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Paul H.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA)	
)	
v.)	File No. CR 92-55
)	
JOSEPH FRANK WHITELEY)	

MEMORANDUM OPINION

This matter is before the Court on the Defendant's Motion to Suppress pursuant to Fed. R. Crim. P. 12 and 41. For the reasons stated below, this motion is DENIED.

FACTUAL BACKGROUND

On March 31, 1992, at about 11:20 a.m., a man robbed the Jefferson National Bank at 6515 Jefferson Davis Highway in Chesterfield County. Several witnesses observed the robber, a white male, over six feet tall, with a large nose and a "rough-looking complexion, wearing a stocking hat, dark glasses, a sweatshirt or jacket, and dark pants. The robber displayed a .357 pistol and removed cash from several drawers behind the teller line. In the process, the suspect unwittingly took an explosive, red dye pack. Witnesses saw the suspect leave the bank and drive away in a small red Ford, license number BBQ-544. Police arrived on the scene within minutes.

Outside the bank, a motorist observed heavy red smoke pouring from the window of a small red Ford on Jefferson Davis Highway,

just blocks from the bank. The motorist immediately reported his observation to a police officer at the bank. The officer went to the scene where he saw the red Ford, parked with the engine still running. In the unoccupied car he saw money partially covered with red dye.

At that moment, another witness approached the officer and reported seeing a man behind a U-Totem store a short distance away. The man looked like he was "hiding something" in his jacket or sweatshirt. He wore a stocking cap as he passed behind the U-Totem, but had removed the hat when he reappeared on the other side of the store. While relating these events to the officer, the witness pointed out a man, whom he believed to be the same individual, walking across Jefferson Davis Highway in the direction of some apartments. The officer reported these facts by radio to other officers in the area.

One such officer, Officer Scott Early, drove to the far side of a wooded area, adjacent to the apartments. Soon, the Defendant, Joseph Frank Whiteley, emerged from that wooded area. Whiteley is a white male, about 6 feet 2 inches tall, with a rough complexion. Despite the fact that Officer Early was under the impression that the robber was a black male, his experience told him that early reports are often incorrect, and, therefore, he realized that the man walking out of the woods might be the bank robber. The suspect was proceeding away from the direction of the bank on foot and through a fenced-off area that is restricted to pedestrians. Officer Early stopped Whiteley and directed him to place his hands

on the trunk of the police car. Officer Early then conducted a "pat down" search and discovered a large folding knife in Whiteley's pocket. He then informed Whiteley that he was under arrest for carrying a concealed weapon and read his Miranda warnings. Whiteley later provided identification in the name of Joseph Michael Courtland.

All of these events took place within fifteen minutes of the robbery, and within a few blocks of the bank. Witnesses were still at the bank, in the process of interviews with police officers. An officer asked two witnesses, Mr. Turner and Mr. Wilford, to accompany him to the scene of the arrest. There, Turner and Wilford saw Whiteley sitting in the front of a police car. Police directed Whiteley to stand outside of the car. Both Turner and Wilford identified Whiteley as the man they had seen robbing the bank only twenty minutes earlier.

ARGUMENT

A. The Stop, Pat-Down, Search, and Arrest of Whiteley

Based upon a reasonable, articulable suspicion of criminal activity, a police officer may detain a suspect for a brief period of questioning and identification. Terry v. Ohio, 392 U.S. 1 (1968). During such detention, the officer may conduct a "pat-down" search of the suspect for weapons, if the officer believes the detainee poses any threat of harm to the officer or others. Id. at 28; United States v. Crittendon, 883 F.2d 326, 328-29 (4th Cir. 1989).

The Defendant argues, first, that Officer Early did not have a reasonable suspicion to stop and detain Mr. Whiteley, and, second, that once stopped, Officer Early has no basis to believe that Mr. Whiteley was either armed or dangerous. Thus, the Defendant claims that both the stop and frisk of the Defendant were unreasonable, and, therefore, the fruits of these encounters should be suppressed. This argument is completely without merit.

Officer Early conducted a lawful Terry stop when he saw Whiteley, a man walking through a restricted fenced-off area from the direction of a bank where an armed robbery had occurred just blocks away only fifteen minutes earlier. Whiteley himself told Early that he was coming from Jefferson Davis Highway, the street where the bank was located. Further, Whiteley was emerging from a wooded area where a witness had seen the robbery suspect only moments before. It is hard to imagine a clearer case of "articulable suspicion" than this one. Once stopped, a pat-down search of Whiteley was justified since the bank robber was reported to be armed with a handgun. See Crittendon, 883 F.2d at 329 (frisk justified where detainee suspected of crime involving use of weapon).

Upon discovery of a concealed switchblade, Officer Early had probable cause to arrest Whiteley for violating Virginia law regarding the carrying of concealed weapons. Even if they had never found the knife, police were entitled to continue the investigative detention of Whiteley for the five or ten minutes necessary to identify him positively as the bank robber. See,

e.g., United States v. Quinn, 815 F.2d 153, 157 (1st Cir. 1987) (25 minute detention reasonable while awaiting arrival of trained dog to sniff for drug evidence); United States v. Martinez, 808 F.2d 1050, 1054 (5th Cir. 1987) (15-30 minute stop reasonable while police diligently pursue investigation).

B. The Identification of Whiteley by Two Witnesses

The Defendant also objects to the identification made by Mr. Turner and Mr. Wilford while Mr. Whiteley was in police custody. The Defendant claims that given the circumstances of these identifications, they must be suppressed as unduly suggestive and, therefore, unconstitutional.

Both the Supreme Court and the Fourth Circuit have declared that "show-up" identification procedures are not per se unconstitutional. Neil v. Biggers, 409 U.S. 188 (1972); Willis v. Garrison, 624 F.2d 491, 493 (4th Cir. 1980). The Fourth Circuit has stated:

A show-up identification meets . . . due process standards . . . if, taking into consideration the 'totality of the circumstances' . . . it is found to be not 'so necessarily suggestive and conducive to irreparable mistaken identification' as to deny the defendant fundamental fairness. One of the show-up situations consistently found to satisfy these due process standards . . . is the confrontation had promptly after the crime. Such a confrontation has been stated to have 'great merit.'

Willis, 624 F.2d at 493 (quoting Stanley v. Cox, 486 F.2d 48, 50-01 (4th Cir. 1973)). Though suggestiveness is inherent to a certain extent in every show-up identification, due process does not require that every pretrial identification of a witness be conducted under laboratory conditions of an approved line-up.

Stanley, 486 F.2d at 52.

Courts considering the reliability of show-up identification procedures typically look to the five factors set forth by the Supreme Court in Neil v. Biggers. These factors, all which support the admissibility of the identifications in this case, are as follows:

1. The Opportunity to View -- Both Wilford and Turner observed the suspect in the bank from a distance of only ten feet, in well-lighted conditions, for about one minute. In short, they had an excellent opportunity to view the robber.

2. Degree of Attention -- Obviously, both witnesses were struck by the unusual event of seeing an armed man in a bank, and both paid close attention to the event.

3. Accuracy of Description -- Both Mr. Turner and Mr. Wilford provided detailed and accurate descriptions of a white male, over six feet tall, approximately 190 pounds, with a rough complexion and no facial hair. Wilford was especially struck by Whiteley's unusually large nose. Each witness accurately described Whiteley's clothing, down to the white tennis shoes.

4. Witness' Level of Certainty -- Wilford withheld identification of Whiteley until he had stepped out of the police car. When he could see the Defendant's face, Wilford was confident that Whiteley was the man who had just robbed the bank. Turner's identification was immediate and definite.

5. Time Between the Crime and Confrontation -- The elapsed time was only about twenty minutes.

One Court of Appeals has noted that "prompt, on-the-scene identifications are likely to promote fairness, by enhancing reliability of the identifications, and permit expeditious release of innocent subjects." United States v. Wilson, 435 F.2d 403, 404-05 (D.C. Cir. 1970). Given this principle and considering the circumstances of this case, it cannot be said that Turner and Wilford's confrontations with Whiteley were so "unnecessarily suggestive" that Whiteley was denied due process of law.

CONCLUSION

For the reasons discussed above, the Defendant's Motion to Suppress is DENIED as to each issue.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE