

EXAMINER'S ANALYSIS OF QUESTION NO. 12

1. Right to Counsel

A suspect has no 6th Amendment right to counsel at an on-the-scene identification. The right to counsel attaches only to corporeal identifications "conducted at or after the initiation of adversarial judicial criminal proceedings." *People v Hickman*, 470 Mich 602, 609 (2004); *Moore v Illinois*, 434 US 220 (1997); *People v Perry*, 317 Mich App 598 (2016); Const 1963, art 1, § 20.

Donald has no constitutional right to have counsel present at the on-the-scene identification under the US or the Michigan constitution because his right to counsel has not attached as formal criminal proceedings had not yet been initiated. Donald's complaint that he was deprived of his right to an attorney at the on-the-scene identification will fail.

2. On-the-Scene-Identification

A prompt on-the-scene identification is one where the victim or witness views the suspect in the field within a reasonable time of the crime. A prompt on-the-scene identification "allows the police to know whom to arrest and ensure the expeditious release of innocent suspects." *People v Wilki*, 132 Mich App 140,142 (1984). The on-the-scene identification also allows the victims to confirm or deny the identification while his or her memory is fresh and accurate. *People v Turner*, 120 Mich App 23, 34-35 (1982) (overruled on other grounds, *People v Randolph*, 466 Mich 532 (2002), (superseded by statute on other grounds); *People v Purifoy*, 116 Mich App 471, 480 (1982); *People v Libbett*, 251 Mich App 353, 362 (2002).

On-the-scene identifications are a "reasonable, indeed indispensable, police practice because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance." *People v Winters*, 225 Mich App 718, 728 (1997); *Libbett*, 251 Mich App at 361 (2002). This method of identification promotes "fairness and greater reliability." *Winters*, 225 Mich App at 728. It "insures both that the police have the actual perpetrator and that any improvidently detained individual can be immediately released." *Libbett*, 251 Mich App at 361; *Winters*, 225 Mich App at 728.

The use of the on-the-scene identification by the police was proper and Donald's argument that it should not have been done will fail.

3. Due Process

Donald does have a constitutional right of due process in the procedure used in the on-the-scene identification. *Hickman*, 470 Mich at 610. A suspect has a due process right from being subjected to "unnecessarily suggestive" identification procedures which are "conducive to irreparable mistaken identification" *Winters*, 225 Mich App at 725, citing *Stovall v Denno*, 308 US 293 (1967). This right applies whether it occurs before or after the initiation of criminal proceedings. *Winters*, 225 Mich App at 725.

A pretrial identification, including an on-the-scene identification, is a violation of due process if the procedure is "so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Williams*, 244 Mich App 533, 542 (2001) quoting *People v Kurlczyk*, 443 Mich 289, 302 (1993). Suggestive identifications include the witness being told "that the police have apprehended the right person." *People v Gray*, 457 Mich 107,111 (1998); evidence of other motives by the police; *Libbett*, 251 Mich App at 363; or the police suggest by other means that the suspect be chosen.

Identification factors to consider include: (1) The opportunity of the witness to view the suspect at the time of the crime; (2) The witness's degree of attention; (3) The accuracy of the prior description by the witness; (4) The level of certainty of the witness in the identification; and (5) The length of time between the crime and the identification. *People v Colon*, 233 Mich App 295, 304-305 (1998).

Donald complains the on-the-scene identification was suggestive because: (a) he was under arrest so he should have been in a line up not an on-the-scene identification; (b) he was handcuffed in a police car when seen by Peter which is suggestive; and (c) 70 minutes elapsed between the crime and identification, which is not prompt.

Discussion

(a) The fact Donald was arrested on an outstanding warrant does not negate the fact he was a suspect in the theft of the watch and does not prevent the police from investigating that crime. The police were not required to put him in a line up. An on-the-scene identification by its nature does not require a line up or show up. Donald's argument will fail.

(b) The identification has a degree of suggestiveness because Donald "looks like an offender" considering he was identified by Peter while he was handcuffed in the back of the police car after

he was arrested on an outstanding warrant. *People v Starks*, 107 Mich App 377, 379-381 (1981). But it is also part of the on-the-scene identification. It is not so suggestive as to overcome the purpose of the prompt on-the-scene identification nor to lead to the conclusion that Peter made the identification only because Donald was handcuffed in the back of the police car. Any conclusion based on the rule is acceptable. An applicant might note that Peter's identification of Donald was spontaneous in that he identified him before the police officer even got out of the car, and therefore the procedure was not suggestive. The counterpoint is that Peter was called by the police and told to meet them in the parking lot at the Coney Island. The inference is that the meet was for Peter to view a suspect.

(c) The on-the-scene identification was prompt, within 70 minutes of the theft. The time between the apprehension of Donald and Peter's identification of him was only 10 minutes. The search for, and apprehension of, Donald took up most of the time, about an hour. There were two people arrested, but Peter identified only Donald as involved in the theft. That identification resulted in the release of the other person. Seventy minutes is a reasonable period of time for the police to respond, apprehend the suspects, and have an identification. See e.g., *Libbett*, 251 Mich App 353 (2 hours); *Starks*, 107 Mich App 377 (an hour and a half.) However, points can be awarded if the contrary conclusion is reached.

In conclusion, Donald's complaints that it was unfair and suggestive for the witness to see only him in the police car while under arrest fail. The arrest does not trigger the line up or show up and does not eliminate the use of an on-the-scene identification. The timing of the identification was reasonable. Donald's arguments will not succeed.