

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

MATTHEW EVANS,

Defendant.

REPORT AND
RECOMMENDATION

07-cr-159-bbc-4

REPORT

The grand jury has charged defendant Matthew Evans, Troy Thomas, Donald Thompson, Curtis Seaberry and Skye Archambault with armed bank robbery, using firearms during a crime of violence, and conspiracy, based on the November 9, 2007 robbery of the Mid America Bank in Footville, Wisconsin, just West of Janesville.¹ Thomas, Thompson, Seaberry and Archambault have reached plea agreements with the government and will be testifying against Evans at his solo trial. Evans is the only defendant who was not arrested during hot pursuit from the robbery; his claim is that he was not part of this gang, some other guy was the fifth person in the car, and that suggestive identification procedures employed by the police have caused Thomas, Thompson, Seaberry and Archambault all to have mistakenly identified Evans as the guy with whom they spent about five hours at close quarters while planning, driving to, committing and fleeing from the bank robbery. Toward this end, Evans has moved to suppress

¹ Lisa Ramos initially was charged as defendant number 6, but because of her minimal role in this affair she was allowed to plead guilty to a charge of concealing a conspiracy. *See* dks. 140-43. In this report and recommendation, I am disregarding Ramos's limited role and focusing on the five active participants.

the four out-of-court identifications and to prohibit any attempts by these four admitted bank robbers to identify Evans in court as bank robber number five.² The government opposes this motion; Evans's attorney chose not to file a reply brief in support. For the reasons stated below, I am recommending that this court deny Evans's motion.

FACTS

In the fall of 2007, Troy Thomas, a penny-ante crack dealer, lived with his two girlfriends, Lisa Ramos and Skye Archambault. The trio was broke and homeless, sleeping in Thomas's car, a Mercury Grand Marquis, or cheap motels. The three orbited between Orfordville, Wisconsin, where Archambault's family lived, and Rockford, Illinois, where Thomas's friend, Donald Thompson, lived at the "Fairgrounds" housing project. Thomas and Thompson both knew a man named Curtis Seaberry, who also lived at the Fairgrounds.

During at least one of their visits to Orfordville, Thomas and Archambault mused about knocking off the Mid-America Bank in nearby Footville because it seemed ripe for easy picking. The musings accelerated toward action in early November 2007. Thomas, Archambault and Ramos had been staying at a cheap motel near Rockford; apparently on the morning of November 9, 2007, the innkeeper tossed them out for failure to pay the bill. Angry and humiliated, Thomas decided it was time to change his fortunes by robbing the bank.

Although the details are subject to various recollections, it appears that about 8:30 or 9:00 a.m. on November 9, 2007, Thomas, Thompson and Seaberry ended up at the apartment

² Some of these defendants have reported to the government that Evans also has attempted to bribe them to recant their testimony against him but this is not directly relevant to his motion to suppress.

of a man named “Bo-Bo” who lived next door to Thompson at the Fairgrounds. Another man, known to Seaberry as “Toby” and referred to by others as “Lord” showed up to hang out. (In this report and recommendation, I’ll use the nickname Toby). Seaberry had known Toby for about two years and had seen him several times around the Fairgrounds since Seaberry had been released from prison in August 2007. Seaberry knew that Toby had a girlfriend named April because Seaberry’s girlfriend had fought with April and had told Seaberry about it afterward. Thomas, Thompson, Seaberry, Bo-Bo and Toby smoked some dope and convinced themselves that this was a good day to rob the bank. Before they left, Bo-Bo got cold feet and backed out. Ramos was not part of the action that morning and also drops from the narrative.

This left Thomas, Archambault, Thompson, Seaberry and Toby as the operative crew. Thomas had three firearms in the trunk of his car; he kept the sawed-off shotgun, gave a .40 caliber pistol to Thompson, and gave Seaberry a .22 caliber pistol. Toby literally was left holding the bag in which they expected to put the bank’s money. All four men were wearing dark clothing. Seaberry, Thomas and Thompson had “Scream” masks to hide their faces. There was no mask for Toby, so he decided to use his do-rag to cover his face.

The gang drove from Rockford to Archambault’s mother’s house in Orfordville and dropped off Archambault to look for a police scanner. The men drove by the bank in Footville to case it then returned to pick up Archambault. Archambault was unable to produce a working police scanner. Thomas decided they needed a second car for the robbery; the gang drove together to Beloit where they found a Lexus parked in front of a store with the engine running while the owner shopped. They snatched the car and sped off. A distance away, they transferred

the guns, masks and money bag from Thomas's car into the Lexus. Archambault stayed with Thomas's car and agreed to meet them after the robbery for the car-switch and getaway.

The four men drove back to Footville and parked in the parking lot of the Mid America Bank. All four men charged into the bank, weapons drawn and masks on (Toby with his do-rag and money bag). After completing the robbery, they dashed out, jumped into the Lexus and sped off. Thomas was driving with Thompson in the front passenger seat. Seaberry was in the back seat with his acquaintance Toby. The men rendez-voused with Archambault, switched cars and drove off in Thomas's Marquis. Seaberry, Toby and Thompson were in the back seat, with Toby in the middle. Seaberry watched Toby sneak money out of the loot bag and slip it into his socks. Toby glanced at Seaberry to indicate that this was between the two of them. Seaberry said nothing to the others.

As Archambault drove south toward Rockford, a police car pulled up behind her and tailed her without turning on its roof lights. Archambault pulled into a farmhouse driveway and got out of the car to pretend that she was looking for directions. The police car pulled in behind and activated its lights. Seaberry and Toby jumped out of the car and ran off. Thomas took the wheel, Archambault jumped back in and Thomas peeled out at high speed with the officer in hot pursuit. Thomas, Archambault and Thompson made it across the Illinois border but the car ran out of gas. Both were immediately arrested. Back on the Wisconsin side of the border, police quickly apprehended Seaberry. Toby was not apprehended. The time was about 1:00 p.m.

Agents eventually took Seaberry to the Rock County, Wisconsin Sheriff's Department where he was processed and questioned. Thomas, Thompson, Archambault and Lisa Ramos

(who had been arrested upon driving to the scene of the stop in Illinois) were taken to the Winnebago County, Illinois Sheriff's Police headquarters, processed and questioned. Based on the sparse clues provided as to "Toby's" identity—nickname, housing project location, girlfriend's name—the deputies triangulated onto Matthew Evans as their suspect. They pulled up Evans's photograph from their Metro Narcotics Unit's computer database. *See* dkt. 27.

Sheriff's Detective Pete DalPra and FBI Agent Randy Sealby, who were interviewing Troy Thomas, obtained a copy of Evans's photograph, handed it to Thomas and asked if Thomas knew him. Thomas quickly responded to the effect of "Yeah, that's him, that's the guy we were with." Thomas evinced no doubt or hesitation; his only emotion was surprise that the agents had been able to obtain a photo of Evans so quickly. Thomas did not know Evans's name, he just knew him as the other man in the car with him, Thompson and Seaberry.

Following this identification, Detective Dalpra and his chief used a program in the jail's computer to craft a six photo array that included Evans's photograph. Evans's photo ended up in the number three slot. *See* dkt. 29. Detective DalPra then met with Archambault and presented her with a form that stated:

LINEUP/ PHOTO SPREAD NOTICE

You are about to view a lineup of individuals or photographs of individuals. Before you view the lineup, you must read and understand the following statements:

1. The suspect might not be in the lineup or photo spread and thus you are not obligated to make an identification.
2. You should not assume that the person administering the lineup or photo spread knows which person is the suspect in the case.

See dkt. 28.

Archambault signed the form, indicating that she had read and understood it. Detective DalPra then handed Archambault the photo array and asked if she recognized any of the people on it from anywhere. Archambault appeared nervous but in full possession of her faculties. Archambault pointed to photo number three and said that she believed that this was the person who had been with them for the bank robbery but that she was not 100% sure. She explained that she had been in the front seat and hadn't been looking back to see who the fourth man was. She quantified her identification as 60% sure and wrote this on the back of the array. It was 9:50 p.m. *See Exh. 29.*

Detective DalPra then took a fresh copy of the same photo array and advisal form into the room where Thompson was being fingerprinted. Thompson signed the form. Detective DalPra placed the photo array on the counter and asked if Thompson recognized anyone on it. He asked why he was being shown this. Detective DalPra said that they were looking for his cooperation; Thompson retorted that he had been cooperating. Detective DalPra replied that the others had cooperated more because they all had provided statements but Thompson had not. Thompson responded that he thought he could give a statement at any time. Detective DalPra advised that this was not correct: no one would be around over the weekend to talk to him, and once Thompson appeared in court on Monday, they could no longer just call him up and ask him if he would give a statement. Thompson responded that in that case, he wanted to give a statement now and to look at the photo array.

Thompson picked out photo number 3 as the man who had been part of the bank robbery crew, although he did not know the man's name. It was about 10:00 p.m. *See Exh. 31.* Detective DalPra turned Thompson over to other agents to take a statement from him.

The Winnebago County authorities e-mailed their single photo of Evans to the Rock County Sheriff's Department. *See* Gov. Exh. 12. During a break in the Seaberry interview, someone presented a color printout of the photo to the interviewers, FBI Agent Josh Mayers and Sheriff's Detective Warren Yoerger. They took the photo back into the interview room, intending to show it to Seaberry. Before they could do so, while the photo still was facing the agents, that is, upside across the table from Seaberry, Seaberry turned the photo around and told the agents that this was a photo of "Toby," the other guy in the car. It was approximately 10:10 p.m. Given what Seaberry already had told them and the manner in which he had pro-actively identified Evans as Toby, the agents deemed this an unequivocal identification and did not follow-up with additional foundational questions.

ANALYSIS

Evans's motion to suppress raises two interrelated questions. First, were any of the out-of-court identification procedures employed on November 9, 2007 unduly suggestive? If so, then those out-of-court identifications must be suppressed. If not, then these identifications are admissible. If any of these identifications is unduly suggestive, the second question is whether it so tainted the witness's ability accurately to identify the fourth man in this robbery that the witness should be prohibited from attempting to identify that person at Evans's trial. *See United States v. Carter*, 410 F.3d 942, 948 (7th Cir. 2005); *United States v. Rogers*, 387 F.3d 925, 936 (7th Cir. 2004). Although single-photo identification procedures are strongly disfavored, they are not *per se* suggestive. *Manson v. Brathwaite*, 432 U.S. 98, 117 (1977). In assessing the reliability of

an identification made from a suggestive photo identification procedure, courts usually look at five factors:

- (1) The opportunity of the witness to view the event and the actor;
- (2) The degree of the witness's attention;
- (3) The accuracy of the witness's attention;
- (4) The witness's level of certainty; and finally
- (5) The time elapsed between the time and the identification.

United States v. Moore, 115 F.3d 1348, 1360 (7th Cir. 1997). The primary evil to be avoided is a very substantial likelihood of irreparable misidentification. *Id.*, quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

In *Moore*, defendant challenged a six-photo array as unduly suggestive. The court found that it was not, noting that all six individuals shown in the array were African Americans, males, young, with some hair, and had at least some similar features. Each of the individuals was clean shaven, all of the pictures were in black and white, all the photos were the same size, and each photo showed the individual from the shoulders up.

In this case, Evans challenges the photo array because his photograph is smaller than the photos of the other five men, who all are closer to the camera. The observation is true but the conclusion Evans draws from it is a non sequitur. Nothing about Evans's smaller photo draws the eye toward it; if anything, the smaller size drops Evans into the background, particularly compared to Photo 2, which shows a man who is much lighter complected than the other five, and Photo 5, which shows a man wearing a shirt with a dazzling zig-zag pattern.

Apart from this, the circumstances leading to the two photo array identifications clearly establish that these identifications were reliable. Archambault spent several hours in the Marquis driving “Toby” and the other men to and from the robbery. Thompson spent all that time, plus time in the Lexis and in the bank, with Toby and the two other men. The identifications were made on the same day, about ten hours after they last saw Toby flee from the Marquis. Archambault professed only 60% certainty in her identification, explaining that Toby sat behind her in the car so she didn’t get to see him that much. Thompson expressed no uncertainty at all. No word or deed of Detective DalPra or his colleagues served to guide Archambault or Thomas toward Photo 3. In short, the November 9 photo identifications made by Archambault and Thompson are admissible.

This segues to the solo photo identification procedures used with Thomas and Seaberry. Because the call for Seaberry is not even close, I will start with him. However suggestive a solo photo procedure *could* be in theory, this procedure was incapable of being suggestive to Seaberry in this case. The police should have waited until they had a photo array to avoid raising this unnecessary suppression issue, but their failure to do so doesn’t require exclusion of Seaberry’s November 9 identification of Evans’s photo.³ Seaberry expressed no hesitation whatsoever; in fact, he short-circuited the identification process by taking the upside-down photo of Evans from

³ It may be that the agents interviewing Seaberry were confident that using a single photo was not suggestive because of Seaberry’s report of how long he had known Toby. Regardless, the use of a one photo “show up” is always an unnecessary investigative risk.

the other side of the table, turning it right-side-up and declaring Evans to be Toby. It was an instantaneous, unequivocal identification.

How could it have been otherwise? Seaberry had known Toby for about two years before the robbery, had seen him several times recently around the Fairgrounds, knew who his girlfriend was, and had sat knee-to-knee with him in the Marquis and the Lexis for several hours while traveling to and from the robbery. Seaberry could describe Toby's disguise (a do-rag) and what he carried (the money bag). Seaberry was not a victim caught off guard who had 30 seconds to look at a group of fast-moving robbers during the most stressful minute of his life; Seaberry was identifying a fellow robber with whom he had spent the entire morning in the back seat of a car. It was virtually impossible to taint his identification of Toby by showing him a single photo of Evans on the same day as the robbery. However preferable a photo array might have been as a procedural matter, as a practical matter the failure to use one did not affect the outcome. In this particular case on these particular facts, the identification procedure was not unduly suggestive. This court should not suppress Seaberry's November 9 photo identification of Evans and it should not prohibit Seaberry from attempting to identify the fourth bank robber at Evans's trial.

This leaves Thomas's identification, which is the only close call in the group. As with Seaberry, the police should have generated a six photo array before showing him any pictures. Perhaps they were willing to take a chance with Thomas before generating a "six-pack" because they wanted some corroboration of their suspicions before taking the time to run the photo array program. In any event, the test is objective, not subjective; either the procedure was unduly

suggestive or it wasn't, and the deputies' thought processes are secondary or tertiary concerns at most.

The court could go either way on Thomas's November 9 identification of Evans's photo. Thomas had not known "Toby" before that day so he did not have the background with him that Seaberry had. On the other hand, Thomas was the leader of this motley crew and he spent several hours in the car with Toby traveling to and from the robbery. When handed the photo, Thomas quickly and unequivocally identified him as the guy who was with them that morning for the bank robbery. Although it is less clear-cut than in Seaberry's case, this is another situation in which the totality of circumstances militates against finding this one-photo procedure unduly suggestive. I am recommending that this court allow the government to present this photo identification at trial and to ask Thomas to attempt to identify Toby.

On the other hand, the exclusionary rule is intended as a crude behavioral modification technique for police. The best way to train police not to use photo show-ups would be to punish them when they do so. Hopefully then, in some future case that is closer and where the photo-identification could be outcome determinative, the police will do it by the book so as to avoid suppression and the implosion of their case. In the end, society as a whole benefits, the goal of every utilitarian. If this court were to choose this approach, then I would recommend that it nonetheless allow Thomas to attempt to identify Toby at Evans's trial since there is almost no chance that the unduly suggestive nature of the photo show-up permanently tainted Thomas's

ability accurately to identify Toby if he sees him again.⁴ This would not be true in most cases, but it is a virtual certainty here.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny all of defendant Matthew Evans's pending motions to suppress evidence.

Entered this 29th day of February, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

⁴ Evans hasn't advanced his cause by reportedly attempting to bribe Thomas, Thompson and Seaberry to change their stories. *See* Exh. 36 at 5. Obviously, all four men see each other at the jail and are talking to each other about the case. It's difficult to see the point of this motion to suppress other than an attempt to throw some legal spaghetti against the wall to see if it will stick.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

120 N. Henry Street, Rm. 540
Post Office Box 591
Madison, Wisconsin 53701

Chambers of
STEPHEN L. CROCKER
U.S. Magistrate Judge

Telephone
(608) 264-5153

February 29, 2008

Daniel Graber
Assistant United States Attorney
P.O. Box 1585
Madison, WI 53703-1585

Mark Maciolek
Samuel Phillip Law Offices, LLC
44 East Mifflin St., Ste. 802
Madison, WI 53703

Re: ___ United States v. Matthew Evans
Case No. 07-cr-159-bbc-4

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the newly-updated memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before March 10, 2008, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by March 10, 2008, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

cc: Honorable Barbara B. Crabb, District Judge

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

- (1) injunctive relief;
- (2) judgment on the pleadings;
- (3) summary judgment;
- (4) to dismiss or quash an indictment or information;
- (5) to suppress evidence in a criminal case;
- (6) to dismiss or to permit maintenance of a class action;
- (7) to dismiss for failure to state a claim upon which relief can be granted;
- (8) to dismiss actions involuntarily; and
- (9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth

with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. See *United States v. Hall*, 462 F.3d 684, 688 (7th Cir. 2006).