

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	CASE NO. SX-09-CR-075
PLAINTIFF,	)	
	)	CHARGES:
v.	)	ASSAULT 3 RD ; BRANDISHING, EXHIBITING OR
	)	USING A DEADLY WEAPON; CARRYING/USING
EMMET A. PETERSEN, JR.,	)	A DANGEROUS WEAPON DURING THE
	)	COMMISSION OF A CRIME OF VIOLENCE
DEFENDANT.	)	
	)	JURY TRIAL DEMANDED
	)	
	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's "Motion To Suppress In And Out Of Court Identification Testimony." For the following reasons, the Defendant's Motion will be granted.

I. Facts

This case stems from an incident that occurred on January 3, 2009 in the vicinity of Fort Frederik beach, Frederiksted, in the Judicial District of St. Croix. Defendant is alleged to have been involved in a fight which ended with both Defendant and another individual, Darren Kelly being treated for stab wounds at the Juan Luis Hospital.

As part of the investigation, Detective Michael Simmonds interviewed Mr. Kelly while at the hospital. When Detective Simmonds asked Mr. Kelly for a description of his assailant, Mr. Kelly responded that the individual was a black male, slim built, around 5'5" to 5'7". No further description was given. Later, upon hearing that Defendant had entered the hospital for a similar injury, Detective Simmonds brought Mr. Kelly to Defendant's hospital room for an identification. There was no one else present in the hospital room.

II. Standard of Review

A due process violation can result when an identification procedure is so suggestive that it undermines the reliability of the resulting identification. Allowing a jury to consider an identification that is tainted by such a procedure can constitute reversible error entitling the defendant to a new trial. (*Foster v. California*, 394 U.S. 440, 442 (1969); *see also Neil v. Biggers*, 409 U.S. 188, 196 (1972) (pre-trial identification of a defendant is inadmissible at trial if the identification was made at a confrontation that “was so suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law.”).

A government identification procedure violates due process when it is “unnecessarily suggestive” and creates a “substantial risk of misidentification.” A suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of “reliability” for reliability is the linchpin in determining the admissibility of identification testimony. *United States v. Emanuelle*, 51 F.3d 1123, 1128 (3d Cir. 1995).

In deciding a motion to exclude identification testimony, first, a Court must determine whether the identification procedure was suggestive. If so, the Court must determine whether there was some good reason for failure to resort to less suggestive procedures. However, if the procedure was thus unnecessarily suggestive, the Court must then determine whether the identification itself was nevertheless reliable, under the totality of the circumstances. *See Richards v. People of the Virgin Islands*, 53 V.I. 379 (S. Ct. 2010).

In determining whether the Identification is reliable, courts examine the identification procedure in light of the “totality of the circumstances.” These circumstances include: a) The opportunity of the witness to view the criminal at the time of the crime; b) The witness' degree of

attention; c) The accuracy of the witness prior description of the criminal; d) The level of certainty demonstrated by the witness at the confrontation; and e) The length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

III. Analysis

1. The Identification Procedure Was Unnecessarily Suggestive and Created a Substantial Risk of Misidentification

Following the standards outlined in *Richards*, this Court finds that the “show up” identification used by Detective Simmonds while in the hospital was unnecessarily suggestive. The officer had no overwhelming need that required an identification at that time. The defendant was injured, and escorted to the hospital by uniformed patrol officers. The detectives in this case could easily have assembled a photo array, or a lineup at a later time for identification purposes. To bring witnesses to the defendant’s hospital room unnecessarily suggested to the witnesses that the defendant was in fact the perpetrator of the attack.

Since this Court finds that the identification procedure was unnecessarily suggestive, the next step in the analysis is to determine whether the Identification was reliable under the totality of the circumstances. Here, the witness did have an opportunity to view the criminal, as he stated that it was light outside. The witness also stated that he was certain he could identify the criminal at the confrontation. Furthermore, clearly the time period between the event and the identification was short. So prongs one, four, and five have been met.

The problem with the identification lies in prongs two and three. First, the level of attention by the witness was severely lacking. Defense Counsel, during his cross-examination, elicited the fact that the witness, prior to identification, could not say whether his assailant’s hair was long or short, whether he had any facial hair, whether he was wearing a head tie, nor could

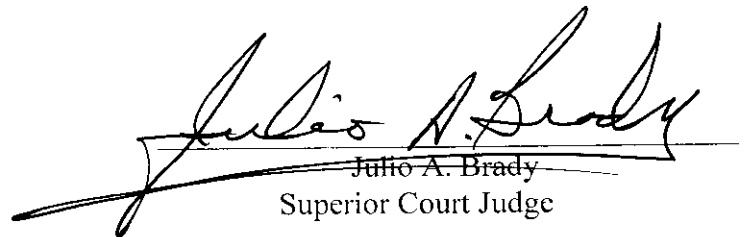
the witness specifically identify any article of clothing worn by his assailant. The only description given was that the assailant was between 5'5" and 5'7" with a slim build. This description simply is not enough to satisfy the degree of attention prong.

This Court also finds the third prong to be troublesome. While it is true that the defendant meets the description given, the fact is that the description could fit any number of individuals residing in the Virgin Islands. With such a vague description, this Court will not allow such an identification to be considered by a jury. This vague description is the very definition of substantial risk of misidentification.

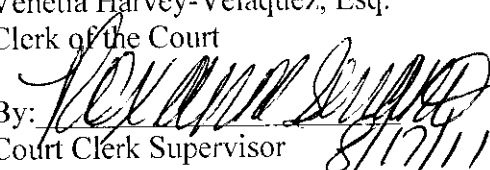
IV. Conclusion

Upon review of the record, it is clear to this Court that the identification was not only highly suggestive, but it also created a substantial risk of misidentification. Thus, under the precedent set in *Richards* this Court cannot allow the identification evidence to be presented to a jury, and therefore, it will be suppressed. A separate Order of even date will be issued in conformity with these findings.

DATED: August 16, 2011.


Julio A. Brady
Superior Court Judge

ATTEST:
Venetia Harvey-Velaquez, Esq.
Clerk of the Court

By: 
Court Clerk Supervisor 8/17/11