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DISTRICT I

May 3, 2022

To:

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Circuit Court Judge
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Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2021AP292-CR

State of Wisconsin v. Geion J. Sims (L.C. # 2016CF4443)

Before Brash, C.J., Dugan and White, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Geion J. Sims appeals a judgment of conviction and an order denying postconviction relief. He contends that the circuit court erroneously denied his pretrial suppression motion. Based upon a review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

The State charged Sims with armed robbery and attempted armed robbery, both as a party to a crime, and with operating a motor vehicle without owner's consent. In pretrial proceedings, Sims moved to suppress evidence of a live lineup in which two witnesses identified him as a suspect. Sims argued that the lineup was unduly suggestive because he was the only "stocky" person in the group and because his skin was lighter than that of the other participants. The parties agreed that the circuit court could resolve the motion based solely on their arguments and the video recording of the lineup. After reviewing the video, the circuit court found that there were no appreciable differences in the participants' complexions, and the circuit court further found that, while there was some variation in the participants' heights and weights, the participants all appeared "very similar." The circuit court concluded that the lineup was not unduly suggestive and denied the suppression motion.

Sims then resolved the case with a plea agreement. Pursuant to that agreement, he pled guilty to amended charges of theft from person by use of a dangerous weapon as a party to a crime; and to attempted operation of a motor vehicle without owner's consent. The circuit court accepted his guilty pleas and dismissed the remaining charge against him. The matters thereafter proceeded to sentencing.

Sims sought postconviction relief. As relevant here, he filed a postconviction motion seeking to withdraw his guilty pleas on the primary ground that the circuit court erroneously denied his suppression motion. In support, he provided documentation that he weighed 231 pounds during his medical examination at the Milwaukee County Jail three months before the lineup. He further showed that, at 231 pounds, his weight was fifty-one pounds more than that of the next heaviest person in the lineup and 100 pounds more than the person in the lineup who weighed the least. He contended that his weight distinguished him from the other lineup

participants and that this distinction warranted suppression on the ground that the lineup was unduly suggestive. Alternatively, Sims alleged that he was entitled to withdraw his guilty pleas because his trial counsel was ineffective for failing to preserve his claim that the lineup was unduly suggestive due to his weight.

The circuit court denied the postconviction motion without a hearing. The circuit court found that Sims's weight did not cause Sims to stand out in the lineup and that the lineup was not impermissibly suggestive. As to the allegation of ineffective assistance of counsel, the circuit court found that trial counsel's original suppression motion included the argument that Sims was the only "stocky" individual in the lineup. The circuit court went on to conclude that trial counsel was not ineffective for failing to support that argument with documentation about Sims's actual weight "because it is not the number which determines whether the lineup was impermissibly suggestive. What matters is that the defendant and the fillers *looked* similar enough so as not to suggest him as the target." Sims appeals.

As a preliminary matter, the parties agree that Sims's pretrial suppression motion included an argument that the lineup was impermissibly suggestive because Sims "was the only stocky lineup participant." Sims advises that he therefore "no longer believes that this court needs to address whether trial counsel was ineffective for not preserving the argument." Accordingly, we deem the ineffective assistance of counsel claim withdrawn. We turn to the remaining question, namely, whether the circuit court properly rejected Sims's claim that the lineup was impermissibly suggestive.

"The review of a circuit court's order granting or denying a suppression motion presents a question of constitutional fact. We will uphold the court's factual findings unless they are

clearly erroneous, but we independently apply constitutional principles to those facts.” *State v. Ionescu*, 2019 WI App 68, ¶8, 389 Wis. 2d 586, 937 N.W.2d 90 (citation omitted). To suppress an out-of-court identification, a defendant has the initial burden of demonstrating to the circuit court that the procedure was impermissibly suggestive. *See State v. Benton*, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923. If the defendant makes such a showing, the State must demonstrate that the identification was nonetheless reliable. *See id.*

Sims contends that the lineup in this case was impermissibly suggestive because he weighed more than the other participants. When police conduct an identification procedure in which the target either appears “unique in a manner directly related to an important identification factor” or has a characteristic that is “particularly striking or pronounced” in comparison to the other participants in the array, the procedure may be impermissibly suggestive. *See Powell v. State*, 86 Wis. 2d 51, 66-67, 271 N.W.2d 610 (1978). Mere variations in appearance, however, are insufficient to warrant suppression of an identification. “The police are not required to conduct a search for identical twins in age, height, weight or facial features.” *Wright v. State*, 46 Wis. 2d 75, 86, 175 N.W.2d 646 (1970). Indeed, identical participants are not only impossible to find but “also undesirable, because then the witness wouldn’t be able to identify the suspect.” *See United States v. Johnson*, 745 F.3d 227, 230 (7th Cir. 2014) (citation omitted).

The circuit court here found that there were some differences in the body types of the lineup participants, observing that “somebody seemed a little taller than the one before; someone seemed a little thinner than the one before; someone seemed a little heavier than the one before.” The circuit court also found, however, that the participants were all dressed alike and “appeared very similar. There wasn’t anything that ... stuck out.”

The circuit court's factual findings are supported by the video recording of the lineup. The recording shows that each of the men in the lineup appeared for viewing sequentially, one at a time, so gradations in the participants' characteristics were not apparent. Each participant walked into view and took the same actions in response to the same directions from a police officer conducting the lineup procedure. Each participant wore the same loose-fitting jail uniform that did not accentuate his weight. None of the participants appeared strikingly bigger than the others. Accordingly, the circuit court's factual findings are not clearly erroneous, and we will not disturb them. *See Ionescu*, 389 Wis. 2d 586, ¶8.

In light of the factual findings here, we conclude that the circuit court properly denied Sims's suppression motion. Sims failed to establish that he had a unique feature that distinguished him from the others or that anything in the lineup procedure drew attention to him. To the contrary, all of the lineup participants looked similar to one another with unremarkable variations in body type. Accordingly, Sims failed to satisfy his burden to show that the lineup was impermissibly suggestive. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment and postconviction order are summarily affirmed.
See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals