

ISSUE

Did officers have probable cause to arrest a rape suspect?

FACTS

A series of rapes occurred in Long Beach during an 18-month period. There were indications they might have been committed by the same man (the news media dubbed them the “Belmont Shores Rapes”) but many victims did not see the attacker, others got only a glimpse of him in darkness, and their descriptions varied significantly. Two victims didn’t know the attacker’s race, two described him as Hispanic, three described him as white. One victim said he was 5’10”-5’11” with lightly tanned skin, another said he was 5’7”-5’8” with dark skin.

Immediately after one of the attacks, officers summoned a police bloodhound to the scene. After detecting a “scent pad,” the dog led officers to a 20-unit apartment building almost two miles away. The dog went directly to the second floor but did not alert to any particular apartment or person.

At this point, officers noticed that the lights in one of the first floor units were on. They knocked on the door but no one answered. They tried to pick the lock but couldn’t get the door open. According to the court, this caused them to become “even more suspicious.” When officers determined that the occupant of the unit was Grant, they considered him a “possible suspect.”

After obtaining a DMV photo of Grant, officers put together a six-person photo lineup which they showed to the nine victims. Five of the photos were of Hispanic men. Grant was the only Caucasian.¹ Only two of the victims made an identification. One identified Grant positively, the other said she was “pretty sure.”

The woman who made the positive ID was not raped; she was awakened by the sound of someone trying to break into her home. She phoned 9-1-1 and described the man as a “5’7” Hispanic with dark skin tone and short hair. About two weeks later, she was shown a six-person photo lineup after which she tentatively identified a man named Hernandez. About three months later (after Grant had become a suspect), she was shown another six-person photo lineup from which she positively ID’d Grant.

The woman who made the tentative ID awoke to find a man crawling on her bedroom floor. They struggled, she caught a glimpse of the man’s face, then the man threw a blanket over her head. When she phoned 9-1-1 she described the man as white, with olive-toned skin, about 5’10”-6’ tall. About three weeks later (before Grant had become a suspect) she was shown a six-person photo lineup in which she tentatively ID’d a man named Oliver. About four months later (after Grant had become a suspect), she was shown another six-person photo lineup: she said she was “pretty sure” Grant was the attacker.

At this point, officers arrested Grant without a warrant. About three months later he was eliminated as a suspect as the result of DNA testing. He was released from jail and all charges were dropped. He then filed a federal civil rights lawsuit against the investigating officers. The jury awarded him \$1.75 million dollars.

DISCUSSION

¹ **NOTE:** The court did not dispute Grant’s allegation that the officers “placed his photograph next to photographs of five other individuals that neither shared his race nor general facial characteristics.”

The central issue on appeal was whether the officers did, in fact, have probable cause.² The court noted that probable cause to arrest would have existed if a prudent person would have concluded there was a fair probability that Grant committed the crimes.³ As noted, probable cause to arrest Grant was based primarily on the identifications made by two of the victims.⁴ The question, then, was whether these identifications were sufficiently reliable.

In determining the reliability of an ID made at a physical or photo lineup, the courts consider, (1) whether the lineup was impermissibly suggestive, and (2) whether there was reason to believe the identification was accurate.

Suggestiveness

Grant contended the photo lineups were impermissibly suggestive for three reasons: (1) he was the only Caucasian in the lineup (nearly half the victims described the attacker as Caucasian); (2) he was physically dissimilar to the fillers; and (3) his skin tone stood out because it was closest to that described by the victims. The court agreed the lineups were impermissibly suggestive, noting:

Grant's features bear little resemblance to the others in the array. His face appears long and narrow, whereas four of the other five individuals have rounder, fuller faces. Similarly, Grant's skin tone appears significantly lighter than four of the five other individuals in the array. That five victims identified their assailant as either Hispanic with light-toned skin or Caucasian with olive-toned skin renders this difference even more salient.

Reliability

Even if a lineup was suggestive, an identification by a witness might establish probable cause if the surrounding circumstances reasonably indicated the ID was reliable. In determining the reliability of a witness's identification, the courts consider the totality of circumstances, especially the following:⁵

² **NOTE:** The other issue was whether the officers were entitled to qualified immunity. The court ruled they were not, mainly because they "took no steps to protect the identification procedure from suggestiveness nor to verify the accuracy of the identifications once made. A material issue of fact existed as to whether a reasonable officer would have relied on questionable eyewitness identifications without further verification."

³ See *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, 1111 ["Probable cause to issue an arrest or search warrant [exists if] there is a fair probability that a person has committed a crime or a place contains contraband or evidence of a crime."]; *U.S. v. Carranza* (9th Cir. 2002) ___ F.3d ___ ["Probable cause existed if under the totality of circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the suspect] committed a crime."]; *U.S. v. Valencia-Amezcu*a (9th Cir. 2002) 278 F.3d 901.

⁴ **NOTE:** Probable cause was also based on two other circumstances: (1) Grant generally resembled the vague physical descriptions provided by the other victims, and (2) the bloodhound tracked a scent to Grant's apartment building. Neither was deemed significant by the court. In discussing the ID's, the court said, "[M]ere resemblance to a general description is not enough to establish probable cause." In discussing the bloodhound, the court noted she did not show any interest in Grant's apartment. The court also noted that when the dog arrived on the second floor, she "showed signs of confusion," that she was a young dog "with only 150 opportunities to track during both training and active duty," and that the officers "did not provide any evidence regarding [the dogs'] accuracy rate to bolster her reliability." The court concluded, "The jury had good reason to question the reliability of [the dog's] 'identification.'"

⁵ See *Neil v. Biggers* (1972) 409 US 188, 198-200; *Simmons v. United States* (1968) 390 US 377, 385; *Manson v. Brathwaite* (1977) 432 US 98, 106-14; *Moore v. Illinois* (1977) 434 US 220, 229; *People v. Cunningham* (2001) 25 Cal.4th 926, 989; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052; *People v. Nguyen* (1994) 23 Cal.App.4th 32, 39; *People v. Phan* (1993) 14 Cal.App.4th 1453,

- OPPORTUNITY TO SEE PERPETRATOR: Did the witness get a good look at the perpetrator? Relevant circumstances include the amount of time the witness saw the perpetrator, lighting conditions, and the distance between the perpetrator and the witness.
- ATTENTION DIRECTED TO PERPETRATOR: Did the witness actually pay attention to the perpetrator's physical features?
- ACCURACY OF DESCRIPTION: How accurate was the witness's initial description of the perpetrator?
- DEGREE OF CERTAINTY: How certain was the witness that the defendant was the perpetrator?
- TIME LAPSE: How much time lapsed between the crime and the identification?
- ACCURACY IN OTHER LINEUPS: A witness's ID is less reliable if the witness failed to identify the defendant in a previous lineup or misidentified another person.

Applying these circumstances to the facts, the court ruled the jury's verdict was supported by the evidence. Among other things, the court pointed out:

[The woman who made the positive ID] viewed her assailant standing outside her window from inside her home for only a few seconds after being startled awake. Moreover, she identified Grant almost three months after the attempted break-in and after having tentatively identified another man. Although [the woman who said she was "pretty sure" Grant was the attacker] had a greater opportunity to view her assailant as they struggled in close proximity, the entire encounter lasted only minutes and her head was partially covered by a blanket part of the time. [She] also made a tentative identification of another individual before she selected Grant.

Consequently, the court affirmed the jury's verdict and award.

1462; *U.S. v. Duran-Orozco* (9th Cir. 1999) 192 F.3d 1277, 1282; *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1219-20; *People v. Fortier* (1970) 10 Cal.App.3d 760, 764-5; *People v. Edwards* (1981) 126 Cal.App.3d 447, 454; *People v. Kilpatrick* (1980) 105 Cal.App.3d 401, 412; *People v. Sanders* (1990) 51 Cal.3d 471, 508; *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 557; *People v. Blair* (1979) 25 Cal.3d 640, 662. *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386.