

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

vs.

MARK ANTHONY SWINT

Defendant-Appellant

: JUDGES:
: Hon. William B. Hoffman, P.J.
: Hon. Sheila G. Farmer, J.
: Hon. John W. Wise, J.
:
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: Case No. 2003CA00165
:
:
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: OPINION

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 2002CR0945

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: February 9, 2004

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Farmer, J.

{¶1} On August 5, 2002, the Stark County Grand Jury indicted appellant, Mark Anthony Swint, on one count of aggravated robbery with a firearm specification in violation of R.C. 2911.01. Said charge arose from the robbery of Joseph Capalingo while seated in his vehicle outside an ATM on September 9, 1995. Kelly Messenheimer was a passenger in the vehicle at the time of the incident.

{¶2} On September 9, 2002, appellant filed a motion to suppress any in court identification based on a suggestive out of court identification. The trial court denied said motion.

{¶3} On October 16, 2002, appellant filed a motion to dismiss the charge claiming it was barred by the applicable statute of limitations. By judgment entry filed February 28, 2003, the trial court denied said motion.

{¶4} A jury trial commenced on April 2, 2003. The jury found appellant guilty as charged. By judgment entry filed April 8, 2003, the trial court sentenced appellant to seven to twenty-five years in prison.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN OVERRULING HIS MOTION TO SUPPRESS ANY IN COURT IDENTIFICATION BASED ON A SUGGESTIVE OUT OF COURT IDENTIFICATION."

II

{¶7} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN OVERRULING HIS MOTION TO DISMISS THE CHARGES AGAINST HIM ON EX POST FACTO GROUNDS IN VIOLATION OF ARTICLE I, SECTION 9 OF THE UNITED STATES CONSTITUTION."

III

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN OVERRULING HIS MOTION TO DISMISS THE CHARGES AGAINST HIM ON RETROACTIVE APPLICATION IN VIOLATION OF ARTICLE II, SECTION 28 OF THE OHIO CONSTITUTION."

IV

{¶9} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AND THEREIN ENTERING A JUDGMENT OF GUILTY OF AGGRAVATED ROBBERY."

V

{¶10} "THE VERDICT FINDING THE APPELLANT GUILTY OF AGGRAVATED BURGLARY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶11} Appellant claims the trial court erred in denying his motion to suppress "any in court identification based on a suggestive out of court identification." We disagree.

{¶12} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact.

In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 485; *State v. Guysinger* (1993), 86 Ohio App.3d 592. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 116 S.Ct. 1657, 1663, "...as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶13} Appellant argues Ms. Messenheimer's identification of him should have been excluded because of two factors. First, Ms. Messenheimer was unable to identify or describe the robber at the time of the incident, but could do so several years later. Secondly, Ms. Messenheimer was able to identify appellant from a photo array only after the police manipulated the photos by placing paper over the hair of the suspects.

{¶14} A hearing on the motion to suppress was held on September 30, 2002 and was denied as noted on the trial court's deposition sheet filed same date. The sheet

notes "entry to follow" although no judgment entry was ever filed by the trial court on the findings relative to the motion to suppress. No transcript of the suppression hearing was filed nor was a request for the transcript made. We note the clerk of court docketed a judgment entry as the denial on the motion to suppress, entry #30, but upon review of this entry, we find it only addressed the motion to dismiss, not the motion to suppress.

{¶15} Trial courts are not required to give specific findings on a motion to suppress in writing, and may give those findings orally at the time of the hearing. *Jackson v. Denno* (1964), 378 U.S. 368.

{¶16} Based upon the lack of a transcript, we must presume regularity in the proceedings and conclude the trial court gave its reasons on the record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197. Therefore, we will not reverse for lack of findings by the trial court.

{¶17} The facts of the identification by Ms. Messenheimer are included in the trial transcript via the testimony of Sergeant Ronald Springer, testimony which was subjected to cross-examination. T. at 218-222. Ms. Messenheimer explained in detail her observations of appellant at the time of the incident and her identification involving the photo array, again, all subjected to cross-examination. T. at 150-151, 165-167, 174-175.

{¶18} The issue of "suggestiveness" implies direct involvement by the police in pointing out or identifying a specific person as the prime suspect. Nothing of that tenor occurred sub judice.

{¶19} Appellant properly points out the "totality of the circumstances" test controls decisions on suppression of identifications, as well as these factors: "the

opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers* (1972), 409 U.S. 188, 199-200.

{¶20} The mechanism to test these factors involves first, the trial court's decision on the motion to suppress and secondly, if it is not suppressed, the jury's view of the credibility of the identifying witness. The trial court's instructions to the jury reflect this process. T. at 317.

{¶21} From the facts presented, we find as a whole the covering of the hair of the suspects in the photo array was not inherently suggestive or of such a nature that the trial court erred in denying the motion to suppress.

{¶22} Assignment of Error I is denied.

II, III

{¶23} Appellant claims the trial court erred in denying his motion to dismiss on ex post facto grounds and retroactive application. Specifically, appellant claims the statute of limitations as extended by R.C. 2901.13 should not be applied retroactively. We disagree.

{¶24} Pursuant to the Supreme Court of Ohio's decision in *State v. Rush*, 83 Ohio St.3d 53, 1998-Ohio-423, S.B. No. 2 legislation does not violate the ex post facto provisions of the United States Constitution. The Ohio General Assembly specifically extended the statute to offenses committed before the enactment (March 9, 1999):

{¶25} "Section 2901.13 of the Revised Code, as amended by this act, applies to an offense committed on and after the effective date of this act and applies to an offense committed prior to the effective date of this act if prosecution for that offense was not barred under section 2901.13 of the Revised Code as it existed on the day prior to the effective date of this act." R.C. 2901.13, Uncodified Law.

{¶26} Because the incident occurred on September 9, 1995, the six year statute of limitations applied. However, prior to the expiration of the six years, the Ohio General Assembly extended the statute of limitations to twenty years. As defined by *Bezell v. Ohio* (1925), 269 US 167, 169-170, the facts sub judice do not qualify as ex post facto legislation:

{¶27} "It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto."

{¶28} Accordingly, consistent with *Rush*, we find the extension of the statute of limitations to be procedural, not substantive, and therefore does not qualify as a violation of the ex post facto clause. See, *State v. Perez*, Stark App. No. 2002CA00218, 2003-Ohio-542.

{¶29} Appellant also argues the statute should not be applied retroactively. Because the extension of the statute of limitations is procedural, no vested right would be affected by this legislation. *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291; *Van*

Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St.3d 100. The specific intent of the Ohio General Assembly is included in the statute and it is to be applied retroactively.

{¶30} Assignments of Error II and III are denied.

IV, V

{¶31} Appellant claims the trial court erred in denying his motion for acquittal pursuant to Crim.R. 29 and the jury's verdict was against the manifest weight of the evidence. We disagree.

{¶32} Crim.R. 29 governs motion for acquittal. Subsection (A) states the following:

{¶33} "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

{¶34} The standard to be employed by a trial court in determining a Crim.R. 29 motion is set out in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus:

{¶35} "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

{¶36} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of

witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶37} As noted in Assignment of Error I, appellant argues the identification testimony was not credible. Appellant further argues the palm print evidence from the hood of the vehicle was subject to different interpretations as to its origin.

{¶38} The direct identification by a witness and its credibility is a decision for the trier of fact. The covering of the suspects' hair in the photo array so that it would be shorter was consistent with appellant's own admission that his hair was shorter in 1995. The palm print evidence could not have been more than two days old as the vehicle had been washed two days prior to the incident. There was no explanation as to how appellant's palm print appeared on a stranger's car except for Ms. Messenheimer's testimony that one of the assailants leaned against the vehicle's hood. She subsequently identified appellant as one of the assailants.

{¶39} Upon review, we find sufficient evidence to overcome the motion to acquit and support the conviction, and no manifest miscarriage of justice.

{¶40} Assignments of Error IV and V are denied.

{¶41} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.