

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3060
(Summary Calendar)

REGINALD MELANCON,

Petitioner-Appellant,

versus

ED C. DAY, Warden, and
RICHARD P. IEYOUB, Attorney
General, State of Louisiana,

Respondents-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana

(CA-91-2614-G)

November 19, 1992

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Proceeding pro se from the Louisiana State Penitentiary, Petitioner-Appellant Reginald K. Melancon appeals the district court's denial of his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. Melancon's petition challenges his conviction in

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

state court, complaining that he was identified through an impermissibly suggestive procedure. Finding no reversible error by the district court in denying Melancon's petition, we affirm.

I

FACTS AND PROCEEDINGS

Melancon was convicted of armed robbery and sentenced to serve 33 years of imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. State v. Melancon, 536 So.2d 430, 430-31 (La. Ct. App. 1988).

Melancon filed a petition requesting habeas relief under 28 U.S.C. § 2254 claiming that his due process rights had been violated by an improperly suggestive lineup from which he was identified by the victim. There is no dispute that Melancon has exhausted his state remedies with respect to this claim. Melancon, 536 So.2d at 430-34; State ex rel. Melancon v. State, 582 So.2d 860 (La. 1991). The district court dismissed the petition with prejudice finding that the identification made by the victim was sufficiently reliable. Melancon filed a notice of appeal and the district court granted a certificate of probable cause.

II

ANALYSIS

Melancon claims that the physical lineup in which he was identified by the victim was improperly suggestive and should have been suppressed by the state trial court. The basis for the claim is that the victim had previously described his assailant as being clean shaven, and that the other five men in the lineup had facial

hair but Melancon did not.

A defendant's due process rights are violated if an identification which is unreliable due to impermissibly suggestive procedures is admitted in evidence. Neil v. Biggers, 409 U.S. 188, 196-99, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972). We use a two-step process to determine the admissibility of identifications. See United States v. Shaw, 894 F.2d 689, 692-93 (5th Cir.), cert. denied, 111 S. Ct. 85 (1990) (direct criminal case). The threshold determination is whether the identification process was impermissibly suggestive. If the process was not suggestive, the inquiry ends; if it is, we proceeded to determine "whether under the totality of the circumstances the suggestiveness leads to a substantial likelihood of irreparable misidentification." Id. at 692 (quoting Passman v. Blackburn, 652 F.2d 559, 569 (5th Cir. Unit A 1981), cert. denied, 455 U.S. 1022 (1982)). The following factors are examined to determine the reliability of the identification:

"(1) the opportunity of the witness to view the criminal, (2) the witness's degree of attention, (3) the accuracy of the description, (4) the witness's level of certainty, (5) the elapsed time between the crime and the identification, and (6) the corrupting influence of the suggestive identification itself."

Id. at 692-93 (quoting United States v. Atkins, 698 F.2d 711, 713 (5th Cir. 1983)).

Here, both the state trial court and the district court viewed a picture of the individuals composing the lineup.¹ Neither court

¹ That picture is included in the state record of the case and shows the faces of the other five individuals, but Melancon's

was impressed with the argument that only Melancon was clean shaven because the facial hair on the other men was minimal. Even so, the district court assumed for the sake of argument that the lineup was suggestive and proceeded to the next level of inquiry. Considering that police officers testified at trial that individuals with mustaches were requested for the lineup and that Melancon was specifically ordered to shave off his mustache, the district court's assumption is reasonable.

Applying the facts of this case to the factors enunciated in Shaw confirms that the identification here was reliable. Wells, the victim, testified that Melancon approached to within three to four feet of him on a sunlit balcony overlooking a courtyard. Wells testified further that Melancon pushed him (Wells) against the railing of the balcony and robbed him at gunpoint. Wells estimated that the robbery took three to four minutes, but was not firm in this estimate and on cross-examination reduced it to approximately 32 seconds. Wells also stated that he got a good look at his assailant. Wells originally described the perpetrator as being five feet seven inches to five feet eight inches tall and weighing 150 pounds. The police officer who took this description testified that it was "5 foot 8 inches, thin build, brown complexion, a knit cap, white T-shirt, dark pants and black boots." Melancon's arrest sheet describes him as being five feet nine inches tall and weighing 142 pounds. The lineup picture appears to

was somehow obliterated by the flash of lights when the picture was taken.

verify these general characteristics. The lineup in question took place nine weeks following the robbery. Finally, Wells testified unequivocally that Melancon was the man who robbed him. The police officer conducting the lineup also testified that Wells was positive in his identification of Melancon.

Wells had ample opportunity to see his assailant under well lit circumstances. There is nothing to indicate that his attention was focused on anything but the fact that he was being robbed. Wells subsequently gave a description of the perpetrator that closely approximated Melancon's physical size. Wells was very certain about his identification of Melancon, and only nine weeks elapsed between the robbery and the lineup. Finally, Wells testified at trial that he was not sure whether his assailant had a mustache, but he knew that he did not have a heavy beard. The lineup presented to Wells comprised individuals who did not have full beards, but merely facial hair that can be best described as minimal. Given all of these circumstances, it cannot be said that the identification of Melancon as the perpetrator was rendered unreliable simply because he was clean shaven and the other individuals had minimal facial hair. We conclude that Melancon's claim has no merit, and that the district court's dismissal of his habeas petition should be and therefore is

AFFIRMED.