

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 28810

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellant, v.
PAUL SAY, Defendant-Appellee, and
SHENDON YAMAGUCHI and LELAND FERNANDES,
Defendants

K. HAMAKADO
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STATE OF HAWAII

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APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CR. NO. 05-1-0187)

MEMORANDUM OPINION

(By: Nakamura, C.J., Fujise and Leonard, JJ.)

Plaintiff-Appellant State of Hawaii (State) appeals from the "Findings of Fact, Conclusions of Law and Order Granting Defendant Paul Say's Motion To Suppress Out of Court Identification of Defendant" (Suppression Order), which was entered by the Circuit Court of the Fifth Circuit (circuit court) on October 3, 2007.^{1/} Two witnesses had selected the photograph of Defendant-Appellee Paul Say (Say) after being separately presented with a photographic lineup by the police. The circuit court concluded that the "photographic lineups were impermissibly suggestive" and granted Say's motion to suppress the witnesses' out-of-court identifications.

On appeal, the State argues that the circuit court erred in: 1) admitting in evidence at the suppression hearing portions of a police report that were not authenticated and contained hearsay statements; 2) placing the burden of proof with respect to Say's suppression motion on the State; 3) finding that on the photographic lineup, the text "Lineup Name: PAULSAY" was listed directly above photograph one and photograph four (Say's photograph); and 4) suppressing the identifications of Say by two witnesses.

For the reasons discussed below, we vacate the Suppression Order and remand the case for further proceedings consistent with this Memorandum Opinion.

^{1/} The Honorable Kathleen N.A. Watanabe presided.

BACKGROUND

This case arises out of an altercation on Kaua'i in which Chad McClintic (Chad) and Chase McClintic (Chase) and were allegedly assaulted by a group of people, one of whom used a baseball bat. The Kaua'i Police Department (KPD) separately presented Chad, Chase, and Jan Nadarisay (Nadarisay) with a photographic lineup containing Say's photograph. Chad selected Say's photograph and commented, "[m]aybe the one with the bat." Chase did not select any photograph. Nadarisay selected Say's photograph, stating that she was not one hundred percent sure, but that Say's photograph looked like the person she observed sitting in the bed of a truck that purportedly was associated with the altercation.

Say was indicted and charged in Count 1, along with Shendon Yamaguchi (Yamaguchi) and Leland Fernandes (Fernandes), with first-degree assault for causing serious bodily injury to Chad, in violation of Hawaii Revised Statutes (HRS) § 707-710 (1993).^{2/} Say was charged alone in Count 2 with second-degree assault for causing bodily injury to Chase with a dangerous instrument, to wit: a bat, in violation of HRS § 707-711(1)(d) (1993).^{3/} The indictment also charged Fernandes with additional crimes arising out of the same altercation.^{4/}

On June 4, 2007, Say filed a motion to suppress the photographic identifications made by Chad and Nadarisay. In

^{2/} HRS § 707-710 provides in relevant part:

A person commits the offense of assault in the first degree if the person intentionally or knowingly causes serious bodily injury to another person.

^{3/} At the time relevant to this case, HRS § 707-711(1)(d) provided:

(1) A person commits the offense of assault in the second degree if:

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(d) The person intentionally or knowingly causes bodily injury to another person with a dangerous instrument[.]

^{4/} The circuit court subsequently dismissed the charge against Yamaguchi.

support of his motion, Say attached excerpts of a KPD police report concerning the results of the photographic lineup presented to Chad, Nadarisay, and Chase as Exhibits A through D. Say argued, among other things, that the identification procedure used by the police was impermissibly suggestive because 1) the photographic lineup referred to Paul Say as the subject; and 2) while one witness (Nadarisay) was instructed not to select anyone unless she was one hundred percent positive, another witness (Chad) was not so instructed. Say stated in his supporting memorandum that he intended to introduce Exhibits A through D at the suppression hearing.

The State filed a memorandum in opposition. The State's opposition did not dispute the accuracy of the factual background set forth in Say's suppression motion or the accuracy of the information set forth in Exhibits A through D attached to Say's suppression motion. The State simply argued that the identification procedure used by the police was not impermissibly suggestive.

On September 12, 2007, the circuit court held a hearing on Say's motion to suppress. At the hearing, defense counsel stated that it was the defense's position that the facts surrounding the identification procedure were not disputed by the State, and therefore, the defense believed there was no need for, and would not be calling, any witnesses. The Deputy Prosecuting Attorney (DPA) responded that the State was not willing to stipulate to any facts.

Defense counsel then offered in evidence the excerpts of the police report attached as Exhibits A through D to Say's suppression motion. The DPA objected, arguing that the defense could not authenticate these exhibits without calling a witness and that the exhibits were also inadmissible as hearsay. Defense counsel stated that prior to the hearing, he had advised the DPA previously handling the case on at least two occasions that the defense did not plan to call any witnesses because the State had not disputed the underlying facts asserted by the defense. Defense counsel acknowledged, however, that he did not obtain a stipulation from the prior DPA that the State would not object to

Exhibits A through D. The circuit court, over the State's objection, admitted Exhibits A through D in evidence at the suppression hearing. In support of its ruling, the circuit court noted that the exhibits had been produced by the State to the defense in discovery and that the State did not object to the exhibits in its memorandum in opposition to Say's suppression motion.

The exhibits admitted in evidence included a black and white photocopy of the photographic lineup shown to Chad, Nadarisay, and Chase; written instructions regarding the identification procedure; and references to remarks made by Chad and Nadarisay when they were shown the photographic lineup. The exhibits indicated that Chad, Nadarisay, and Chase were separately shown an identical photographic lineup that contained Say's picture. The photo array consisted of six photographs arranged in two rows of three photographs, with each photograph in the second row aligned directly below the corresponding photograph in the first row. Say's photograph was photograph four--the first photograph in the second row situated directly below photograph one.

The text "Lineup Name: PAULSAY"^{5/} was typed above the first row, with the text beginning above the right half of photograph one and extending to the end of the margin between photographs one and two. According to the exhibits, Chad selected photograph four (Say's photograph) and remarked, "Maybe the one with the bat." Chase did not select any photograph in the array.

The exhibits reflect that the KPD officer that presented the photographic lineup to Nadarisay instructed Nadarisay not to select an individual unless she was "100% positive" in her identification. There is no indication in the exhibits that a similar instruction was given to Chad. Nadarisay looked at the photographic lineup and initially told the officer that "she could not make a selection because she was not 100%

^{5/} "PAULSAY" is all in capital letters, and there is no space between "PAUL" and "SAY."

positive." Nadarisay then told the officer that Nadarisay had spoken to a friend about what Nadarisay had seen and that the friend said the truck in question belonged to Fernandes (Say's co-defendant). Nadarisay continued looking at the photographic lineup and said she was not positive, but that the photograph of Say looked like the person she saw sitting in the bed of the truck.

The State did not call any witnesses or offer any evidence at the suppression hearing. Relying on the admitted exhibits, Say argued that the photographic lineup was impermissibly suggestive because Say's name appeared on the photographic lineup and the police gave inconsistent instructions to Chad and Nadarisay. The circuit court asked defense counsel what evidence the defense had that the "name" on the photographic lineup was known or was familiar to Nadarisay. Defense counsel responded: "[W]e don't have evidence to say that [Nadarisay] knew who that person was. But if you take a look at her statement, if she knew the truck of Leland Fernandes, it is not a far reach to infer that she knew Paul Say." Defense counsel also suggested that "everyone on a small Island [(Kaua'i)] knows everybody[.]"

In response to the circuit court's questioning, the DPA acknowledged that it was not "standard operating procedure" for the police to include a name on a photographic lineup and that showing the name to the witnesses was a "mistake." The DPA argued, however, that the mistake did not render the lineup unduly suggestive because the inclusion of Say's name on the photographic lineup did nothing to indicate which photograph was that of Say. The circuit court interjected, "That's assuming that whoever is reviewing the photographic lineup does not know who Paul Say is." The DPA replied, "Correct. And there is no evidence on record to show that any of the witnesses personally knew Paul Say." The circuit court took the matter under advisement and ordered the parties to submit proposed findings of fact and conclusions of law.

On October 3, 2007, the circuit court issued the Suppression Order. The circuit court found in relevant part that

- 1) "The words 'Lineup Name: PAULSAY' was [sic] listed directly

above photograph numbers 1 and Defendant Say's photo, photograph number 4" and 2) the KPD instructed Nadarisay not to select a person from the photographic lineup unless she was 100% positive but did not give a similar instruction to Chad. The circuit court concluded that the photographic lineup was impermissibly suggestive because it displayed Say's name after the words "Lineup Name" and the KPD gave inconsistent instructions to Chad and Nadarisay.

The circuit court did not explicitly find or conclude that the identifications by Chad and Nadarisay were unreliable. Instead, it cited the test for determining the reliability of an identification set forth in State v Padilla, 57 Haw. 150, 154, 522 P.2d 357, 360 (1976) and Neil v. Biggers, 409 U.S. 188, 199-200 (1972). The circuit court then noted, among other things, that Chase was unable to identify Say as being involved in the altercation; Chad tentatively identified Say as "maybe the one with the bat"; Nadarisay stated she was not positive and only identified Say's picture after relating that her friend had said the truck belonged to Fernandes; Chad's opportunity to view his assailant was minimal because he was involved in the altercation; Nadarisay was not at the scene of the altercation as it was occurring; and the State did not call Chad or Nadarisay to explain or support their identifications. After noting these things, the circuit court ordered "that the out-of-court photographic lineups were impermissibly suggestive and considering the totality of the circumstances, Defendant Say's Motion to Suppress is hereby granted."

DISCUSSION

We need not determine whether the circuit court erred in admitting Exhibits A through D at the suppression hearing. This is because even if we assume, without deciding, that Exhibits A through D were properly admitted, we conclude that the circuit court erred in determining that the photographic lineup was impermissibly suggestive based on the admitted exhibits and the record before it. Accordingly, we vacate the circuit court's Suppression Order and remand the case for further proceedings.

I.

We apply the following standards in reviewing questions concerning the impermissible suggestiveness of a pre-trial identification procedure and the reliability of a witness's identification.

When the defendant challenges admissibility of eyewitness identification on the grounds of impermissibly suggestive pre-trial identification procedure, he or she has the burden of proof, and the court, trial or appellate, is faced with two questions: (1) whether the procedure was impermissibly or unnecessarily suggestive; and (2) if so, whether, upon viewing the totality of the circumstances, such as opportunity to view at the time of the crime, the degree of attention, and the elapsed time, the witness's identification is deemed sufficiently reliable so that it is worthy of presentation to and consideration by the jury.

State v. Okumura, 78 Hawai'i 383, 391, 894 P.2d 80, 88 (1995) (brackets, quotation marks, and citation omitted). "[T]he questions of suggestiveness and reliability are questions of law that are freely reviewable on appeal." Id. "On the other hand, answering these questions involves determinations of fact by the [trial] court[, and] [a]ppellate review of factual determinations made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard." Id. at 392, 894 P.2d at 89 (quotation marks and citations omitted).

A defendant seeking to suppress a pretrial identification bears the burden of first establishing that the identification procedure was impermissibly suggestive. See id. at 391, 894 P.2d at 88; State v. Mitake, 64 Haw. 217, 221, 638 P.2d 324, 327 (1981). "This threshold inquiry necessitates a reconstruction, by testimony and as aided by demonstrative evidence, of the scenario of the confrontation procedure." Mitake, 64 Haw. at 222, 638 P.2d at 328. If the defendant fails to meet his or her initial burden of demonstrating that the identification procedure was impermissibly suggestive, "the question of the eyewitness identification's reliability need not be answered." State v. Malani, 59 Haw. 167, 170, 578 P.2d 236, 238 (1978).

II.

The circuit court cited two factors in support of its conclusion that the photographic lineup procedure was impermissibly suggestive: 1) the text "Lineup Name: PAULSAY" appeared on the photographic lineup; and 2) the witnesses were given inconsistent instructions by the police. We hold that these factors do not support the circuit court's conclusion.

Say cites no authority for the proposition that the police are required to instruct a witness not to identify a person from a photographic lineup unless the witness is 100% positive. Nor does Say explain why the failure to give such an instruction would render the identification procedure impermissibly suggestive. We conclude that any inconsistency in the police instructing Nadarisay not to make an identification unless she was 100% positive and failing to similarly instruct Chad is inconsequential. The "inconsistent" instructions did not serve to indicate which picture the witnesses ought to select and did not render the identification procedure improper or suggestive.

We conclude that absent evidence that the witnesses knew who Paul Say was and thus could associate his name with his appearance, the display of the text "Lineup Name: PAULSAY" on the photographic lineup was not impermissibly suggestive. We question the circuit court's finding that this text was listed "directly above" photograph one and photograph four (Say's photograph). Our review of the photographic lineup shows that this text does not appear "directly above" any of the photographs. Instead, the text appears above the right half of photograph one and extends over the margin between photographs one and two. However, we need not quibble over how to describe the location of this text because a copy of the photographic lineup is available for our review as part of the record. Based on our review of the photographic lineup, we are convinced that the location of this text did not serve to focus the witnesses' attention on photograph four (Say's photograph) or highlight

photograph four in any way that would suggest to the witnesses that they ought to select it.

Because the location of the text "Lineup Name: PAULSAY" on the photographic lineup is not itself suggestive, the display of Say's name on the photographic lineup would only be suggestive if the witnesses had prior knowledge of who Say was and what he looked like.^{6/} In that event, the presence of Say's name on the photographic lineup could have influenced the witnesses to select the photograph they recognized as that of Say. However, Say presented no evidence that either Chad or Nadarisay personally knew Say or that they could associate Say's name with Say's appearance. Absent such evidence, the display of Say's name on the photographic lineup could not have rendered the photographic lineup impermissibly suggestive.^{2/}

We conclude that based on the record before it, the circuit court erred in concluding that the photographic lineup procedure was impermissibly suggestive and in suppressing the pretrial identifications by Chad and Nadarisay. Accordingly, we vacate the Suppression Order. We do not preclude the possibility that Say, on remand, may adduce additional evidence that would justify the suppression of the witnesses' identifications.

^{6/} Say implies that the appearance of the text "Lineup Name: PAULSAY" on the photographic lineup rendered it impermissibly suggestive because the text indicated that a person suspected by the police was in the lineup. We disagree. It is natural for a witness called to view a lineup to assume that the police have included a suspect, and thus, an indication that a suspect is included in the lineup does not render the lineup impermissibly suggestive. State v. Davis, 256 S.E.2d 184, 187 (N.C. 1979); United States v. Medina, 552 F.2d 181, 190 (7th Cir. 1977); State v. Cosby, 976 S.W.2d 464, 469 (Mo. Ct. App. 1998).

^{2/} Our review of the photographic lineup does not reveal anything about its appearance that would render it impermissibly suggestive. The six photographs in the array were the same size and depict men of similar appearance. None of the photographs are particularly distinctive in comparison with any of the others, and no noticeable emphasis is placed on Say's photograph that would cause it to stand out from the rest.

CONCLUSION

We vacate the circuit court's Suppression Order, and we remand the case to the circuit court for further proceedings consistent with this Memorandum Opinion.

DATED: Honolulu, Hawai'i, October 30, 2009.

On the briefs:

Tracy Murakami,
Deputy Prosecuting Attorney,
County of Kauai,
for Plaintiff-Appellant.

Emmanuel G. Guerrero
for Defendant-Appellee.

Craig H. Nakamura

Chief Judge

Auna Olu Iijun

Associate Judge

[Signature]
Associate Judge