



ROLL CALL REPORTER

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Out of Court Identifications

QUESTION: Should Maryland adopt a new standard for evaluating the admissibility of eyewitness identifications which better reflects present scientific knowledge concerning eyewitness memory?

ANSWER: No. Maryland courts are satisfied with the two-part test applicable to extra-judicial (out of court) identifications: (1) Was the identification procedure impermissibly suggestive? (2) If so, then, under the totality of circumstances, was the identification reliable?

CASE: *Marcus Lee Smiley v. State of Maryland*, Court of Appeals of Maryland
Decided March 9, 2015

This is the most recent Maryland case dealing with eyewitness identifications. It is important in many respects, and officers should pay close attention.

The Shooting: During the early hours of December 10, 2011, while smoking a cigarette in his girlfriend's backyard, in Salisbury, Maryland, Travis Green noticed Marcus Smiley between five and seven feet away from him. Smiley was sitting at the top of the steps of the house next door, and according to Green, he looked "crazy and everything." Green finished his cigarette and began to walk away. As he did so, Smiley asked him, "did you see where he went?" Green did not answer but kept walking towards his truck. At that point, Smiley fired a shot at him at very close range. Green attempted to escape by sliding across the front seat of the truck and fleeing. Smiley gave chase and continued to shoot at Green. Green was hit three times, in the right arm, abdomen, and thigh. Though out of ammunition, Smiley kept pulling the trigger. Green asked, "what are you still trying to shoot me for, what is this about, money?" Smiley did not answer and then ran off.

The Photo Identification: Green was flown to Shock Trauma for treatment, where, two days later, Special Agent Matthew Beccio of the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives presented him with a photographic array created by the Wicomico Bureau of Investigation. The photo array contained six photographs, including that of Smiley, created from digital images cached in an electronic database of those who, according to Agent Beccio, "had the same physical appearance, facial appearance as Smiley." The six photographs had been arranged in two rows of three, with Smiley's photograph located in position five. Green selected Smiley's photograph in approximately 30 seconds.

The Charges, Motion to Suppress and Conviction: Based on this identification, as well as another eyewitness identification, Smiley was charged with attempted first degree murder, attempted second degree murder, multiple counts of first and second degree assault, and multiple hand gun related offenses. Smiley moved to suppress the evidence against him. His attorney argued that the

identification was blighted by an impermissibly suggestive photo array as a result of the elongated (lengthened or extended) appearance of the men in four of the photographs. During the hearing on the motion to suppress, the circuit court judge did note that four of the photographs in the array (not including Smiley's) were "slightly elongated with respect to the head, neck and what little bit of the torso each individual can be seen", but still resembled people "who have that kind of build." The photos depicted six African-American males, all roughly of the same age, all with close-cropped hair. Five of the six had receding hairlines. All six had facial hair of the same style. They all had the same unsmiling expressions on their faces.

Smiley presented Dr. John C. Brigham, who had testified as an expert in the field of eyewitness identification. In his opinion, "people presumably would be unlikely 'to pick a distorted image.'" The judge, however, did not find the array to be impermissibly suggestive. He concluded that although the array was not "perfect", it was "an adequate photographic array for purposes of making an identification without impermissibly suggesting to the viewer which picture to pick out." The motion to suppress was denied. Smiley was convicted and appealed.

The Appeal: On appeal, the Court of Special Appeals affirmed the convictions. The Court of Appeals, Maryland's highest court, then agreed to hear the case. The Court of Appeals also upheld the convictions, agreeing that the elongation of the face and torso in four of the photographs did not render the array impermissibly suggestive. In reaching its conclusion, the court applied the two-step inquiry it established almost thirty years ago. The first question of the inquiry is whether the identification procedure was impermissibly suggestive. If the procedure is not impermissibly suggestive, then the inquiry ends. If, however, the procedure is determined to be impermissibly suggestive, then the second step is triggered, and the court must determine "whether, under the totality of circumstances, the identification was reliable." If the defendant can at least make an initial showing that the identification was impermissibly suggestive, then the burden shifts to the State to show, under a totality of the circumstances, that it was reliable.

Suggestiveness can arise during the presentation of a photo array when the manner itself of presenting the array to the witness or the makeup of the array indicates which photographs the witness should identify. No photo array is required to consist of "clones".

In this case, Agent Beccio presented Green with an array of six photos who shared many common characteristics: they were all African-American men, they were approximately the same age, they had the same hairstyle, and they had the same facial hair and same facial expression. As to the elongation of four of the six photos (not including Smiley's), the elongation was not "cartoonish," and, even with the elongation, two of the four photos showed persons who had that kind of build. As a result, the array was not impermissibly suggestive and Smiley's convictions were upheld.

NOTE: As a general rule, only exigent circumstances will justify an identification procedure limited to a single photograph. In non-exigent circumstances, showing a witness only the suspect's photograph will be deemed impermissibly suggestive. In this regard, show-up identifications can be problematic and many argue that they are inherently suggestive and taint post show-up identifications made by the witness. If a show-up identification is to be made, take all reasonable steps to make it as fair and non-suggestive as possible, without endangering either the officers involved or the witnesses.

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