

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS - ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,
Plaintiff,

CRIMINAL NO. ST-13-CR-276 & 277

JURY TRIAL DEMANDED

Vs.

RANDEY GUMBS
JEROME FRLEY, JR.

Defendants

NOTICE OF ENTRY OF MEMORANDUM OPINION & ORDER

DENISE GEORGE-COUNTS, ESQ., AAG
SUSUAN B. MOOREHEAD, ESQ.
MICHAEL C. QUINN, ESQ.
JUDGES, MAGISTRATES, LAW CLERK OF THE SUPERIOR COURT, IT, LEGAL COUNSEL
OFFICE OF PROBATION FOR DEF.'S
ESTRELLA H. GEORGE, ACTING CLERK OF THE COURT

Please take notice that on **16th DAY OF January** a (n) **MEMORANDUM OPINON & ORDER** dated
January 16, 2015 was entered by this Court in the above-titled matter.

Dated: **16TH DAY OF DECEMBER**

ESTRELLA H. GEORGE

Acting Clerk of the Court

By: CAMEIL A. CLARKE

TITLE: COURT CLERK II

IN THE SUPERIOR COURT THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
RANDEY GUMBS,	)	CASE NO. ST-13-CR-276
JEROME FARLEY,	)	CASE NO. ST-13-CR-277
	)	
Defendant.	)	

MEMORANDUM OPINION

On March 25, 2014, the Court conducted a hearing on Defendant Jerome Farley's February 14, 2014, Motion to Suppress, which had been joined by Defendant Randey Gumbs and opposed by the People, seeking the suppression of all testimony and evidence regarding pretrial identifications of Defendants and preclusion of any in-court identification by the People's witnesses. In a Memorandum Opinion and Order entered October 6, 2014, the Court granted the Motion to Suppress in part, specifically suppressing the pretrial identifications of Defendant Farley by Shane Powell. In so ruling, the Court concluded that the identification procedures employed by Sergeant Linda Raymond were impermissibly suggestive and that, under the totality of the circumstances, the identifications of Farley by Powell were not so reliable as to avoid the risk of an irreparable mistaken identification. The Court also ruled inadmissible certain references to Farley's past criminal conduct. At the same time, however, the Court held that Todd Reinhart's identification of Farley as a person who frequented Reinhart's business was not impermissibly suggestive and declined to reach the issue of whether any in-court identification of Farley by Powell would be precluded.

On January 8, 2015, Defendant Farley filed a Motion in Limine/Renewed Motion to Suppress asking that the Court preclude any in-court identification testimony from Powell. Relying

on the Eyewitness Identification Expert Report of defense witness Dr. Jennifer Dysart¹, Defendant argues that “in order for the jury to understand the circumstances of any in-court identification, they will need to be informed of all previous identification attempts that have been ruled unduly suggestive and unreliable”. Defendant goes on to suggest that “if the Court were to allow Mr. Powell to give in-court identification testimony, after having been shown Mr. Farley’s photograph on at least three prior occasions, there can be no way to effectively cross-examine him without delving into the very evidence that the Court has already ruled inadmissible.”

The People opposed Defendant’s Motion on January 15, 2015, asserting that, applying the totality of the circumstances test based on the factors set forth in *Neil v. Biggers*² as described in *Manson v. Brathwaite*,³ there is little or no likelihood of irreparable misidentification because Powell had a clear opportunity to view Farley, showed a high degree of attention, and gave an accurate and detailed description.

DISCUSSION

1. Defendant need not refer to inadmissible evidence in cross-examining Powell

Before addressing the permissibility of an in-court identification, the Court must point out that Defendant incorrectly assumes that Powell cannot be effectively be cross-examined so as to

¹ Although the People have not filed a motion *in limine*, *Daubert* motion or other challenge to the methodology or conclusions of Dr. Dysart, the Court is compelled to make certain that the parties understand the extent to which Dr. Dysart would be permitted to testify (and not testify) in this case. The opinion contained in Dr. Dysart’s report far exceeds areas of permissible expert testimony and purports to give opinions that either she is not qualified to render, involve legal issues, make credibility determinations, or invade the province of the jury and the Court. Consistent with this Court’s prior rulings in other cases in which identification of the perpetrator is a key issue, Defendant’s identification expert would not be permitted to testify that (1) the identification made by any witness in this case is unreliable or inaccurate; (2) the identification made by any witness in this case is mistaken or erroneous; (3) the presence of particular factors or circumstances make the identification made by any witness in this case less accurate; (4) any particular identification procedure employed was merely confirmatory; (5) any factor should be given greater or lesser weight in determining reliability of an identification, either generally or with regard to a particular identification in this case; or that (6) any witness in this case is untruthful. Moreover, Dr. Dysart would not be permitted to give an opinion on any legal question.

² 409 U.S. 188 (1972). The five *Biggers* factors are: (1) the opportunity the witness had to view the offender at the time of the crime; (2) the witness’ degree of attention at the time of the crime; (3) the accuracy of the description of the perpetrator prior to the identification; (4) the level of certainty displayed by the witness in identifying the defendant; and (5) the length of time between the offense and the identification.

³ 432 U.S. 98, 114-117 (1977).

demonstrate the unreliability of his in-court identification of Farley without disclosing inadmissible evidence of the pretrial identifications.

At trial, the Court will grant Defendants broad leeway in cross-examining Powell concerning his identification of the Defendants. Moreover, the Court's three page identification evidence instruction directs the jury to examine an identification testimony carefully and consider numerous specific factors that could affect the reliability of an identification.

But, contrary to Defendant Farley's contention, while questioning concerning the pretrial identifications of Defendant Farley by Powell would involve presentation of inadmissible evidence, Defendant can still cross-examine Powell regarding the facts that make those identifications unreliable without mentioning the fact that Powell actually identified Defendant Farley on prior occasions. By way of example only, Defendant may point out on cross-examination that: (a) the first description given by Powell (in his November 28, 2012, statement) was totally inconsistent with Farley's features and with Powell's subsequent, marginally more detailed description; (b) Powell indicated on November 28, 2012, that he didn't know Farley; (c) Powell also initially told Raymond he couldn't describe the man from whom he got the check and that "I does forget faces"; (d) Powell was shown a photograph of Farley on more than one occasion prior to identifying Farley and giving a more detailed description of Farley; and (e) Powell conferred with Reinhart prior to identifying Farley, at which time Reinhart promised not to seek prosecution of Powell in return for Powell's identification of the source of the stolen checks. Skillful structuring of cross-examination questions regarding these and other facts can easily produce evidence that would support Defendant's argument that the jury should disregard the in-court identification while avoiding any reference to the pretrial identifications themselves.

2. In-court identification.

The Due Process Clause of the Fifth Amendment of the Constitution of the United States prohibits the introduction of identification evidence obtained through overly suggestive procedures that could lead to an irreparably mistaken identification.⁴ Courts employ a two-step analysis to determine the admissibility of identification testimony: (1) the accused must first demonstrate that the identification procedures employed were impermissibly suggestive, and (2) the court must then consider whether the testimony was reliable despite the suggestive techniques.⁵

The Court will not discuss the underlying facts in significant detail since those are laid out in the Court's October 3, 2014, Memorandum Opinion. For the purpose of this analysis it is sufficient to reiterate that the Court ruled that the investigatory techniques employed by Sergeant Raymond were impermissibly suggestive⁶ and that, applying the factors delineated in *Biggers*, Powell's pretrial identification of Farley was so unreliable as to potentially lead to an irreparably mistaken identification.⁷

In *Richards v. People*,⁸ the Supreme Court of the Virgin Islands, appeared to adopt the test employed by the Third Circuit Court of Appeals in *United States v. Clausen*⁹ regarding the permissibility of an in-court identification in an instance where there has also been a prior pretrial identification:

The standard for admitting evidence of a pretrial identification is the same as the standard for permitting an in-court identification in the wake of a pretrial identification. In both cases, the eyewitness testimony will be permitted unless the

⁴ *Stoval v. Denno*, 388 U.S. 293, 302 (1967).

⁵ *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972).

⁶ *People v. Gumbs and Farley*, No. ST-13-CR-276&277, at 11-12. (V.I. Super. Ct. 2014). "Based on these facts, similar to the facts in *Manson v. Brathwaite*, Powell's identification of Farley on December 24, 2012, clearly amounts to a suggestive "show-up" because an identification made from a single photograph is inherently suggestive. Furthermore, the Court also finds that, while a little less than two months passed from when Powell had been last shown Farley's Sexual Offender Registry photograph until his subsequent photo array identification of Farley on February 15, 2013, the photo array was also suggestive because it included the same photograph of Farley that Powell had been shown on numerous prior occasions."

⁷ *Id.*, at 16-19.

⁸ 53 V.I. 379, 393 (V.I. 2010).

⁹ 328 F.3d 708, 713 (3d Cir. 2003).

pretrial identification procedure was so unnecessarily suggestive as to give rise to such a substantial likelihood of irreparable misidentification that admitting the identification testimony would be a denial of due process. (emphasis added).¹⁰¹¹

Thus, the reliability of the identification is considered the guiding factor in the admissibility of both pretrial and in-court identifications to determine the likelihood of irreparable misidentification.¹²

In *Clausen*, where an agent showed all witnesses the same photographs individually and stated that the witness may or may not be able to recognize anyone, the court concluded that the identification procedures used were not unnecessarily suggestive and, consequently, that the identification was reliable.¹³ In *Richards*, the court concluded that the show-up identification procedure employed was unnecessarily suggestive because the witness was shown only one black male with spiky dreadlocks and the accused was escorted by the police during the show-up. But, the Supreme Court concluded that the identification was reliable under the totality of the circumstances.¹⁴ On appeal, applying the standard described in *Clausen*, the Supreme Court concluded that the fact “that the out-of-court identification did not give rise to a substantial likelihood of irreparable misidentification compels us to conclude that the in-court identification was likewise admissible.”¹⁵

Unlike in *Clausen* and *Richards*, where both the pre-trial and later in-court identifications were determined to be admissible, the reverse is true for this case. Here, employing the analysis in

¹⁰ *Id.*, citing *United States v. Mathis*, 264 F.3d 321, 330 (3d Cir.2001)(citing *United States v. Stevens*, 935 F.2d 1380, 1389 (3d Cir.1991)).

¹¹ See also *Percival v. People*, S. Ct. Crim. No. 2013-0083, 2015 WL 113300, at *7 (V.I. Jan. 7, 2015)(“[A] defendant may attack an identification on grounds that it was ‘so unnecessarily suggestive and conducive to irreparable mistaken identification’ as to result in a denial of due process.”)(citing *Richards v. People*, 53 V.I. 379, 385 (V.I. 2010) (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967)); *Ostalaza v. People*, 58 V.I. 531, 549 (V.I. 2013) (“The burden is on a defendant initially to show that an identification was ‘impermissibly suggestive,’”); *Richards*, 53 V.I. at 385–86 (“If he succeeds in demonstrating that the identification was impermissibly suggestive, the court must then determine “whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.”)(quoting *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972)(internal quotation marks omitted).

¹² See *Richards*, 53 V.I. at 385–86 citing *Brathwaite*, 432 U.S. 98, 107 n.9, 97 S. Ct. 2243, 2249 n.9, 53 L. Ed. 2d. 140 (1977)

¹³ *Clausen*, 328 F.3d at 713.

¹⁴ *Richards*, 2010 WL 318405, at *4-*6.

¹⁵ *Id.* at *7.

Richards and other Virgin Islands Supreme Court decisions¹⁶, application of the same out-of-court identification standard to the in-court identification would appear to compel a finding that an in-court identification would be impermissible because the Court previously concluded that the pretrial identification procedures were unnecessarily suggestive and the pretrial identification was unreliable.

Yet, the analysis does not end there. In the context of an impermissible suggestive lineup, the United States Supreme Court indicated in *United States v. Wade*¹⁷ that, even if a pretrial identification is suppressed, a witness may still identify the accused at trial if the prosecution can establish that the in-court identification is independent of the inadmissible pretrial identification.¹⁸ The court then listed several factors to be considered in evaluating whether an in-court identification has a source independent from an impermissible pretrial identification, including: (1) a prior opportunity to observe the alleged criminal act, (2) discrepancies between the initial description and the appearance of the accused; (3) a prior identification of another person as the perpetrator, (4) identification by photograph prior to the suggestive procedure, (5) failure to identify the accused on a prior occasion, and (6) a lapse of time between the alleged act and the identification. There is some, but not substantial overlap between these factors and those comprising the *Biggers* test. Moreover, this list is not exclusive, and other courts have relied upon different or additional factors.¹⁹

¹⁶ See also “[A] defendant may attack an identification on grounds that it was ‘so unnecessarily suggestive and conducive to irreparable mistaken identification’ as to result in a denial of due process.” *Percival v. People*, No. S.CT.CRIM. 2013-0083, 2015 WL 113300, at *7 (V.I. Jan. 7, 2015) citing *Richards v. People*, 53 V.I. 379, 385 (V.I. 2010) (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967)). “The burden is on a defendant initially to show that an identification was ‘impermissibly suggestive,’ ” *Ostalaza v. People*, 58 V.I. 531, 549 (V.I. 2013), and if he succeeds in demonstrating that the identification was impermissibly suggestive, the court must then determine “whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.” *Richards*, 53 V.I. at 385–86 (quoting *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972)) (internal quotation marks omitted).

¹⁷ 388 U.S. 218 (1967).

¹⁸ *Id.*, at 240–41.

¹⁹ See *United States v. Wise*, 515 F.3d 207, 215 (3d Cir. 2008) (in-court identification admissible though police showed witness a photo of defendant that contained a reference to the police department because witness previously lived with

Significantly, the prosecution bears the burden of establishing an independent source for the in-court identification.²⁰ But here, instead of attempting to demonstrate an independent basis for an in-court identification, the People merely argue that a balancing of the *Biggers* factors reveals there is no likelihood of irreparable misidentification because Powell had a clear opportunity to view Farley, showed a high degree of attention, and gave an accurate and detailed description. There is some overlap between the *Biggers* factors and those identified in *Wade*, particularly with regard to *Wade* factors (2) and (6). But, the Court has already concluded in its October 6, 2014, Memorandum Opinion that balancing of the *Biggers* factors weighs in favor of a finding of unreliability. Particularly with regard to *Wade* factors (2) and (6), the Court found substantial discrepancies between Powell's initial description and the appearance of Farley, and that there was a substantial lapse of time between Powell's receipt of the stolen check and his pretrial identification of Farley and an even longer lapse before Powell viewed the photo array. Now, that latter factor weighs even more toward unreliability, since it almost another year has passed.

Review of the remaining *Wade* factors, which the People do not address, in the absence of additional evidence dictates the conclusion that an independent basis for the in-court identification has not been established. The evidence produced at the suppression hearing suggests that (1) Powell had only one opportunity to observe Farley; (3) Powell initially identified the source of the check as a "white guy" he'd never seen before, and never saw again, who had asked Powell for drugs,²¹ (4) Powell's identification of Farley by photo array occurred after the suggestive

defendant and, thus, identification was independently reliable); *Snow v. Sirmons*, 474 F.3d 693, 723 (10th Cir. 2007) (in-court identification admissible because supported by other evidence admitted in trial).

²⁰ See, for example, *Frisco v. Blackburn*, 782 F.2d 1353, 1356-57 (5th Cir. 1986); *United States v. Lawson*, 410 F.3d 735, 739 n.3 (D.C. Cir. 2005).

²¹ Powell said he couldn't describe the man other than to say he and the man were approximately the same height, about 5'11". Raymond indicated that Powell gave no description of the individual's face or build and said he wasn't paying attention to him. Powell also told Raymond, "I can't describe him. Its [sic] been months and I does forget faces."

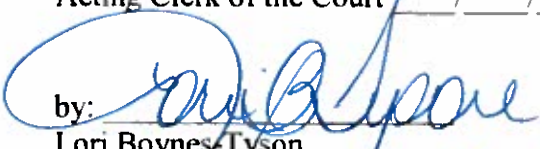
procedure, not before it, and (5) Powell initially indicated that he did not know Farley, even after being shown Farley's photograph.

In *United States v. Wise*,²² the Third Circuit, concluded that there was no substantial likelihood of irreparable misidentification in court where, even though the pretrial identification procedure was unnecessarily suggestive, the record supported the witness's in-court identification as reliable because the witness had lived with the defendant for over a month. Here, unlike in *Wise*, there was no prior relationship between the witness and the Defendant.

Relying solely on the *Biggers* factors, the People fail to demonstrate how the in-court identification would be independent of the unreliable pretrial identifications. The Court previously analyzed the factors presented in the People's Opposition in detail under the totality of the circumstances test and found the pretrial identifications to be unreliable. The only change, as raised by the Defendant in his Motion *in Limine*, is that now there is an even longer period of time between the offense and any in-court identification. Therefore, any in-court identification would risk a substantial likelihood of irreparable misidentification and would be a denial of due process.

Dated: January 16, 2015.

ATTEST: Estrella H. George
Acting Clerk of the Court

by: 
Lori Boynes-Tyson
Court Clerk Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

²² 515 F.3d 207, 215 (3d Cir. 2008).

IN THE SUPERIOR COURT THE VIRGIN ISLANDS
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PEOPLE OF THE VIRGIN ISLANDS,

Plaintiff,

v.

RANDEY GUMBS,
JEROME FARLEY,

Defendant.

CASE NO. ST-13-CR-276

CASE NO. ST-13-CR-277

ORDER

The Court having issued a Memorandum Opinion on this date; consistent therewith it is

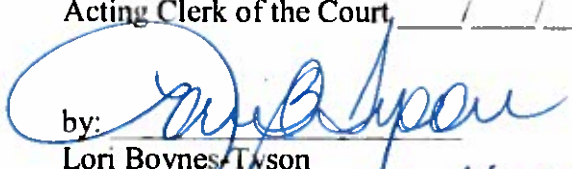
ORDERED that Defendant Farley's January 8, 2015, Motion in Limine/Renewed Motion
to Suppress is GRANTED; and it is

ORDERED that an in-court identification of Defendant Farley by Shane Powell is
SUPPRESSED; and it is

ORDERED that copies of this Order and the accompanying Memorandum Opinion shall be
directed to counsel of record.

Dated: January 16, 2015.

ATTEST: Estrella H. George
Acting Clerk of the Court

by: 
Lori Boynes-Tyson
Court Clerk Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

1/16/15