



Roll Call Reporter

LEGAL UPDATE FOR MARYLAND LAW ENFORCEMENT OFFICERS

March 2018

Photographic Arrays and the Inclusion of Unique Features Such as Tattoos

Question: If a suspect is described as having a neck tattoo, is a photo array in which only one person has a visible neck tattoo impermissibly suggestive?

Answer: Yes. When the presence of a tattoo is at the center of the witness's description, law enforcement officers must include pictures of individuals with tattoos in generally the same area as the suspected perpetrator to avoid creating a suggestive photo array.

Case: *Malik Small v. State of Maryland*
Court of Special Appeals of Maryland
Decided March 1, 2018

The Armed Robbery, Shooting, and Description of the Suspect

Mr. Ellis Lee was waiting at a lighted bus stop in Baltimore City at approximately 2:00 a.m. on June 27, 2015. A man, who was covering part of his face with his T-shirt, pointed a gun at Mr. Lee and told him to hand over his money. Once it became clear that Mr. Lee did not have any money, the man told Mr. Lee to run and then opened fire, striking Mr. Lee once in his right lower calf muscle as he fled. Mr. Lee stopped briefly to call his family, and eventually made his way to Gittings Avenue, where

he sought help at the fire department. Mr. Lee was transported by ambulance to the Johns Hopkins Hospital emergency room. Baltimore City police officer Kenneth Howard, who was later joined by detectives Joel Hawk and Matthew DiSimone, met with Mr. Lee at the hospital and interviewed him about what had happened. Mr. Lee described his attacker as a black male, light skin, approximately five feet, eight inches tall, regular build, and short haircut. He said the man was wearing blue jeans and a light colored T-shirt, the bottom of which he used to cover part of his face. Mr. Lee said that he had seen the man twice before at the Staples where he worked and that he recognized the man's voice. Importantly, he said that the man had a block-cursive letter tattoo with the letter "M" in it on his neck.

The First and Second Photo Arrays

Later that same morning, after Mr. Lee was released from the hospital, he was transported to the police station where he viewed two photo arrays. Both arrays were drawn from a Baltimore City Police Department mugshot database. For the first array, Detective DiSimone purposely did not include neck tattoos in the database search. In the array, however, which was shown to Mr. Lee at 8:30 a.m., Malik Small was the only person featured with a neck tattoo. The tattoo, shown from the front, displayed a block-cursive "M". Mr. Lee indicated that Small's photo "may" depict the man who shot him, but said that he was not sure. He said he was

about “80 %” sure that Small was the assailant. The detectives indicated on the array that no positive identification had been made.

The officers then presented Mr. Lee with a second photo array roughly three hours after the first. Although this time all photos featured persons with neck tattoos of various content, Small’s photo was only one of two that had lettering in the tattoo. More significantly, Small’s photo was the only one repeated from the first photo array and the only one with a block-cursive “M.” Mr. Lee selected Small’s photo, stating, “That’s him. That’s who shot me.” He wrote under the photo: “This is the same tattoo and face I remember robbing me and the man I remember shooting me. I also remember him from coming into my job on two different occasions.” Mr. Lee was 100% certain of his identification. Two weeks after his photo identification, Mr. Lee called Detective DiSimone to report seeing a man on a dirt bike who he thought might be his assailant. Detective DeSimone dismissed this identification, and told Mr. Lee that the assailant (Small) had already been arrested and charged.

The Arrest, Motion to Suppress, Conviction, and Appeal

Small was arrested shortly after the photo identification and charged with numerous offenses, including attempted robbery, second degree assault, and reckless endangerment. He moved to suppress all evidence arising from both photo arrays, contending that the arrays were unconstitutionally suggestive and unreliable. The circuit court was troubled by the suggestiveness of repeating Small’s photo in the second array and by Mr. Lee’s testimony that he was only 70% sure of his identification, but found by clear and convincing evidence that the photo identification of Small was reliable. Lee was found guilty and appealed.

The Decision on Appeal

The Court of Special Appeals held that the inclusion of Small’s photo in the first photo array showing the distinctive “M” tattooed in cursive in his neck—

where no other person had a visible neck tattoo—coupled with the fact that Small was the only person whose photo was repeated in the second array, rendered the identification procedure impermissibly suggestive. The court concluded, however, that the totality of the circumstances surrounding Mr. Lee’s identification of Small—including recalling the unique features of his tattoo—made it sufficiently reliable to overcome the suggestive nature of the identification procedure and thus prevented the violation of Small’s rights under the Due Process Clause.

In reaching its conclusion, the Court reviewed the constitutional principles governing identification procedures. The Due Process Clause is implicated when law enforcement officers use an identification procedure that is both suggestive and unnecessary. A photographic identification procedure that is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification should be suppressed. In determining whether to suppress an extra-judicial identification on due process grounds, Maryland suppression courts undertake a two-step inquiry. Initially, the court determines whether the identification procedure was impermissibly suggestive. In other words, was there police conduct, improper or not, that “tipped off” the witness making the identification as to which photograph to choose? If the answer is “No,” the inquiry ends and the out-of-court identification and in-court identifications are admissible at trial. If the answer is “Yes,” the court must determine whether, under the totality of the circumstances, the identification was reliable. In this case, the answer was “Yes,” so it became the State’s burden to prove reliability by clear and convincing evidence.

The factors considered in determining reliability include: (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 by the witness at the



identification; and (5) the length of time between the crime and the identification. These factors are not exclusive and, ultimately, reliability is determined by the totality of the circumstances. In this case, most of the factors weighed heavily in favor of reliability. Further, Mr. Lee had seen his assailant before and knew his voice. Importantly, Mr. Lee had described Small's distinctive neck tattoo in his first interview with police at the hospital. In sum, the totality of the circumstances established the reliability of Mr. Lee's photo identification, despite the suggestiveness of the photo array procedure. As a result, Small's conviction was upheld.

Note: When evaluating the procedure employed by law enforcement to obtain a photo identification, trial courts examine the level of uniformity of physical features between the persons in the photo array. A similarity of features is critical. However, a suspect's unique or unusual feature or identifying mark as described by a witness may be included in the array. This is because observation of identifying characteristics is the core of any identification process. The issue of including a suspect's photo in multiple arrays is more problematic. To use a suspect's image in successive arrays might be suggestive if the same photograph were reused or if the arrays followed each other quickly enough for the witness to retain a distinct memory of the prior array. It was the inclusion Small's photo with his neck tattoo prominently displayed in the first photo array that made the identification in this case suggestive. No other person in the array had a neck tattoo. Filler photos should have been used of persons who not only physically resembled Small, but who also shared any of his unique or unusual features. An exact match or "clone" image is not required. **However, if an assailant is described as someone with a tattoo, then the filler photos-- the photographs of persons not suspected of committing the crime in question-- should include, if possible, persons with tattoos (not**

necessarily the same tattoos) in the same general location as described by the witness.

Finally, § 3-506.1 of the Public Safety Article of the Maryland Code outlines specific eyewitness identification procedures over a variety of media. Each agency must ensure that its current eyewitness identification procedures fully comply with the requirements of Maryland law. In this regard, § 3-506(1)(c)(1) of the Public Safety Article requires that law enforcement agents ensure that each "filler" resembles the description of the suspected perpetrator "in significant physical features, including any unique features." In this case, the officers should have included other persons with tattoos visible on their necks. **In some states, the police will alter the photographs shown so that each person has as similar tattoo. This is a dangerous practice and is not required in Maryland. However, when the presence of a tattoo is at the center of a witness's description, law enforcement officers must include pictures of people with tattoos in generally the same area as the suspected perpetrator to avoid creating a suggestive photo array.**

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