

U.S. v. Bruce

(9th Cir. 2021) __ F.3d __ [2021 WL 98242]

Issue

In attempting to identify a perpetrator, under what circumstances may officers show a witness a single photo of the suspect?

Facts

David Bruce was a correctional officer at the federal penitentiary at Atwater, California. He was also smuggling drugs into the facility. His side-hustle was uncovered as the result of a random search of a vehicle entering the facility. The occupants of the vehicle, Thomas and Tracy Jones, were arrested after officers found four vacuum-packed bags of marijuana and a package of heroin.

Thomas cooperated with investigators and said he was supposed to give the drugs to a correctional officer he knew only as “Officer Johnson.” According to Thomas, someone would deliver the drugs to his home, and he would pass them to Officer Johnson during clandestine meetings in a parking lot near the facility.

He also provided investigators with a physical description of Officer Johnson, including the Pittsburgh Steeler’s hat had been wearing. So, one of the investigators obtained a Facebook photo of Bruce and showed it to Thomas who positively identified him as Officer Johnson.

Bruce was arrested when he arrived at the parking lot, expecting to meet with Thomas. He was charged with, among other things, attempting to distribute drugs, conspiracy and bribery. At his trial, the prosecution was permitted to present testimony that Thomas had identified Bruce as Officer Johnson, and he was convicted.

Discussion

Bruce argued that Thomas should not have been permitted to identify him as his contact because an identification made by showing the witness a single photo is impermissibly suggestive. It is settled that a lineup or other identification procedure that was otherwise fair may be deemed impermissibly suggestive if officers said or did something beforehand that would have prompted the witness to focus on the suspect.¹ And it is equally settled that showing a witness a single photograph—and then effectively asking “Is this the guy?”—is glaringly suggestive.

Even so, there are situations in which such a procedure is permitted. Specifically, an identification by a witness will not ordinarily be suppressed if the witness had a clear memory of the suspect’s appearance, usually because he and the suspect were friends or relatives. For example, it would hardly be suggestive to show a witness a single photo of his fugitive mother and ask, “Is that your mother?”

Although Bruce was an accomplice, not a friend or relative, the court ruled that the same principle applied because Thomas had an ongoing relationship with Bruce. As the

¹ See: *Moore v. Illinois* (1977) 434 US 220, 224-25 “Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they suspect the witness to identify the accused. Such a suggestion, coming from a police officer or prosecutor, can lead a witness to make a mistaken identification.”]; *Simmons v. US* (1968) 390 US 377, 383 “[The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.”].

court explained, “Unlike witnesses who are startled by a crime in progress, [Thomas] ventured out to meet with ‘Officer Johnson’ on two occasions and voluntarily got into his car both times. The two men were in close proximity and the second meeting took place just 15 days before Jones was stopped and questioned at the checkpoint.” Accordingly, the court ruled that, under these circumstances, the identification was reliable. POV

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