IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. EDDIE COSEY, Defendant.	No. 3:07-cr-0584-2-JAJ **ORDER**

This matter comes before the court pursuant to the defendant's December 11, 2007, Motion to Suppress Identification [dkt #68]. The court held an evidentiary hearing on this motion on January 31, 2008, at which the defendant was present and represented by Frederick Goetz. The government was represented by Assistant United States Attorney Clifford Cronk. The motion to suppress is denied.

In the motion to suppress, the defendant contends that a six person photo lineup presented to a Chicago area automobile dealer was impermissibly suggestive and created a substantial risk of irreparable misidentification at trial. The government denies the defendant's allegations.

FINDINGS OF FACT

The facts of this matter are also the subject of an earlier motion to suppress evidence for which the court has filed findings of fact and conclusions of law on January 18, 2008. To determine whether it was defendant Eddie Cosey who had purchased an automobile that had been stopped in early June 2007, Clinton police detective Anthony Stone sent a six person photographic lineup to Detective Dwight Crull of the Orland Hills, Illinois, Police Department.

On July 3, 2007, Detective Crull took the photo lineup to the Orland Hills car dealership where the automobile in question had earlier been purchased. There, Detective

Crull met with the manager of the dealership, Mo Atieh. Mr. Atieh knew that a police officer would be coming to conduct the photo lineup as Detective Stone from the Clinton Police Department had informed him of this procedure. Mr. Atieh was on the telephone at the time Detective Crull came to the dealership. While Atieh was still on the telephone, he reviewed the photographic lineup for a minute or less and then identified the fourth picture as the man who had purchased the automobile in question. The fourth picture is a photograph of the defendant, Eddie Cosey. Detective Crull had Mr. Atieh initial that photograph. See Gov Ex. 1. The entire process consumed approximately five (5) minutes. Detective Crull simply administered the lineup. He did not know which individual was alleged to have purchased the car.

Exhibit 1 shows six (6) large, medium-complected African-American males with short hair or, in one instance, a shaved head. The defendant contends that the photo lineup is impermissibly suggestive because the defendant is the only individual whose mouth is open. He contends that you can see a distinctive gap in Mr. Cosey's teeth.

The court concludes that the photo lineup was not impermissibly suggestive. The defendant is the only one with his mouth open. However, it is very difficult to determine from the photograph whether the defendant has the alleged gap in his teeth. More importantly, there is no evidence that Mr. Atieh ever described the purchaser of the automobile as having a gap in his teeth. Without such evidence, the defendant cannot make a credible challenge to the suggestiveness of the photo lineup.

CONCLUSIONS OF LAW

Identification Procedures

The defendant claims that Mot Atieh and Dwight Crull's trial testimony should be suppressed because he was identified at unnecessarily suggestive photo identification procedures which violated his due process rights. In Manson v. Brathwaite, 432 U.S. 98,

114 (1976), the Court concluded that reliability is the linchpin in determining the admissibility of identification testimony. See Stovall v. Denno, 388 U.S. 293 (1967)(Suspect taken to a nearby hospital where victim identified him the day after the crime); Neil v. Biggers, 409 U.S. 188 (1972)(Rape victim identified her assailant at a station house show-up seven months after the crime). Even though the Court expressed concern about the seven-month time lapse between the crime and the identification in Biggers, the Court said the central question was whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive. Id.

The threshold issue is whether the defendant has shown that the identification procedures were "impermissibly suggestive". United States v. Donelson, 450 F.3d 768, 772 (8th Cir. 2006). If such a showing is made, then the court looks to the totality of the circumstances to determine whether there was created a very substantial likelihood of irreparable misidentification. United States v. Boston, 494 F.3d 660 (8th Cir. 2007).

The factors to be considered in determining whether a pre-trial identification violated the defendant's due process rights are set out in Biggers, 409 U.S. at 199-200. These include (1) the opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification. Manson, supra, at 114.

There was nothing unduly suggestive about the photographic line-up. As noted in the Findings of Fact above, the photographs all show large, medium-complected African American males with short hair or a shaved head. Absent some indication that Mr. Atieh had previously identified the defendant as having a gap between his teeth, the fact that only one photograph shows a man with a partially open mouth is of no significance.

Contributing to the finding that this was not a suggestive photo identification is the fact that the officer who displayed the photo array did not know which picture depicted the defendant.

Because Mr. Atieh did not testify at the hearing, the court does not have direct evidence concerning his degree of attention. It is clear, however, that he dealt with the defendant in a calm situation long enough to negotiate the purchase of an automobile. The defendant made an impression on Mr. Atieh, as shown by his ability to describe the defendant, his jewelry and the large wad of cash he was carrying. Mr. Atieh unequivocally identified the defendant and placed his initials on the photo of the defendant to indicate his selection. By the time he made this photographic identification of the defendant, it had been only approximately one month since the time he had sold the car to the defendant and his girlfriend.

CONCLUSION

Upon the foregoing,

IT IS ORDERED

That defendant's Motion to Suppress Evidence [dkt #68] is denied.

DATED this 13th day of February, 2008.

JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA