Affirmed and Opinion filed November 9, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-96-01303-CR

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DESMOND EUGENE COLEMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 700,150

O P I N I O N

Desmond Eugene Coleman appeals from his jury conviction for robbery. The jury assessed his punishment at ten years' imprisonment and a $5,000.00 fine, both probated for ten years. In two issues, or points of error, appellant contends: (1) his in-court identification was tainted by an impermissibly suggestive pretrial identification procedure, and (2) the trial court erred in admitting evidence that had been illegally seized. We affirm.

On August 3, 1995, at about 2:00 a.m., the complaining witness, Christina Riley, and a friend, Jeff Robertson, had a flat tire and walked to a nearby Shell station to call for a ride. While talking to her sister from a pay telephone at the station, Ms. Riley observed appellant

and two men walking toward her and Robertson. Appellant and a smaller man approached Ms. Riley, and appellant pointed a gun at her and said: "Give me your money." Ms. Riley gave her purse and a black organizer to the smaller man, and appellant walked over to Robertson, pointed the gun at him, and demanded his money. Robertson told appellant that he did not have any money, and appellant took Robertson's bag of food that he purchased earlier at a Jack-in-the-Box restaurant. Appellant and the smaller man then left.

At about 8:00 a.m., the same day, Officers Morris Davis and M.D. Floyd received a dispatch to investigate two black males in a Cadillac at a bank. A bank teller reported that the two black males had tried to pass a stolen check. Torrance Price was driving his Cadillac out of the bank exit, with appellant sitting in the passenger seat, when Officer Floyd blocked their exit with his police car. Officer Davis drove up shortly after Floyd stopped the Cadillac. The officers placed appellant and Price in patrol cars while they conducted their investigation and searched Price's car. Ms. Riley's purse with her checks, social security card, and other personal documents were found in Price's Cadillac. Appellant was taken to the police station where he gave voluntary statements admitting he participated in four robberies on August 2 and 3, including this one, with two other unidentified black males and Price. In his statement, he said the "tall slim dude" with him actually pointed a gun at Ms. Riley and took her purse while he pointed a BB gun at Robertson and took his food.

The jury found appellant guilty of the lesser included offense of robbery. Appellant filed a motion for punishment to be assessed by the jury, and asked that the jury be allowed to recommend probation. The jury assessed appellant's punishment at ten years imprisonment, a $5,000.00 fine, and recommended that both the imprisonment and fine be probated. The trial court sentenced appellant to ten years probation, but required that appellant serve 180 days in the county jail as a condition of his probation.

Motion to Suppress In-court Identification

Before the trial commenced, the trial court heard appellant's motion to suppress. Ms. Riley testified that the Shell station was well lighted. Appellant and another black man stopped two to three feet from Ms. Riley, and she stated she had an opportunity to see the faces of both men. She described the man that approached her as six feet one inch or six feet two inches tall, wearing very baggy clothing. The other black male was smaller than appellant, and was also dressed in baggy clothing. Although nothing was obstructing her view of their faces, Ms. Riley stated that she was concentrating on the gun pointed at her. Appellant pointed a large, semiautomatic gun at Ms. Riley and said: "Give me your money." Appellant then moved over and pointed the gun at Robertson, and demanded his money. While appellant was robbing Robertson, the small man held a small gun on Ms. Riley and took her purse and black organizer. Ms. Riley identified appellant at the suppression hearing as one of the men that robbed her on August 3. She stated her identification was based on her recollection of him on August 3. She stated she viewed a photo spread at the police department but could not identify appellant's photograph. At a second photo spread, she identified the other man with appellant in the photo spread as smaller of the two, whose name was Marcus Cook.

On cross-examination, Ms. Riley stated she arrived at the courtroom in the morning and was invited inside by the prosecutor. Ms. Riley stated she had no conversation with the prosecutor concerning appellant's identification. Appellant walked passed the open door to the courtroom, and turned around. Appellant was alone at this time, and Ms. Riley told the prosecutor, "That's him." Appellant argued at the hearing that this confrontation was arranged by the prosecutor and was impermissibly suggestive.

The trial court held there was no evidence that Ms. Riley knew the person she identified was on trial in this case, and her identification was based on the incident and not tainted by any subsequent event.

In his first issue, appellant contends that any in-court identification of him was tainted by the one-on-one confrontation between him and Ms. Riley when she observed him walk by the door. Appellant argued that she was unable to identify him at the photo spread lineup, and

the prosecutor's arrangement for Ms. Riley to view appellant when he came in the courtroom prior to trial enabled Ms. Riley to identify appellant when she could not identify him at the photo lineup. Appellant argues that such prearrange one-on-one confrontation was impermissibly suggestive, and her subsequent in-court identification was invalid. We disagree.

There is no evidence of any action taken by the prosecutor or any other official to help Ms. Riley identify appellant. She stated her identification was based solely on her recognizing appellant from her viewing him while he was robbing her.

When an accused complains that a pretrial identification was unduly suggestive, but the pretrial identification did not involve police action, "the constitutional sanction of inadmissibility should not be applied." *See Rogers v. State*, 774 S.W.2d 247, 260 (Tex.Crim.App.1989) *Craig v. State*, 985 S.W.2d 693, 694 (Tex.App.–Houston [1st Dist] 1999, pet. ref'd). In *Rogers*, witnesses identified a capital murder suspect from a lineup. *Id*. at 259. The day before the lineup, the witnesses saw a picture of the suspect in a newspaper. *Id*. The newspaper picture depicted the suspect's arrest. *Id*. At trial, the witnesses identified the accused as the murderer. *Id*. On appeal, the accused complained that the witnesses viewed the picture depicting his arrest. *Id*. at 260. The court noted that, as far as it could tell, the photograph was not part of a greater scheme by law enforcement officers to suggest to an otherwise unsuspecting audience that the accused committed the murder. *Id*. The court held that in the absence of any official action contributing to the likelihood of misidentification, the constitutional sanction of inadmissibility would not be applied, regardless of the extent to which any witness's in-court identification might have been rendered less reliable by prior exposure to the picture. *Id.*

In the present case, the record does not reflect that appellant's walking by the courtroom before his trial commenced involved any police or prosecutorial action, much less that it was part of a law enforcement scheme to produce a suggestive identification. Therefore,

following the rationale of *Rogers*, we conclude that the trial court properly denied appellant's motion to suppress.

Appellant also contends that Ms. Riley's failure to identify appellant prior to the trial makes her subsequent in-court identification "highly improbable and unreliable." The failure of Ms. Riley to identify appellant after viewing two photo spreads goes to the weight, not the admissibility of the evidence. *Garcia v. State,* 563 S.W.2d 925, 928 (Tex.Crim.App.1978). We find there were no pretrial procedures that were impermissibly suggestive. We further find that the record supports the trial court's finding that Ms. Riley's in-court identification of appellant was based solely on her recognition of appellant from her observations the morning of the offense. We overrule appellant's contentions in issue one.

Evidence of the Robbery Taken from Price's Car

In issue two, appellant contends the trial court erred by admitting Ms. Riley's purse into evidence because the police officers had no authority to search Price's car. Appellant was a passenger in Price's car when the police officers stopped them at the bank, and thereafter searched the car finding Ms. Riley's purse and organizer.

When the State offered the purse into evidence, appellant objected as follows:

> The same objection, your Honor, that we previously made. We would object to its admission on all its grounds.

The previous objection was on the grounds of hearsay to a statement made by Officer Floyd in response to the prosecutor's question concerning what he did with the purse after finding it in Price's Cadillac. Officer Floyd testified that he had inventoried Price's Cadillac, found Ms. Riley's purse in it, and stated he "showed it to the round-about victim." Appellant's hearsay objection to Officer Floyd's statement that he "showed it . . . victim" was sustained. Appellant filed no motion to suppress the purse on the grounds of illegal search and seizure, and he made no objection to the introduction of the purse into evidence on the grounds of illegal search and seizure. Appellant has failed to preserve error concerning the legality of the

search of Price's Cadillac by failing to make an objection to the evidence in trial court on these grounds. Because his argument on appeal does not comport with his objections at trial, we will not address it. TEX. R. APP. P. 33.1(a); *Santellan v. State*, 939 S.W.2d 155, 171(Tex.Crim.App. 1997). Appellant's contentions in issue two are overruled.

We affirm the judgment of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed November 9, 2000.
Panel consists of Justices Cannon, Draughn, and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.