

ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE A MUG SHOT PHOTOGRAPH OF DEFENDANT IN AN ORANGE JUMP SUIT

This Court should reverse defendant's conviction because the trial court improperly admitted into evidence a mug shot photograph of defendant in the standard "orange jump suit" commonly issued to prisoners. To further prejudice defendant, the State elicited testimony from two investigators that defendant was "well known" to the Wildwood police and the DEA from previous encounters. Since defendant's entire defense of the charges below relied upon the investigator's misidentification of the "black male" who sold her drugs, the trial court's admission of the highly prejudicial mug shot was harmful error and necessitates a reversal of defendant's conviction.

In State v. Burton, 309 N.J. Super. 280 (App. Div.), certif. denied, 156 N.J. 407 (1998), the Appellate Division emphasized that a trial court's admission of a defendant in an orange jump suit is highly prejudicial and, except in cases of "overwhelming evidence of guilt," requires a reversal. In that case, six photographs, including one of the defendant's, were assembled. Each photograph was of a male in orange jail clothing. The detective took the photographic array to the victim and asked the victim if he could identify the suspect. After looking at the photographs for between five and seven minutes,

the victim selected the defendant's photograph and stated that he was positive that the defendant was the person who had committed the crime. Id. at 286.

Under those circumstances, the Appellate Division concluded that

[t]he probative value of the photographs, particularly in light of the fact they were introduced only to enhance the reliability of the identification, was substantially outweighed by the risk of undue prejudice in bringing to the attention of the jury the fact that defendant had previously been arrested and incarcerated.

* * *

We strongly disapprove of the admission into evidence of photographs of defendants in jail clothing. It is an error that should not be repeated. If this were a closer case, we would not hesitate to reverse the conviction on that ground alone.

Id. at 288-89 (emphasis added).

Indeed, despite the trial court's limiting instruction to the jury to consider the photograph only for the fact that the victim identified the person in the photograph as the assailant, the Appellate Division emphasized that "we can conceive of no instruction which could effectively and realistically neutralize the prejudice to defendant. The photographic array should not have been admitted into evidence." Id. at 289.

In State v. Cribb, 281 N.J. Super. 156 (App. Div. 1995), the Appellate Division recognized that even the admission of a purportedly "neutral" mug

shot can be prejudicial to a defendant if testimony is introduced that further reinforces the improper suggestion that defendant has a prior criminal record. In that case, the Appellate Division concluded that the “testimony of Detective O'Dwyer exacerbated the prejudicial potential of [the victim’s] reference to the photograph as a mug shot:”

Q. Did you know a person who fit the description that she related to you?

A. No, I did not.

Q. Did you speak to any other officers regarding that description?

A. Yes. On the 21st I discussed with other officers at a Hamilton Township Detective Bureau meeting . . . the general description.

Q. Did there [sic] other officers you spoke to know someone who fit that description?

A. Yes.

Q. Who is the person who fit the description?

A. Ervan Cribb.

O'Dwyer then testified that he procured an "identification photo of Ervan Cribb" as well as "seven other photographs of black males, dark complexion and mid to late twenties with short hair." He then created the photo lineup utilizing those eight photographs. It was apparent to the jury from O'Dwyer's testimony that the seven other males whose photos were used in the array were not considered by the police to be suspects.

O'Dwyer's testimony had a tendency to establish that the police believed that Ervan Cribb fit Memmer's description and, therefore, was the perpetrator. It also tended to establish that Ervan Cribb was an individual notorious to the police.

Id. at 161. Under those circumstances, the Appellate Division held that the admission of the mug shot into evidence unfairly prejudiced the defendant and required a reversal of his conviction. Id. at 162.

Federal courts also have consistently recognized that mugshots and other prejudicial photographs “carry a clear implication of criminal activity that breaches the rule against admitting evidence of the defendant’s bad character or previous brushes with the law.” United States v. Hines, 955 F.2d 1449, 1455 (11th Cir. 1992). In Hines, as in Burton, the court strongly disapproved of the photographs showing men “wearing identical orange uniforms that are clearly institutional garb” Id. at 1456.

In United States v. Torres-Flores, 827 F.2d 1031 (5th Cir. 1987), the court emphasized that it “is a fundamental principle of our jurisprudence that evidence of an accused’s prior criminal record is inadmissible . . . [and] . . . violative of an accused’s right to have his guilt or innocence of the crime charged determined strictly on the basis of the evidence regarding the crime charged.” Id. at 1036. In Torres-Flores, as in this case, there was only one witness who could allegedly identify the defendant as the perpetrator of the

alleged crime. Id. at 1038. Although the court noted that “identification was the crux of the Government’s case” and that the prosecution therefore “needed to introduce the photographs into evidence[,]” the court concluded that the jury could have improperly concluded “that the defendant had a prior criminal or arrest record” by viewing the “mug shot” photograph. Id. at 1039.

Furthermore, in response to the government’s contention that any prejudicial effect of the photograph had been ameliorated by the government’s and the trial court’s “covering up” of the prejudicial portions of the photograph, the court held that the “inartful covering of the defendant’s photograph more than likely heightened the jury’s awareness of the prejudicial nature of the photograph. . . . [T]hese exhibits left little room for imagination in the minds of the jurors as to what was being concealed. The probability that the Government’s exhibits impressed upon the jury the fact of the defendant’s prior criminal conduct is substantial.” Id.

In this case, the trial court erred in admitting into evidence the mug shot photograph of defendant in an orange jump suit (S-5). Contrary to the Appellate Division’s directives in Burton, the trial court stated, “I don’t think the average person would know about the orange jumpsuit.” 3T49:1-2.

The probative value of the mug shot was substantially outweighed by the risk of undue prejudice in bringing to the attention of the jury the fact that

defendant previously had been arrested. As in Burton, the trial court should have excluded the evidence pursuant to N.J.R.E. 403(a), particularly because the photograph was introduced only to enhance the reliability of Investigator LoRusso's purported identification. When the sole issue at trial is the identification of the alleged perpetrator -- as in this case -- admitting a photograph of the defendant in prisoner's clothing is so "inherently inflammatory . . . as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation" of the basic issue in the case -- whether defendant was the "black male" who sold drugs to Investigator LoRusso. State v. Thompson, 59 N.J. 396, 421 (1971).

Moreover, as in Cribb, the State elicited trial testimony in this case that ensured that the jury knew that defendant was "well known" to the police, thereby virtually guaranteeing prejudice to defendant from the improperly admitted mug shot. The State introduced the testimony of Lieutenant Charles Barnett of the Cape May County Prosecutor's Office and elicited the following testimony:

Q. . . . I'm going to ask about November 21st, 1995.

A. Yes.

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Q. On that date and time do you recall going to a residence on Roberts and Arctic Avenue in Wildwood?

A. Yes, I do.

Q. Do you recall who else was there, if anyone, with you?

A. Several detectives from our office as well as members of the DEA.

* * *

Q. On that date and time did you see the defendant at that place?

A. Yes, I did.

Q. Was he inside the house?

A. Yes, he was.

Q. And you were inside the house?

A. Yes, I was.

4T90:2-92:1 (emphasis added).

Defense counsel objected to that testimony and the trial court recognized that its “concern is that the testimony is going to come in about prior bad acts.” 4T90:18-24. Nevertheless, the trial court improperly admitted this testimony into evidence. Moreover, the trial court gave absolutely no limiting instruction to the jury not to consider Lieutenant

Barnett's testimony as suggesting that defendant had prior criminal conduct, which it obviously did. As the Appellate Division emphasized in Cribb:

there was no legitimate need to tell the jury that the police considered defendant to be the only suspect in the photo array or to imply defendant's notoriety . . . identification was the only issue and the evidence of defendant's guilt was provided by only one eyewitness. Under those circumstances, we are persuaded that [the officer's] testimony, coupled with [the victim's] reference to the photo as a "mug shot," had a substantial capacity to influence the jury in favor of conviction because it tended to buttress the credibility of [the victim's] identification of defendant as the perpetrator and reinforce its impact.

281 N.J. Super. at 161-62.

Indeed, in its opening statement in the trial court below, the State informed the jury that defendant was a "well known" criminal in the Wildwood area, and that the Wildwood police previously had spoken with defendant for several hours in the very same spot that the "black male" conducted the alleged drug transaction at issue:

He recognizes the defendant because he knows him. He met with him before. He spent time with him before. He'll tell you he spoke with him before for several hours. And what's more important is he met with the defendant and he knew the defendant from this very same location.

3T21:16-20 (emphasis added).

The State then further reinforced the prejudicial impact of the mug shot by eliciting the following testimony from Investigator Super:

Q: Now you say Arthur Fitzpatrick. How do you know him?

A: I'd met Arthur before. Arthur is a well known subject in this neighborhood. In other words, he's always in the area.

Q: Did you ever see him there at that place?

A: Yes, I had.

Q: Do you recall ever talking to him?

A: Yes, I did have occasion to speak to him.

Q: Where was that?

A: That was at a residence that's also located at the corner of Arctic and Roberts Avenue.

Q: Was that inside or outside the residence?

A: That would have been, I was inside the residence at the time.

* * *

Q: Do you recall when that was, when –

A: I believe it was in 1995.

Q: Okay. So in 1995 you met with him at the residence.

A: Yes.

Q: And we already determined it was inside. And I was asking you do you recall how long you spent with him on that date?

A: It was, I would estimate it was several hours.

Q: And how close did you get to him?

A: Within five feet, or closer.

3T108:16-109:25 (emphasis added).

The mug shot photograph of defendant in the orange jump suit, reinforced by Officer's Barnett's testimony, Investigator Super's testimony, and the State's opening remarks, unfairly prejudiced defendant and requires a reversal of his conviction below. Although not every trial error requires a reversal of a conviction, State v. LaPorte, 62 N.J. 312, 318 (1973), a "real" error, "one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached[,]" Burton, 309 N.J. Super. at 289, necessitates a reversal. State v. Bankston, 63 N.J. 263, 273 (1973).

Here, the evidence of defendant's guilt was based completely on Investigator LoRusso's purported identification of the "black male" that sold her drugs. Investigator LoRusso wrote no description of the suspect's clothes in her report. No description of the suspect's height or weight. No description of specific facial features. No description of the suspect's approximate age. No description of facial hair. In short, Investigator LoRusso noted no

identifying characteristics of the perpetrator at all, simply a “black male.”

3T58:10-60:19.

Defendant was between 45 and 50 years old at the time of the alleged drug transaction. 3T60:14-16. In addition, defendant had a “big afro, like what Dr. J used to wear when he was in the ABA” 3T59:14-60:6.

Nevertheless, Investigator LoRusso did not note in her report that the “black male” had those significant identifying characteristics. 3T60:14-19.

Moreover, Investigator LoRusso purportedly identified defendant as the “black male” after Investigator Super showed her the single mug-shot photograph of defendant in the orange jump suit and told her “this is Arthur Fitzpatrick.” 3T153:17-154:6. No photo array of any sort was shown to Investigator LoRusso. 3T153:17-154:6. As Investigator Super testified, “I think I showed her [Investigator LoRusso] a picture and said this is Arthur Fitzpatrick.” 3T153:17-154:6. That unfairly suggestive method of identification is a far cry from overwhelming evidence of guilt.

Indeed, Investigator Super’s own purported identification of the “black male” was made from “50 feet away” at “about 20 miles, 25 miles per hour[,]” while he was trying to remain concealed from the suspects in the area. 3T34:2-8; 3T134:3-8. During cross-examination, Officer Super was shown a videotape taken from a car traveling down the same street and at the same

speed Investigator Super was traveling when he claimed to have identified defendant as the “black male” speaking to Investigator LoRusso. 3T138:14. Investigator Super, however, was unable to identify a white person on the corner who turned out to be a person he knew and had met “several times.” 3T139:10-20. Again, that is a far cry from overwhelming evidence of guilt.

Because the trial court’s admission of the mug shot photograph of defendant in an orange jump suit was harmful error, this Court should reverse defendant’s conviction.