2013 IL App (2d) 111189-U
No. 2-11-1189
Order filed May 16, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-1343
JONATHAN A. STINNETTE,	)	Honorable Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly denied defendant's motion to suppress pretrial identifications: despite the physical differences between defendant and the other men in the first photo array, the relevant circumstances indicated that the identification was reliable, and the second identification was not tainted by the fact that defendant was the only man in both arrays; (2) we vacated and reimposed three fines imposed by the circuit clerk, awarded defendant full credit to reflect the 541 days he spent in presentencing custody, and reduced his delinquency fee to reflect that credit; in light of those fines, we vacated the Violent Crime Victims Assistance Fund fine imposed by the clerk and reimposed it at the proper amount of $4.

¶ 2 Following a jury trial in the circuit court of Lake County, defendant, Jonathan A. Stinnette, was found guilty of aggravated robbery (720 ILCS 5/18-5(a) (West 2008)) and was sentenced to a

nine-year prison term. Defendant argues on appeal that: (1) the trial court erred in denying his motion to suppress a witness's pretrial photo-array identifications; (2) certain "fees" assessed by the clerk of the circuit court are actually fines for which he is entitled to monetary credit for time in custody prior to sentencing (see 725 ILCS 5/110-14(a) (West 2008)); (3) the clerk miscalculated defendant's Violent Crime Victims Assistance Fund penalty (see 725 ILCS 240/10 (West 2008)); and (4) the clerk improperly charged a delinquency fee for nonpayment of fines that were fully offset by the monetary credit for presentencing custody. We find no error in the denial of the motion to suppress and we therefore affirm defendant's conviction. However, because we agree with defendant's second, third, and fourth arguments (as does the State), we modify the judgment accordingly.

¶ 3 At trial, convenience store owner Nizar Somani testified that on March 18, 2009, at about 2 p.m., two men wearing masks and gloves robbed his convenience store in Round Lake Beach. One of the men was about five feet and three inches tall. The other was six feet or more in height and heavyset. The shorter man was carrying what appeared to be a gun. They took money from the cash register. In addition, the taller man took a large box containing scratch-off lottery tickets. Although the men were wearing gloves and masks, enough of their skin was visible for Somani to observe that the shorter man had dark skin and that the taller man's skin was brown. Somani added that the taller man's skin color was similar to his own. (Somani is Pakistani.) Both men ran out of the store. Somani saw them drive off in a Chevrolet Monte Carlo that appeared to be brown.

¶ 4 Somani was unable to identify the men who robbed his store. It was another witness, Christopher Watkins, who linked defendant to the crime. At the time of the offense, Watkins was standing next to his car in a parking lot near Somani's store. He observed two men get into a maroon

Monte Carlo and speed away. Watkins identified photographs of defendant, in two photo arrays, as the driver of the Monte Carlo. Watkins also identified defendant in open court.

¶ 5 Prior to trial, defendant moved to suppress the photo-array identifications on the basis that they were impermissibly suggestive. At the hearing on the motion, Watkins testified that, at the time of the offense, he was smoking a cigarette outside a ColorTyme furniture rental store that he was planning to visit. The ColorTyme store was located near Somani's convenience store. Watkins observed a young black male running from the store to a maroon Monte Carlo. That individual was thin and stood about five feet, eight inches tall. Watkins then observed a second man approach from the same direction and proceed to the driver's side of the Monte Carlo. The second man had light skin and a "healthier" build. He was wearing a "hoodie" with the hood pulled up, but Watkins could see the "round part" of his face. Watkins testified, "I got a good look at his face *** because me and him locked eyes." Watkins suspected that he had witnessed a crime, and he feared for his safety. He testified that he wanted to run, but his mind and his legs would not work together. Watkins and the second man looked at each other for two or three seconds before the second man entered the Monte Carlo and drove away.

¶ 6 About eight days later, Watkins was shown three black-and-white photo arrays. He identified a photograph of defendant from one of the photo arrays as the heavier and lighter-skinned of the two men who had driven off in the Monte Carlo. About a year later, Watkins was shown a photo array consisting of color photographs. Watkins again identified defendant as the driver of the Monte Carlo. Watkins testified that, when he saw the photographs of defendant, he was positive that defendant was the same person he had seen drive off in the Monte Carlo. He testified that he selected defendant's photographs from the two arrays immediately upon seeing them.

¶ 7 Defendant argues that the first photo array from which Watkins identified defendant was unduly suggestive because defendant is heavyset and has light skin, whereas the five black males in the other photographs were slender and had dark skin. Defendant complains that his photograph was the only one in that array that fit Watkins's description of the individual he locked eyes with at the time of the robbery.

¶ 8 A defendant moving to suppress a witness's pretrial identification bears the burden of showing that, under the totality of the circumstances, the identification procedure was " ' "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process ***." ' [Citations.]" *People v. Simpson*, 172 Ill. 2d 117, 140 (1996). Circumstances bearing on the reliability of the identification include "(1) the witness' opportunity to view the suspect at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the suspect; (4) the level of certainty demonstrated at the time of the lineup; (5) the length of time between the crime and the lineup; and (6) any acquaintance with the suspect prior to the crime." *People v. Denton*, 329 Ill. App. 3d 246, 250 (2002) (citing *Neil v. Biggers*, 409 U.S. 188 (1972)). These circumstances are to be weighed against the alleged corrupting circumstances of the identification procedure. *Denton*, 329 Ill. App. 3d at 250.

¶ 9 The alleged corrupting circumstance in this case is the dissimilarity between defendant's appearance and that of the five other men whose photographs appeared with defendant's in the photo array. Although section 107A-5(c) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/107A-5(c) (West 2008)) directs that "[s]uspects in a lineup or photo spread *should* not appear to be substantially different from 'fillers' or 'distracters' in the lineup or photo spread, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw

attention to the suspect" (emphasis added), it is well settled that " '[i]ndividuals selected for a photo array lineup need not be physically identical' " (*People v. Allen*, 376 Ill. App. 3d 511, 521 (2007) (quoting *Denton*, 329 Ill. App. 3d at 250)) and differences in appearance among individuals depicted in a photo array ordinarily bear upon the weight to be given to the identification of the defendant, not to the admissibility of the identification (*Allen*, 376 Ill. App. 3d at 521; *Denton*, 329 Ill. App. 3d at 250). Thus, in *People v. Shields*, 181 Ill. App. 3d 260, 266 (1989), it was held that a motion to suppress a lineup identification was properly denied even though the defendant was the only participant in the lineup with gray hair, he was 10 to 20 years older than the other participants, and he was dressed differently than the other participants (who were dressed similarly to one another).

¶ 10 Consideration of the totality of the circumstances leads us to conclude that, notwithstanding the differences between defendant's physical appearance and the physical appearance of the others whose photographs appeared in the array, Watkins's identification of defendant did not violate due process. Before we explain that conclusion, however, we note that, in advocating a contrary result, defendant has relied not only on evidence presented at the suppression hearing, but also on certain evidence presented at trial. A defendant seeking appellate review of the denial of a pretrial motion to suppress an identification may not rely on evidence presented at trial unless, when such evidence is presented, the defendant moves for reconsideration of the ruling on the motion to suppress. *People v. Brooks*, 187 Ill. 2d 91, 127-28 (1999). Defendant did not do so here. Accordingly, we consider only the evidence presented at the hearing on the motion to suppress.

¶ 11 The first relevant consideration is Watkins's opportunity to observe the suspect at the time of the crime. Watkins encountered the suspect outdoors during the early afternoon. No evidence was offered about the weather at the time, but under typical conditions on March 18 at 2 p.m., natural

light would suffice to allow a clear view of the suspect. Defendant argues that Watkins's testimony that he "locked eyes" with the suspect suggests that Watkins did not get an "overall impression of [the suspect's] appearance." However, Watkins specifically testified that he got a "good look" at the suspect's face while their eyes were "locked." That Watkins observed the suspect for only a few seconds does not make the identification unreliable. *People v. Rodriguez*, 134 Ill. App. 3d 582, 589-90 (1985).

¶ 12 The second consideration is the witness's degree of attention. Here, it appears that Watkins was paying careful attention to the suspect because he believed that a crime had been committed. Although defendant posits that Watkins was too preoccupied with his own safety to focus on defendant's appearance, this is a matter of pure conjecture.

¶ 13 The record does not reveal what description of the suspect, if any, Watkins provided to the police prior to viewing the photo array. Watkins testified that he did not recall describing the suspect to the police prior to the photo-array identification. Accordingly, the third consideration—the accuracy of the witness's prior description of the suspect—does not apply.

¶ 14 The fourth consideration is Watkins's level of certainty in his identification. Watkins was highly confident that the photograph of defendant matched one of the individuals he had observed fleeing from the vicinity of the robbed convenience store. He testified that he recognized defendant immediately when he saw his photograph. Defendant contends that psychological research has shown that a witness's confidence that he or she has identified a suspect is a poor predictor of the accuracy of the identification. If so, this consideration might be entitled to little weight, but to the extent that defendant would have us entirely discount this consideration on the basis of social-science research that was not in evidence, his argument runs afoul of decisions of our supreme court

that have deemed an eyewitness's level of certainty a relevant circumstance (see, *e.g.*, *Simpson*, 172 Ill. 2d at 141). Accord *People v. Rodriguez*, 387 Ill. App. 3d 812, 824 (2008).

¶ 15 The remaining considerations are the length of time between the crime and the pretrial identification and any prior acquaintance with the suspect. Although Watkins had never seen the suspect before the crime, the interval between the crime and the photo-array identification of defendant was short enough to foster a reliable identification. *Cf. People v. Slim*, 127 Ill. 2d 302, 313-14 (1989) (eleven-day interval did not undermine reliability of lineup identification).

¶ 16 As noted, Watkins was shown another photo array—which consisted of color photographs—about a year after the offense occurred and he again identified a photograph of defendant. Defendant maintains that this procedure increased the risk of misidentification because defendant was the only "repeat player," *i.e.* the only individual in both photo arrays. Defendant cites authority from another jurisdiction frowning on the use of a photo array prior to a lineup with only one "repeat player." However, our supreme court has specifically held that this practice does not render the lineup improperly suggestive. *People v. Johnson*, 149 Ill. 2d 118, 148 (1992). Similarly, in this case, the earlier photo-array identification did not taint the later identification.

¶ 17 Finding no error in the trial court's ruling on defendant's suppression motion, we turn our attention to defendant's arguments pertaining to certain "fees" assessed against him. The clerk of the circuit court assessed, among other items, the following "fees" provided for in section 5-1101 of the Counties Code (55 ILCS 5/5-1101 (West 2008)): a $4.75 drug court "fee" (55 ILCS 5/5-1101(f) (West 2008)), a $10 "specialty" court "fee" (55 ILCS 5/5-1101(d-5) (West 2008)), and a $5 Children's Advocacy Center "fee" (55 ILCS 5/5-1101(f-5) (West 2008)). Although these items are statutorily designated as fees, they are properly categorized as fines. *People v. Graves*, 235 Ill.

2d 244, 255 (2009) ("fee" under section 5-1101(d-5) is a fine); *People v. Jake*, 2011 IL App (4th) 090779, ¶ 29 (drug court "fee" is a fine); *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009) (Children's Advocacy Center "fee" is a fine). Before proceeding, we note that the clerk of the circuit court lacks the authority to impose a fine; they should have been imposed by the trial court in its sentencing order. See *People v. Evangelista*, 393 Ill. App. 3d 395, 401 (2009). Thus, we vacate the clerk's assessment of the Children's Advocacy Center, drug court, and specialty court fines and we reimpose each of these fines pursuant to our authority to "make any order that ought to have been given or made." Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994); *Evangelista*, 395 Ill. App. 3d at 401.

¶ 18 Defendant argues that he is entitled to monetary credit toward these fines based on the time he spent in custody prior to sentencing. Section 110-14(a) of the Code provides:

> "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine." 725 ILCS 5/110-14(a) (West 2008).

A defendant may apply for the credit for the first time on appeal. *People v. Caballero*, 228 Ill. 2d 79, 88 (2008). It is undisputed that defendant was in custody for 541 days and therefore accumulated a credit of $2,705. We agree with defendant (as does the State) that the credit fully satisfies his fines.

¶ 19 The clerk also assessed a $20 Violent Crime Victims Assistance Fund penalty, which must be reduced to $4. Section 10(c) of the Violent Crime Victims Assistance Act (Act) provides, in pertinent part:

> "When any person is convicted in Illinois *** of an offense listed below *** *and no other fine is imposed*, the following penalty shall be collected by the Circuit Court Clerk:

(1) $25, for any crime of violence as defined in subsection (c) of Section 2 of the Crime Victims Compensation Act; and

(2) $20, for any other felony or misdemeanor, excluding any conservation offense." (Emphasis added.) 725 ILCS 240/10(c) (West 2008).

¶ 20 Because defendant received other fines, section 10(c) does not apply. Instead, the applicable provision is section 10(b), which provides for a penalty of "$4 for each $40, or fraction thereof, of fine imposed." 725 ILCS 240/10(b) (West 2008). Because defendant's other fines totaled less than $40, the proper penalty under the Act is (as the State concedes) $4. Again, because the clerk lacked the authority to impose this penalty, we vacate the clerk's assessment of it and reimpose it in the correct amount of $4.

¶ 21 Finally, defendant was charged a 30% delinquency fee for nonpayment of, among other items, the $5 Children's Advocacy Center fine, the $4.75 drug court fine, the $10 specialty court fee, and the Violent Crime Victims Assistance Fund penalty (which, as originally assessed by the clerk, was $16 too high). Defendant and the State agree, as do we, that because defendant accumulated sufficient monetary credit under section 110-14(a) to satisfy these fines, he is not liable for a delinquency fee for nonpayment of the fines. Moreover, defendant is not liable for a delinquency fee on the excess portion of the Violent Crime Victims Assistance Fund penalty. The delinquency fee must be reduced by $10.73 (30% of $35.75).

¶ 22 For the foregoing reasons, we vacate the drug court fine, the "specialty" court fine, and the Children's Advocacy Center fine; we impose those fines in the amounts of $4.75, $10, and $5 respectively; and we modify the mittimus to reflect a credit of $2,705 that fully offsets those fines. We vacate the Violent Crime Victims Assistance Fund penalty and impose that penalty in the correct

amount of $4. Finally, we reduce the delinquency fee by $10.73. In all other respects, the judgment of the circuit court of Lake County is affirmed.

¶ 23 Affirmed as modified in part and vacated in part.