



Legal Update

Reliable Identification will be Suppressed if the Identification Procedure was Unnecessarily Suggestive

Commonwealth v. Kevin Ploude (Appeals Court decision – November 10, 2022)

Relevant facts

While inside a bakery, the victim looked through the front window and saw a man he did not know going through his truck. The victim confronted the suspect who was hunched over the passenger's seat. The suspect said he thought it was his friend's truck and that he was "whacked out" after taking a bunch of pills. A passerby asked if they should call the police. When the victim said "yes," the suspect took out a box cutter and threatened to stab the victim. The victim let him go.

The victim was able to provide a physical description to the police. The description included "scruffy facial hair" and tattoos all over his arms, body and neck. Police found a phone in a bag that the suspect had left behind. The officer unlocked the screen and saw several "selfie" pictures of a man matching the description of the suspect. After obtaining a search warrant for the phone, officers determined it belonged to the defendant.

The officer called the victim and said they "thought they knew who the perpetrator was, based on the cell phone that had been left at the scene." Officers asked the victim to view a photo array.

Eight photographs comprised the array. The defendant's photo showed him clean shaven with visible tattoos on either side of his neck. The filler pictures were generated by entering search criteria into the department's computer that was consistent with the victim's description. None of the filler photographs depicted anyone with neck tattoos. All the filler photographs showed men with facial hair.

For specific guidance on the application of these cases or any law, please consult your supervisor or your department's legal advisor or prosecutor.

The department policy stated that if a suspect has a distinctive feature, the filler photos should be adjusted so that no distinctive features stand out. The officer printed the photos in black and white to try to “neutralize” the neck tattoos. The department had the ability to either remove the neck tattoos from the defendant’s photo or to add tattoos to the other photos. Neither of these things were done.

A blind presenter was used for the identification procedure and used the standard form to instruct the victim before showing him the pictures. The victim identified the defendant by saying, “That’s him! That’s the guy!” The victim did not say his confidence level and did not say what features in the photo he based the identification on.

The defendant was arrested and booked the next day. At the time of booking, the defendant had facial hair and a “highly visible large tattoo of an animal’s face on the front of his throat.”

The defendant moved to suppress the identification. The defendant argued that the identification procedure was unnecessarily suggestive in two ways: first because the officer told the victim that the suspect has been identified based upon the phone he left behind; and second, because the defendant’s picture was the only one with neck tattoos.

Discussion

The court found that the officer should have avoided saying anything to the victim about why the officers believed they had a suspect. However, suppression of the identification was not required in this case because the statement did not add much to what would naturally occur to a witness who was being asked to see a photo array. The court also found that any suggestiveness caused by the comment was offset by the instructions provided to the victim by the blind presenter.

The court reiterated that the law disapproves of using photos that distinguish the suspect’s photo from the others on the basis of some physical feature. In prior cases, the court has not suppressed such identifications in two specific circumstances:

1. when it is clear that the identification was not made because of the distinguishing characteristic. “A witness’s unequivocal testimony that he was not relying on a distinctive feature will considerably neutralize any suggestiveness in a photographic array.” (emphasis in original) Commonwealth v. Thornley, 406 Mass, 96, 100 (1989).
2. when the distinctive feature was not part of the original description of the suspect.

The case here does not fit into either category.

The Commonwealth argued that the identification should not be suppressed because it was reliable. They argued that the victim identified the photo of the defendant even though the photo did not show the prominent tattoo on the front of his throat that was present at the time of the robbery. This argument fails because the issue is not the reliability of the identification, but whether the process was unnecessarily suggestive. An identification that is obtained by an unnecessarily suggestive procedure will be per se excluded from evidence even if it is reliable because it is a violation of the defendant’s right to due process under art. 12.

The identification should have been suppressed.

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