

## Show-up, ID – Eighth Circuit

### Description

Eyewitness identification practices have come under a great deal of scrutiny as we have come to learn that improper eyewitness IDs are one of the major reasons for bad convictions across the country. Bad convictions have become such an issue that organizations like the Innocence Project have had to step in help fight these injustices. The Innocence Project is a private non-profit organization that investigates claims of wrongful conviction. To date, the organization is responsible for the exoneration of 367 people – 21 of whom were on death row. One of the major factors for convictions in these cases was a bad witness identification. While it is important that we clear cases, it is more important that we arrest the responsible party.

As far back as the 1700's English Jurist William Blackstone observed that "It is better that ten guilty men go free than one innocent suffers." So, let's take a look at what the 8<sup>th</sup> Circuit had to say about this case.

### Facts

On a July evening Justin Summers was riding in a vehicle driven by his wife on an Iowa road. Summers and his wife observed a vehicle parked on the side of the road with heavy front-end damage. Summers also saw a person he described as a "black male, 5'9" to 6', wearing a white hat and dark clothes" standing by the driver's door.

Summers's wife slowed down to see if they could provide assistance to the driver who had apparently been involved in an accident. As the car slowed down Summers saw the suspect throw "something small" into the weeds. Summers claimed the suspect appeared "very agitated" and was fumbling around looking for something on the passenger side of the vehicle. As the Summers pulled up and asked if they could help, the suspect made it clear he did not want any help and the Summers drove away. As they drove off, Mr. Summers turned and saw the suspect throw a pistol into the ditch.

Summers called 911, identified himself, and told the dispatcher what he had just observed and suggested that police respond to the scene. Officers arrived and found the defendant – David Heard – standing by the driver's side of the vehicle. Heard was 5'8" tall and wearing a black t-shirt and blue jeans. Heard was not wearing a hat. Officers searched the area near the car and discovered 27 small bags of marijuana and a handgun which appeared to be recently left there. Officers then arrested Heard.

Approximately one hour after receiving the initial call, police called Justin Summers and asked if he could return to the scene. Once at the scene the officers asked Summers to view the suspect from twenty feet away. The officers instructed Summers "to have an open mind" and that he should tell the officers if the suspect was the person he saw or if this was not the person he saw earlier.

Heard was standing 20' away from Summers and he was handcuffed. Officers shined a spotlight on Heard and Summers, "without hesitation", identified Heard stating that everything was the same except Heard did not have his hat on. Summers also claimed that during the identification process Heard

“gave him the hard look he had given him earlier when they drove up to the car.”

Prior to trial, Heard filed a motion to suppress the eyewitness identification. The court denied the motion and Heard was subsequently convicted. This appeal followed.

### **Eighth Circuit Findings**

On appeal Heard argued that the identification procedure was unnecessarily suggestive, and the trial court failed to provide a jury instruction concerning witness identifications. According to Heard, calling the witness back to the scene and shining a light on the defendant while he stood there handcuffed did not meet the modern standards required for a proper ID.

The court noted that police are not limited to photo arrays or lineups to conduct identification procedures as long as the process is not overly suggestive and began its discussion by reviewing the factors that affect identification reliability. These factors include:

- The opportunity of the witness to view the criminal at the time of the crime;
- The witness's degree of attention;
- The accuracy of the witness's prior description of the suspect;
- The level of certainty demonstrated at the identification; and
- The time between the crime and the identification.

The court noted that Summers testified at the trial that he paid close attention to Heard due to the damage to the car, the clothes Heard was wearing were easily recognizable, little time elapsed between the initial incident and the identification (less than 90 minutes) and Summers was confident of his identification.

With respect to the jury instruction, the court found that the state's case contained much more evidence than simply the identification and, under those circumstances, the judge had discretion to provide the jury instruction. The court then affirmed the trial court ruling.

### **Takeaways**

Whether you have your own agency directive on this highly critical activity or use the [Daigle Law Group Directive on “Eyewitness Identification”](#) it is important that officers follow a set procedure for any witness identification be it a show-up ID, Photographic ID or Lineup ID.

Studies have shown that the instructions given to the witness are just as important as the procedure itself. The DLG directive outlines instructions that need to be provided to the witness BEFORE the identification. Some of the more important instructions include:

- That it is as important to exclude innocent persons as it is to identify the perpetrator;
- That the eyewitness should not feel compelled to make an identification;
- That the eyewitness should take as much time as needed in making a decision;
- That the police department will continue to investigate the offense regardless of whether the eyewitness makes an identification.

Finally, officers must be careful not to provide any information to the witness concerning the suspect or in any way sway the witness towards an identification. When possible, an investigator not familiar with

the case should administer the identification process to assure an objective process.?

**United States v. Heard, No. 18-3411 (8th Cir. 2020)**

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