SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interest of brevity, portions of any opinion may not have been summarized.)

State v. Dorian Pressley (A-52-16) (078747)

Argued January 30, 2018 -- Decided April 19, 2018

PER CURIAM

Counsel for both sides raise an intriguing question: whether an identification made by a law enforcement officer should be tested by the same standards that apply to a civilian. See State v. Henderson, 208 N.J. 208, 248-72, 287-93 (2011).

In this case, the State presented strong evidence that defendant Dorian Pressley distributed cocaine. According to the testimony at trial, defendant sold two vials of cocaine directly to an undercover detective on April 30, 2013. At the end of the face-to-face exchange, defendant gave the detective his phone number and told her to store the number under the first three letters of his name. A second officer observed the transaction. Immediately after the sale, the undercover officer transmitted a description of defendant to a supervisor. The second officer also radioed information about defendant's movements. About four blocks from where the sale took place, a third officer stopped defendant, who matched the description. The officer realized he knew the suspect—as Dorian Pressley—and let him go to protect the ongoing undercover operation. Back at headquarters, the third officer printed a photo of defendant. The undercover detective also returned to headquarters. Within one hour of the transaction, she viewed the single photo of Dorian Pressley and said she was certain that the individual in the picture had sold her the two vials. Defendant was arrested and convicted after trial of third-degree possession of heroin, third-degree distribution of cocaine, and third-degree distribution of cocaine within 1000 feet of a school.

On appeal, defendant argued that the trial court should have held a pretrial hearing to evaluate the reliability of the identification, and that the prosecutor committed misconduct in her summation. The Appellate Division affirmed defendant's conviction. The Court granted certification. 229 N.J. 609 (2017).

HELD: Based on the record, the Court cannot determine whether part or all of the protections outlined in Henderson should apply to identifications made by law enforcement officers. For the reasons expressed, the Court affirms the judgment of the Appellate Division and upholds defendant's convictions.

1. Defendant claims that "police officers are not more accurate eyewitnesses than civilians." He relies on social science research and cites multiple published studies. The State and the Attorney General, in turn, submit that the risk of undue suggestiveness is remote when a trained officer is involved. They also rely on social science. (pp. 3-4)

2. The Court is not aware of case law that has reviewed the social science evidence with care. The Court encourages parties in the future to make a record before the trial court, which can be tested at a hearing by both sides and then assessed on appeal. (pp. 5-6)

3. Even if the trial judge in this case had held a pretrial hearing, though, it is difficult to imagine that the identification would have been suppressed. Although showups are inherently suggestive, "the risk of misidentification is not heightened if a showup is conducted" within two hours of an event. Henderson, 208 N.J. at 259. Here, the identification took place within an hour. In addition, the trial judge gave the jury a full instruction on identification evidence, consistent with Henderson and the model jury charge. (pp. 6-7)

4. The Rule 104 hearing held in this case did not substitute for a pretrial hearing on the identification evidence. Although there are some references to the identification process, the hearing did not probe or assess the relevant system and estimator variables. Nor did this case involve a "confirmatory" identification, which is not considered suggestive. A confirmatory identification occurs when a witness identifies someone he or she knows from before but cannot identify by name. Here, the undercover detective first met defendant during the drug transaction. (pp. 7-8)

5. During summation, defense counsel commented on the Attorney General's Guidelines for identification procedures and argued that "[t]here's no exception in [them] for police officer witnesses." In response, the prosecutor argued (a) that the "Guidelines for the most part do address the possible misidentification when there is a lay witness"—which was not untrue; (b) that the witness was "a law enforcement officer who's trained to do what occurred here today"—which was also not untrue; and (c) that the officer made a "confirmatory identification." The last comment misstated the law, but it does not appear that the jury received any instruction on the meaning of the term. The remark was not capable of producing an unjust result—particularly in light of the overwhelming evidence of defendant's guilt. (pp. 8-9)

The judgment of the Appellate Division is **AFFIRMED**.

JUSTICE ALBIN, CONCURRING, is prepared today to hold that, even in the case of police witnesses, whenever practicable, an identification procedure should be conducted by the showing of a photographic array rather than a single photograph. Highly suggestive identification procedures, such as the showing of a single photograph (a photographic "showup") ordinarily should result in a Wade hearing, United States v. Wade, 388 U.S. 218 (1967), in Justice Albin's view.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, PATTERSON, FERNANDEZ-VINA, SOLOMON, and TIMPONE join in this opinion. JUSTICE ALBIN filed a separate, concurring opinion.

SUPREME COURT OF NEW JERSEY
A-52 September Term 2016
078747

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DORIAN PRESSLEY, a/k/a JUSTIN BELTON,

Defendant-Appellant.

Argued January 30, 2018 – Decided April 19, 2018

On certification to the Superior Court, Appellate Division.

Frank J. Pugliese, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Frank J. Pugliese, of counsel and on the brief).

Stephanie Davis Elson, Assistant Prosecutor, argued the cause for respondent (Esther Suarez, Hudson County Prosecutor, attorney; Erica M. Bertuzzi, Assistant Prosecutor, on the brief).

Sarah E. Elsasser, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Gurbir S. Grewal, Attorney General, attorney; Sarah E. Elsasser, of counsel and on the brief).

PER CURIAM

In this case, the State presented strong evidence that defendant Dorian Pressley distributed cocaine. According to the

testimony at trial, defendant sold two vials of cocaine directly to an undercover detective on April 30, 2013. At the end of the face-to-face exchange, defendant gave the detective his phone number for future use and told her to store the number in her phone under "D-O-R" -- the first three letters of his name. A second officer observed the transaction through binoculars from about twenty feet away.

Immediately after the sale, the undercover officer transmitted a description of defendant to a supervisor. She relayed that he wore a red baseball hat, a red Adidas warm-up jacket, and khaki pants. The second officer also radioed information about defendant's movements.

About four blocks from where the sale took place, a third officer stopped defendant, who matched the description. The officer realized he knew the suspect -- as Dorian Pressley -- and let him go to protect the ongoing undercover operation. Back at headquarters, the third officer printed a photo of defendant.

The undercover detective also returned to headquarters. Within one hour of the transaction, she viewed the single photo of Dorian Pressley and said she was certain that the individual in the picture had sold her the two vials.

Defendant was arrested months later and proceeded to trial. During the trial, the judge conducted a Rule 104 hearing and

found that defendant's statements to the undercover agent during the transaction were admissible.

The jury convicted defendant of third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1); third-degree distribution of cocaine, N.J.S.A. 2C:35-5(a)(1) and (b)(3); and third-degree distribution of cocaine within 1000 feet of a school, N.J.S.A. 2C:35-7. The first charge related to defendant's possession of heroin at the time of his arrest. Defendant was sentenced to an aggregate term of ten years' imprisonment.

On appeal, defendant argued that the trial court should have held a pretrial hearing to evaluate the reliability of the identification, and that the prosecutor committed misconduct in her summation. The Appellate Division affirmed defendant's conviction. We granted certification. 229 N.J. 609 (2017). We also granted the Attorney General leave to appear as amicus curiae.

I.

Defendant argues that the trial court should have granted his request for a pretrial hearing, pursuant to United States v. Wade, 388 U.S. 218 (1967), and State v. Henderson, 208 N.J. 208 (2011), because he made a sufficient showing that the identification procedure used in this case was impermissibly suggestive. He claims that the identification was essentially a showup and that an officer unfamiliar with the investigation

should have presented a photo array -- instead of a single picture -- to the undercover detective.

The State and the Attorney General stress that police officers are "trained observers and trained witnesses" whose job requires them to remember details and faces when they conduct an investigation. They contend that when an officer "merely confirm[s] the identity of a suspect she was just investigating," a photo array is unnecessary and no Wade hearing is required.

Counsel for both sides raise an intriguing question: whether an identification made by a law enforcement officer should be tested by the same standards that apply to a civilian. See Henderson, 208 N.J. at 248-72, 287-93. Defendant claims that "police officers are not more accurate eyewitnesses than civilians." For support, he relies on social science research and cites multiple published studies. The State and the Attorney General, in turn, submit that the risk of undue suggestiveness is remote when a trained officer is involved. They also rely on social science articles, but for the proposition that "police officers are more accurate at remembering details of a crime than" members of the public. Collectively, counsel cite a half dozen publications for the Court's consideration.

We are not aware of case law that has reviewed the social science evidence with care. Defendant points to Manson v. Brathwaite, 432 U.S. 98 (1977), the seminal federal case on identification evidence. Defendant correctly observes that Manson, in part, involved similar facts. One of the identifications in that case related to an undercover officer who bought narcotics from a dealer; two days later, another officer showed the undercover agent a single photo to try to identify the suspect. Id. at 100-01. The Supreme Court upheld the identification but noted that, "[o]f course, it would have been better had" the undercover officer been presented "with a photographic array" with "a reasonable number of persons" who looked like the suspect. Id. at 117.

Implicit in the ruling is a simple concept: identifications by law enforcement officers should be examined to determine if an "impermissibly suggestive" identification procedure was used and to assess whether a defendant has proven "a very substantial likelihood of irreparable misidentification." Henderson, 208 N.J. at 238 (summarizing federal law); State v. Madison, 109 N.J. 223, 232 (1988) (same). To be sure, however, the Supreme Court did not address the precise question this appeal presents. Nor did this Court's decision in Henderson.

In 1997, the Appellate Division in State v. Little touched lightly on the issue when it observed that "[t]here can be no dispute that a trained undercover police officer has heightened awareness of the need for proper identification of persons who engage in drug purveyance." 296 N.J. Super. 573, 580 (App. Div. 1997). The opinion cites no sources and does not analyze any social science evidence. The same is true for the out-of-state decisions that the Attorney General has brought to our attention.

Based on the record before us, we cannot determine whether part or all of the protections outlined in Henderson should apply to identifications made by law enforcement officers. We encourage parties in the future to make a record before the trial court, which can be tested at a hearing by both sides and then assessed on appeal. See State v. Adams, 194 N.J. 186, 201 (2008) (declining to adopt new standard for admissibility of identification evidence without full record to review); State v. Herrera, 187 N.J. 493, 501 (2006) (same).

Even if the trial judge in this case had held a pretrial hearing, though, it is difficult to imagine that the identification would have been suppressed. Although showups are inherently suggestive, "the risk of misidentification is not heightened if a showup is conducted" within two hours of an event. Henderson, 208 N.J. at 259. Here, the identification

took place within an hour. In addition, the trial judge gave the jury a full instruction on identification evidence, consistent with Henderson and the model jury charge.

We do not find that the Rule 104 hearing held in this case substituted for a pretrial hearing on the identification evidence. The hearing focused on whether defendant's statements to the undercover officer during the course of the drug sale could be admitted. Although there are some references to the identification process, the hearing did not probe or assess the relevant system and estimator variables.

Nor do we believe that this case involved a "confirmatory" identification, which is not considered suggestive. A confirmatory identification occurs when a witness identifies someone he or she knows from before but cannot identify by name. See, e.g., National Research Council, Identifying the Culprit: Assessing Eyewitness Identification 28 (2014) ("Confirmatory Photograph: Police will, on occasion, display a single photograph to a witness in an effort to confirm the identity of a perpetrator. Police typically limit this method to situations in which the perpetrator is previously known to or acquainted with the witness."); Sides v. Senkowski, 281 F. Supp. 2d 649, 654 (W.D.N.Y. 2003) ("parties knew each other previously"). For example, the person may be a neighbor or someone known only by a street name. See Identifying the Culprit, at 22. Here, the

undercover detective first met defendant during the drug transaction.

II.

We briefly address defendant's argument that the prosecutor engaged in misconduct in her summation and deprived him of a fair trial. Defendant first raised the argument on appeal. Because he failed to object at trial, we review the challenged comments for plain error. See R. 2:10-2. Under that standard, an appellate court can reverse only if it finds that the error was "clearly capable of producing an unjust result." Ibid.; State v. Cole, 229 N.J. 430, 458 (2017).

Prosecutors can sum up cases with force and vigor, and are afforded considerable leeway so long as their comments are "reasonably related to the scope of the evidence presented." State v. Timmendequas, 161 N.J. 515, 587 (1999). In carrying out their duties, prosecutors must always have in mind that their obligation is to do justice, not to win cases. See Berger v. United States, 295 U.S. 78, 88 (1935).

A defendant's allegation of prosecutorial misconduct requires the court to assess whether the defendant was deprived of the right to a fair trial. State v. Jackson, 211 N.J. 394, 407 (2012). To warrant reversal on appeal, the prosecutor's misconduct must be "clearly and unmistakably improper" and "so egregious" that it deprived defendant of the "right to have a

jury fairly evaluate the merits of his defense." State v. Wakefield, 190 N.J. 397, 437-38 (2007) (quoting State v. Papasavvas, 163 N.J. 565, 625 (2000)). In general, when counsel does not make a timely objection at trial, it is a sign "that defense counsel did not believe the remarks were prejudicial" when they were made. State v. Echols, 199 N.J. 344, 360 (2009).

During summation, defense counsel attacked the State's witnesses and argued that "in this case we have some [officers who] are not honest and upstanding." Counsel also commented on the Attorney General's Guidelines for identification procedures and argued that "[t]here's no exception in [them] for police officer witnesses."

In response, the prosecutor argued (a) that the "Guidelines for the most part do address the possible misidentification when there is a lay witness" -- which was not untrue; (b) that the witness was "a law enforcement officer who's trained to do what occurred here today" -- which was also not untrue; and (c) that the officer made a "confirmatory identification." The last comment misstated the law, but it does not appear that the jury received any instruction on the meaning of the term. We do not find that the remark was capable of producing an unjust result -- particularly in light of the overwhelming evidence of defendant's guilt.

III.

We therefore affirm the judgment of the Appellate Division and uphold defendant's convictions.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, PATTERSON, FERNANDEZ-VINA, SOLOMON, and TIMPONE join in this opinion. JUSTICE ALBIN filed a separate, concurring opinion.

SUPREME COURT OF NEW JERSEY
A-52 September Term 2016
078747

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DORIAN PRESSLEY, a/k/a JUSTIN BELTON,

Defendant-Appellant.

JUSTICE ALBIN, concurring.

I concur with the Court's per curiam judgment affirming defendant's conviction in light of the overwhelming evidence of his guilt. The failure to conduct a pretrial identification hearing and the prosecutor's erroneous statement in summation would not have changed the outcome of this case.

Unlike my colleagues, however, I would not elide the issue of whether a suggestive identification procedure should trigger a pretrial Wade hearing when a law enforcement officer is the eyewitness. United States v. Wade, 388 U.S. 218 (1967). The issue is too important and the answer too obvious to await a resolution in the indefinite future. The showing of a single photograph is inherently suggestive, whether the witness is a layperson or a police officer. Even if we accept that police officers have enhanced observational skills, common sense and

our jurisprudence tell us that exposing police officers to highly suggestive identification procedures inevitably will lead to more misidentifications and more wrongful convictions.

I am therefore prepared today to hold that, even in the case of police witnesses, whenever practicable, an identification procedure should be conducted by the showing of a photographic array rather than a single photograph. Highly suggestive identification procedures, such as the showing of a single photograph (a photographic "showup") ordinarily should result in a Wade hearing.

I.

A.

This Court has acknowledged that presenting an eyewitness with a single photograph is an "inherently suggestive" identification procedure. See State v. Henderson, 208 N.J. 208, 259-61 (2011); State v. Herrera, 187 N.J. 493, 504 (2006). When a police officer presents a witness with a single photograph of a suspect, he is "conveying the suggestion to the witness that the one presented is believed guilty." See Wade, 388 U.S. at 234. Even in a case involving an undercover police officer who was shown a single photograph to identify the dealer from whom he made a purchase, the United States Supreme Court stated that the suggestive procedure may have had a "corrupting effect." Manson v. Brathwaite, 432 U.S. 98, 99-100, 114 (1977).

After Manson, courts appear to routinely conduct pretrial hearings when police witnesses are exposed to highly suggestive procedures, such as the single photographic showup. See, e.g., United States v. Jones, 689 F.3d 12, 14-15 (1st Cir. 2012) (noting district court's finding that showing of single photograph to undercover law enforcement officer was "impermissibly suggestive"); United States v. Smith, 429 F. Supp. 2d 440, 449-50 (D. Mass. 2006) (finding that use of "single-photo identification" in undercover agent's identification of arms dealer "was impermissibly suggestive"); State v. Martin, 595 So. 2d 592, 595 (La. 1992) (concluding that single photograph identification by undercover detective "was both suggestive . . . and unnecessary, because there was no emergency or exigent circumstance involved").

We do not need additional social science evidence to reach the obvious conclusion that the showing of a single photograph is as inherently suggestive to a police witness as it is to a lay eyewitness. Although police officers will be better prepared to remember an individual's features in certain circumstances, such as during undercover operations, there is no evidence that police officers as a class have enhanced or superhuman identification abilities. Their memory -- like all human memory -- will be subject to "vagaries" and "malleability." See Henderson, 208 N.J. at 241-48, 283. There

is no reason to believe that the memory of a police officer, even one whose awareness is heightened during a criminal encounter, cannot be corrupted by a suggestive identification procedure.

B.

To obtain a pretrial Wade hearing, a defendant need only show "some evidence of suggestiveness" in the identification procedure that could lead to a mistaken identification. Id. at 288-89 (emphasis added). Law enforcement officers control the "system variables" -- the variables related to the identification procedure -- and therefore they control the integrity of the identification process. See id. at 218.

In Henderson, we set forth a best practices model for a fair identification procedure. An officer conducting a photographic lineup should not know who the suspect is or where the suspect's photograph is located in the lineup. Id. at 248. That approach removes the possibility that the officer, who is administering the identification procedure, will suggest even unconsciously which photograph the witness should select. Id. at 248-49. The photographic array should consist of at least six photographs, including one of the suspect. Id. at 251-52. Additionally, the witness should be told that the suspect may or may not be in the lineup and not to feel compelled to make an identification. Id. at 250.

We have taken exquisite measures to ensure that law enforcement officers follow procedures that will enhance the fairness of eyewitness identifications. Surely, if those procedures will minimize the potential for misidentification by lay witnesses, they will have the same beneficent effect when applied to police witnesses.

To warrant a pretrial hearing, a defendant need only show that one of the procedural variables under law enforcement's control presented "some evidence of suggestiveness." Id. at 288. Law enforcement controls whether a witness is shown a single photograph or an array of six photographs. The State should bear the burden of presenting evidence that a photographic showup was necessary because the production of an array would have unreasonably delayed the identification process. At the hearing, as always, the court will assess the overall reliability of the identification, including in the case of a police officer, his or her training and/or heightened awareness for making an identification.

II.

The unnecessary use of inherently suggestive identification procedures, even in the case of a trained undercover detective, as here, cannot be squared with the logic of Henderson. The system variables discussed in Henderson address the frailty of human memory, not just a layperson's memory, and Henderson lays

out a framework for using non-suggestive identification procedures that will reduce the likelihood of misidentification. That framework should apply across the board because a miscarriage of justice occurs whether a misidentification comes from a lay witness or a police witness.

Certainly, there will be times when it is not practicable to prepare a photographic array for a police witness; on those occasions the circumstances may necessitate showing only a single photo. See id. at 261. Nothing in the record, however, indicates that the police were unable to generate a photographic array without undue delay to present to the undercover detective in this case. The showing of a single photograph to the detective -- defendant's photograph -- certainly signaled to the detective that her police colleagues had "confirmed" defendant as the drug seller.

In sum, the identification procedure used was sufficiently suggestive to warrant a pretrial hearing. The State should have been required to demonstrate the reliability of the identification despite the use of a single photograph.

Additionally, going forward, when an officer makes an identification from an inherently suggestive photographic showup, the State should explain why it was not feasible to use a photographic array. If its response is unsatisfactory, then the court should consider giving a charge that would allow the

jury to draw an adverse inference from the State's use of an unnecessarily suggestive identification procedure. This will provide an inducement for the police to use non-suggestive identification techniques. The consistent use of reliable identification procedures, such as photographic arrays, whenever practicable, is the best way to minimize the potential for misidentifications.

III.

For the reasons expressed, I believe the Court has passed up an important opportunity to apply the principles of Henderson to police witness identifications and thus ensure greater fairness in the criminal justice process.