification evidence.” *Id* at 685. Based on the empirical research contained in the various *amici* briefs, the Court made findings on the current state of the reliability of eyewitness identification, with this thoughtful caveat:

In identifying and describing the variables identified in the research, however, we do not seek to enshrine those variables in Oregon substantive law. We recognize that scientific research is “probabilistic”—meaning that it cannot demonstrate that any specific witness is right or wrong, reliable or unreliable, in his or her identification. Rather, we believe that is imperative that law enforcement, the bench, and the bar be informed of the existence of current scientific research and literature regarding the reliability of eyewitness identification because, as an evidentiary matter, the reliability of eyewitness identification is central to a criminal justice system dedicated to the dual principals of accountability and fairness. We also recognize that, although there now exists a large body of scientific research regarding eyewitness identification, the research is ongoing. Therefore, our acknowledgement of the existence of that research in these cases is not intended to preclude any party in a specific case from validating scientific acceptance of further research or from challenging particular aspects of the research described in this opinion.

Lawson, supra at 685-686.

7. In the present case, the impermissibly suggestive identification procedure utilized was a single individual photographic show-up.

A. Presenting Ms. Angela Lee with a single photograph amounted to an impermissibly suggestive single individual show-up identification procedure.

8. One-on-one show-ups are viewed with disfavor by the Colorado courts. *People v. Young*, 923 P.2d 145 (Colo. 1995). The Supreme Court of Colorado has held that although not *per se* violations of due process, one-on-one show-ups are to be viewed with disfavor as they tend to be unnecessarily suggestive. *People v. Mascarenas*, 666 P.2d 101 (Colo. 1983). Showing one photograph is the functional equivalent. The United States Supreme Court and the Colorado Supreme Court have held that the totality of the circumstances are to be considered in determining whether such a show-up is so unduly suggestive as to be deemed unreliable. *Neil v. Biggers*, 409 U.S. at 199. Factors to be considered in determining whether such a show-up is unduly suggestive are: the witness' opportunity to view the criminal at the time of the crime; the witness' degree of attention at the time of the crime; the accuracy of the prior description; the level of certainty at the show-up; and the amount of time between the crime and the identification procedure. *People v. Weller*, 679 P.2d 1077 (Colo. 1984).

9. The Colorado Supreme Court, in *Young* held that a show-up was not unduly suggestive because the totality of the circumstances showed that the victim and witness to the robbery had a "good opportunity to view" the robber at the time of the crime, and they had both been "attentive." *People v. Young*, 923 P.2d 145 (Colo. 1995). In *People v. Tivis*, 727 P.2d 392 (Colo. App. 1986) the court upheld an identification, as it was based on a thirty minute observation of the defendant during the commission of the crime.

10. A typical single suspect show-up is a procedure in which a criminal suspect is brought before a witness for the purpose of identification. Here it was a single photo of another child shown for the purpose of inculcating Mr. Redwine. It is unreasonable to think that the average witness would be able to keep an open mind in this scenario. Further, it was not necessary to resort to this suggestive identification procedure because there was ample time under the circumstances to create a less suggestive identification procedure, such as a photo line-up. *Manson v. Brathwaite*, 432 U.S. 98, 108-09 (1977).

B. The photographic lineup created in this case was impermissibly suggestive.

11. A photo lineup that includes as few as six pictures is not a per se due process violation, but the fewer the pictures, the closer the array must be scrutinized for impermissibly suggestive irregularities. *U.S. v. Sanchez*, 24 F.3d 1259, 1262 (10th Cir. 1994).

12. Whether a “pretrial photographic identification procedure is impermissibly suggestive must be resolved in light of the totality of the circumstances.” *People v. Monroe*, 925 P.2d 767, 771 (Colo. 1996); *People v. Bolton*, 859 P.2d 311, 319 (Colo. App. 1993).

II. THE IDENTIFICATION PROCEDURES UTILIZED IN THIS CASE WERE UNDULY SUGGESTIVE, AND UNDER THE TOTALITY OF THE CIRCUMSTANCES THE STATE FAILS TO MEET ITS BURDEN UNDER THE SECOND PRONG OF THE ANALYSIS.

14. If the court finds that an identification procedure is impermissibly suggestive, it must then determine whether, under the totality of the circumstances, the suggestive procedure created a substantial likelihood of misidentification. *Bernal* at 192. The reliability of the witness is the “linchpin” in determining the admissibility of an out-of-court identification. *United States v. Wade*, 388 U.S. 218 (1967). A five-factor “totality of the circumstances” test is used to assess the reliability of the witness’ identification. The test examines:

The opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

Biggers, 409 U.S. at 199.

15. In the present case, none of these factors outweigh the suggestive nature of the identification procedure utilized by the police.

CONCLUSION

16. Mistaken eyewitness identification has long been recognized as one of the leading causes of wrongful convictions.² The Supreme Court has long acknowledged the grave role that misidentifications play in the criminal justice system, indicating that mistaken identification “probably accounts for more miscarriages of justice than any other single factor.” *Wade*, 388 U.S. 218, 229 (1967). Eyewitness identifications are inherently flawed, making it extremely important that police identification procedures be conducted with the utmost care. Such careful investigation protects against the faulty nature of human memory.

18. In this case, the identification was tainted by the suggestive procedure utilized by the investigators.

WHEREFORE, Mr. Redwine moves for suppression of the unduly suggestive photo identification.

Dated: September 20, 2018

/s/ John Moran

John Moran, #36019

² McMurtrie, Jacqueline, *The Role of Social Sciences in Preventing Wrongful Convictions*, 42 Am. Crim. L. Rev. 1217 (2005).

Certificate of Service

I hereby certify that I served the
foregoing document by ICCES to
all opposing counsel of record.

/s/ John Moran