



*Pre-lineup statements of witnesses Brittney Anderson and Robert Scott III*

Anderson and Scott were both near the scene when the killing took place and were interviewed by members of the Cleveland police department soon after. Anderson's first statement was on the evening of the shooting to Cleveland police patrolman Geoffrey Walter at the MetroHealth hospital waiting room while her son was being operated on. According to Walter, Anderson was "highly distraught" and "barely could talk," but she did tell him that she saw a newer white four-door car (possibly a Toyota Corolla) coming north on East 113 Street between Union and Regalia. Anderson and Mangham were on the sidewalk a couple of houses north of her car, which was parked on the east side of the street and Smith and M.H. were sitting in it. In the front passenger seat of the northbound white car was a black man wearing a gray hooded sweatshirt pointing a gun with "flames" coming out of the barrel. She dove to the ground. After the shooter's car left the area Smith got out of Anderson's car and told her that M.H. was shot. M.H., Smith and Anderson were then almost immediately driven in Anderson's car to the hospital by Nance and Scott.

Anderson was interviewed at MetroHealth a second time on the day of the crime by homicide detective Tim Entenok. She further described the passenger she saw shooting the gun as having dark brown skin one or two shades darker than hers. She told Entenok that although the shooter's hood was up it was not drawn around his face. Anderson could not provide any description at all of the car's driver, but she did say that nobody other than a driver and the passenger were in the car.

Scott spoke on the night of the killing to Cleveland police detective James Brooks, who was canvassing residents of East 113 in the hope of locating witnesses. Scott told Brooks that he ran out of his house as the shooting started and saw that a child was hit. Scott used his shirt as a

bandage to apply pressure to M.H.'s chest wound as a second man – not identified then by Scott, but later learned to be Nance – drove the car to the hospital.

Scott gave a second interview that same night to homicide detective Kathleen Carlin. There he said he was in his kitchen when he heard gunshots from the front. He ran out the front door and heard more shots, so he got down on the floor of his front porch but not before seeing that shots had come from windows on both sides of a newer white Kia or Saturn four-door with tinted windows. He described at least three shooters but did not give even the vaguest descriptions of any of them.

### *The photo lineups*

As the investigation progressed, the police identified the white car as a rental vehicle and learned from the person who rented it that he had loaned the car to Donnell Lindsey in exchange for drugs, so a warrant was issued for Lindsey's arrest on September 20. Detective Entenok notified the fugitive unit of the warrant. The fugitive unit is responsible for apprehending criminal suspects and consists of officers from various local, state and federal law enforcement agencies. But Entenok testified that he and his partner, detective Carlin, did not give the information about Lindsey – including a photograph – to the local news media. The media, however, did obtain and publish a picture of Lindsey which Anderson saw on a television news program on September 20, the day before she gave a recorded statement to Entenok.

Carlin included a driver's license photograph of Lindsey in creating a six-person photo lineup consisting of two columns and three rows of pictures each about two inches wide and three inches high. Whether it was coincidental or not, the picture of Lindsey used for the lineup was the same one Anderson saw on TV the night before, although Carlin did not know that when she created the lineup.

Carlin testified that she is aware of the importance of following the procedures outlined in section 2933.83 of the Ohio Revised Code when creating and administering a photo lineup. Here, because Anderson said she had only seen the shooter's face and skin tone, Carlin culled a law enforcement photo database for pictures of black men about the same age as Lindsey. But she also included in the lineup a picture of Aaron Dunnings who, by that stage of the investigation, the police had come to suspect was the driver of the white car.

The lineup was already prepared when Anderson arrived at the homicide unit for a detailed interview on September 21. During her interview, and before the lineup was presented to her, Anderson told Entenok that she had seen a picture of the suspect on the news and immediately recognized him as the shooter she saw on September 15. After Entenok asked questions of Anderson for over half an hour he left the room and homicide detective Chuck Gove entered to administer the photo lineup. Gove presented Anderson with the six-person photo lineup created by Carlin and identified the picture of Lindsey as the person who "killed my son."

The same lineup was administered to Scott during a long recorded statement with Entenok and Carlin on January 7, 2016. By then Scott was in custody for an attempted murder charge. He said that after the shooting he had seen a video on social media of men claiming responsibility for the shooting. Before he was shown the lineup he also told the detectives that he had seen "Nell" from East 93 as the shooter from the white car on September 15. Then when shown the lineup by a third detective he identified Lindsey in photograph 4 as somebody he knew from East 93 who was shooting on September 15 and he identified Aaron Dunnings in photograph 1 as someone he knows from growing up and who may have been shooting on September 15.

### *The law*

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of liberty without due process of law. Due process of law may be difficult to precisely define, but it connotes "those canons of decency and fairness established as part of the fundamental law of the land." *Palmer v. Peyton*, 369 F.2d 199, 202 (4<sup>th</sup> Cir., 1966). An out-of-court eyewitness identification of a criminal defendant may be made under circumstances so unnecessarily suggestive and conducive to irreparable mistaken identification that the procedure amounts to a denial of due process of law guaranteed by the Fourteenth Amendment. *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

A claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. *Id.* If those circumstances demonstrate that the procedure used by the police to obtain the identification was not unduly suggestive then evidence of the identification will not be suppressed at trial because the other circumstances surrounding the identification go only to the weight to be accorded to the identification, not its admissibility. *State v. Hall*, 2d. Dist. No. 10-CA-23, 2011-Ohio-635, ¶16. But if the lineup procedure is deemed unnecessarily suggestive, the central question under the totality of the circumstances test is whether the identification was reliable even though the confrontation procedure was suggestive. *Neil v. Biggers*, 409 U.S. 188, 199 (1972). Even if an identification is obtained using unnecessarily suggestive procedures, it will not be excluded from evidence unless the identification was unreliable under all the circumstances. *State v. Waddy*, 63 Ohio St. 3d 424, 438 (1992). Reliability is the linchpin in determining the admissibility of identification testimony. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

The factors to be considered in evaluating the likelihood of misidentification include the

opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Neil*, supra, 199. But those factors need not be analyzed if the lineup itself was not unduly suggestive through the fault of the police.

For a lineup to be “suggestive” it must be assembled with the purpose to influence a witness to select a particular person or to imply that a particular person should be picked by the witness. This can be done in ways both overt – a lineup of five white men and one black man – and subtle – six men who look more or less alike but one is frowning or straightfaced and the rest are smiling. Suggestiveness may also come not from the composition of the lineup itself but through leading questions or cues from the questioner about the people in the lineup. To minimize the possibility of suggestive lineups the General Assembly enacted R.C. 2933.83 governing the administration of photo lineups. The law requires police agencies that do photo lineups to adopt specific procedures for conducting the lineups. R.C. 2933.83(B). If a lineup fails to comply with the procedures set forth in R.C. 2933.83(B)(1) to (5) then: a trial court must consider that failure when deciding a motion to suppress eyewitness identification from the lineup; evidence of the failure to comply shall be admissible to support any claim of eyewitness misidentification from the lineup; and the jury must be instructed to consider credible evidence of noncompliance in determining the reliability of any eyewitness identification resulting from or related to the lineup.

Lindsey offers several reasons the lineups administered to Anderson and Scott were unduly suggestive. For both witnesses, he argues that the lineup improperly included two suspects and the police failed to procure confidence statements. For Anderson, he claims that

she should not have been shown the lineup at all once the police learned she had seen Lindsey's photograph on the news the night before the lineup. For Scott, he argues that too much time elapsed between the crime and the administration of the lineup.

Putting two suspects in the same lineup is discouraged because it doubles the chance that a witness who is merely guessing will identify one. But that risk did not materialize here. Anderson picked only one suspect. If she selected Lindsey because she saw his picture on the news the previous day she didn't pick a photo just to please the interrogator, and in any event her failure to pick Dunnings is consistent with her statement that she only saw one of the car's occupants. And Scott picked both suspects, explaining that he knew them both before September 15, 2015. So for both witnesses there is no evidence they selected pictures at random and happened upon one or both suspects just by chance.

R.C. 2933.83(B)(4)(a) requires law enforcement agencies to adopt procedures that include a written record of a witness' confidence statement made immediately at the time of the identification. A confidence statement usually takes the form of an expression of how sure a witness is that the person whose photo the witness selected was at the crime scene. The level of confidence may be expressed as a percentage or on a scale of one to ten or in some similar fashion. The importance of a confidence statement is that it fixes an identifying witness' level of certainty so that a future identification at a differing level of certainty might be explained by external influences, such as the later acquisition of information diminishing or bolstering the confidence of the witness or the fading of memory over time. Clearly it is preferable to obtain explicit confidence statements, but the video recordings of Anderson and Scott's identifications reveal their degrees of certainty. Moreover, the level of confidence goes to the reliability of the identification but not to the suggestiveness of the procedure, and the failure of the administrators

to obtain the confidence statements didn't make the photo lineup any more suggestive than it might already have been.

Even assuming the Cleveland police detectives were responsible for giving Lindsey's picture to the media there is no evidence that it was done with the intention to improperly influence the administration of the photo lineup. When the photo array was compiled Carlin did not know that Anderson would see the same picture before she was asked to see the lineup, and there is no evidence that Carlin included the BMV picture of Lindsey because she or her partner had released it to the media the day before in the hope that Anderson would see it and get the idea that Lindsey was the perpetrator. Here too the video recording will help the ultimate fact finder to determine the reliability of Anderson's identification, since she is clear that she saw the same person on the news the night before and may have even seen him in an Instagram post bragging about the shooting. But if her identification is unreliable it isn't because the police induced – purposely or through negligence – an untrustworthy identification.

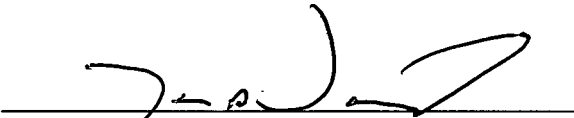
There is also no evidence that the executive branch of government improperly maneuvered by waiting more than three months to show Scott the lineup to enhance the likelihood of an identification of Lindsey and Dunnings. Instead, the delayed administration of the lineup to Scott is explained by the facts that he gave two contemporaneous statements saying he didn't recognize anybody in the car and he was in custody very soon after September 15 facing felony charges from a separate incident. Since he was a witness claiming not to have seen anybody it would be a low priority to show him a lineup, and arranging the lineup became legally and practically more difficult because of his pending case. As with Anderson, whatever unreliability there is in Scott's identifications comes from the witness himself, not from something the police did or failed to do.



**Conclusion**

For all of these reasons, the defendant's December 23, 2016 motion to suppress the September 21, 2015 out-of-court identification of him by Brittney Anderson and the January 7, 2016 out-of-court identification of him by Robert Scott III is denied.

**IT IS SO ORDERED:**

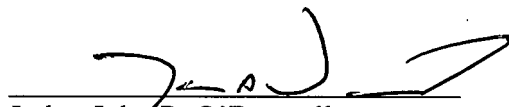
  
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Judge John P. O'Donnell  
2/15/2017

**SERVICE**

A copy of this journal entry was sent by email, this 15<sup>th</sup> day of February 2017 to the following:

Anna M. Faraglia  
[afaraglia@prosecutor.cuyahogacounty.us](mailto:afaraglia@prosecutor.cuyahogacounty.us)  
Brian Radigan, Esq.  
[bradigan@prosecutor.cuyahogacounty.us](mailto:bradigan@prosecutor.cuyahogacounty.us)  
*Assistant prosecuting attorneys for the State of Ohio*

John F. Greene, Esq.  
[JGREENE@CUYAHOGACOUNTY.US](mailto:JGREENE@CUYAHOGACOUNTY.US)  
Kevin M. Spellacy, Esq.  
[KSPELL@MGHSLAW.COM](mailto:KSPELL@MGHSLAW.COM)  
*Attorneys for defendant Donnell D. Lindsey*

  
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Judge John P. O'Donnell  
2/15/2017