

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

THOMAS A. SHAY

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CRIMINAL NO. 92-10369-Z

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS IDENTIFICATION

The defendant Thomas Shay Jr. has filed a motion to suppress both the out of court identification of his single photograph by Dwayne Armbrister in February and March 1992, and the in-court identification by the same witness. By every measure, the pre-trial identification procedures used by the Government, are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377 (1968).

A. Introduction

On February 20, 1992, Armbrister was asked to identify an individual who had been in the store four to five months previously, on October 18, 1991. Unlike an identification following a crime, this identification involved a relatively routine, trivial transaction, the purchase of inexpensive electronic components. Armbrister had waited on perhaps thirty customers a day during the remainder of October, and into November; he had waited on substantially more during December's holiday season. Then, shortly before New Years, a beloved grandfather died and he left the area

entirely until mid February, 1992. Nothing about the event made it likely to stick in his mind; nothing about the intervening months made it likely that he would retrieve these memories independently.

On February 20, 1992 Armbrister was shown a receipt for the purchase of certain electronic components (Exhibit 1). He could reconstruct the transaction from the notations on the receipt, but he had no picture of the client in his mind, no prior description whatsoever.

He was shown a photo array with Shay, Jr.'s picture in it and he was unable to identify the defendant. Then he was shown an individual photograph and recognized the person as someone who had been in his store perhaps two or three times in the past. (Exhibit 4) In any case, while he could reconstruct the person from the individual photograph, he could not connect that individual with the transaction reflected in the receipt.

Government agents visited him on four occasions between February 20 and early April, pressing him to connect the receipt and the photograph. He could not. ATF Agent Leahy reports that he showed Armbrister a single photo of Thomas Shay, Jr. on February 20, 1992. T.p. 25. Armbrister reports that he was shown a single photo by a female agent Lacourse on March 10, 1992. T.p. 2-61. Indeed, in some respects, this motion is not about a single suggestive identification. The government kept on working on Armbrister in repeated visits over the intervening several weeks.

Suddenly, on the eve of his grand jury appearance, Armbrister was able to connect the two pieces of evidence--the person in the

photograph was indeed the person who had made the trivial purchases on October 18.

If the story ended here, there would be no question but that the individual photographic identification was impermissibly suggestive, and any in court identification would have to be suppressed.

The Government seeks to salvage the identification by claiming that Armbrister linked the photograph and the receipt, on his own, without suggestion, without government interference. Armbrister, they claim, suddenly remembered that the person who bought the inexpensive electronic components five months before, and the person in the photograph (Exhibit 4) had a pronounced scar on his mouth. The Government claims that the pictures he had been shown up until this date showed no such scar; the scar information had to have come from Armbrister's independent memory. A larger version of Exhibit 4, Exhibit 11, which they say Armbrister was never shown, proves that Shay, Jr. had a scar on his lip at the time.

The conclusion depends upon two findings (1) whether the Government can establish which individual photograph Armbrister was shown and when and, in particular, that he had never been shown Exhibit 11 before the resurgence of his "independent" memory and (2) whether the Government can establish that Shay had a scar at all at the time of the transaction in October of 1991. The government agents can not establish with any degree of certainty which pictures Armbrister had been shown at which time--the little one (Exhibit 4), the slightly larger one (Exhibit 11).

Armbrister's prior testimony before the grand jury, before the defendant challenged the identification procedures, is clear; from the first individual photograph he had been shown in February or March, he reconstructed an image of the customer he had seen in the store a few times --height, clothing, and a scar.

In any event, there is absolutely no indication that such a pronounced scar existed at all. It is not reflected in the arrest papers (Exhibit 19), which report no significant identifying characteristics on Shay's face; it cannot be seen on the videotape of Shay on the evening he was arrested.

The fair inference is that an imperfection in a photograph Armbrister was shown, something that looked like a scar by Shay's lips, made Armbrister reconstruct the person he had seen in the store along the lines of the photograph. The photograph suggested a scar; Armbrister fell for it. Rather than buttressing an otherwise impermissible identification, the "scar" evidence dooms it.

#### B. Legal Framework

In Simmons, the Court fashioned a two pronged test for determining whether identifications based upon suggestive photo arrays are to be excluded. The first prong involves evaluating whether the initial identification procedure was impermissibly suggestive. (See Section C(1) below). The second prong measures the independent reliability of the identification notwithstanding its suggestive aspects. (See Section C(2) below) While Simmons referred only to a second prong evaluation of the "totality of the

circumstances", in Neil v. Biggers, 409 U.S. 188, 199-200 (1972), the Court articulated five factors that informed that determination: witness's opportunity to view the suspect, degree of attention, accuracy of prior description, level of certainty, and time lapse between the crime and the identification. See Manson v. Brathwaite, 432 U.S. 98 (1977) (concluding that reliability is the "linchpin" in ascertaining the admissibility of identification evidence); United States v. Bouthot, 878 F. 2d 1506 (1st Cir. 1989).

### C. Factual Analysis

1. First Prong: Showing Dwayne Armbrister an Individual Photograph of Thomas Shay, Jr. Constituted an "Impermissibly Suggestive" Identification.

There is no question but that showing Dwayne Armbrister an individual photograph of the defendant on February 20, 1992 and perhaps, again in March of 1992 (T.p. 2-61) comprised an impermissibly suggestive identification. Armbrister was a salesman in the Radio Shack store opposite the Christian Science Center. The ATF agents had visited the store at least two times before in order to cull through receipts for parts which they believed were associated with the device used in the Roslindale bombing. When they came up with a suspicious receipt, they set up an appointment with Armbrister, whose initials appeared on it.

First, on February 20, 1991, they showed Armbrister a photo array, with Shay's picture in it, and he could not identify Shay. T.p. 2-33. Then Agent Leahy showed him a single photograph, and Armbrister remembered the man in the photograph as having been

in the store three times in the fall of 1991. T.p. 2-37. He never connected the person in the receipt transaction with the person in the photo. T.p. 2-38. <sup>1</sup> In March of 1992, Armbrister remembered the female agent, LaCourse showing him a photo array as well as a single photo. T.p. 2-62. Again, he could not connect the photo and the receipt.

On April 7, 1992, just before his grand jury appearance, Armbrister was shown another array and picked out Shay. T.p. 2-47. By April of 1992 Shay was bound to look familiar. Both his picture and his name had been presented to Armbrister over and over.<sup>2</sup>

2. Second Prong: The Totality of the Circumstances Suggests That Any In-Court Identification Will Be Unreliable.

a. Accuracy of prior description

There was no prior description. Armbrister testified that he had no independent memory of the transaction at all simply by looking at the piece of paper. T.p. 2-32. He gave no prior description from which to test the accuracy of his identification.<sup>3</sup>

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<sup>1</sup> He claims that his grief over his grandfather somehow blocked his ability to connect with receipt and the photo. Notwithstanding his grief, he was able to remember the individual in the photo, (T.P. 2-39), and by April, after three or four visits by the ATF (T.P. 2-59), that grief somehow lifted and his memory was unclouded. The testimony is disingenuous.

<sup>2</sup> Armbrister claims that he read nothing about this case in the newspaper, but he admitted reading the Herald and the Globe on occasion. T.p. 2-54. Moreover, by the time he had been questioned by the Government on February 20, 1992, he knew what the investigation was about. T.p. 2-56.

<sup>3</sup> To be sure, the Government would argue that the "scar" information which he mentioned on April 7, 1992 constituted an independent memory, uninfluenced by the photographs he had been shown, or the interviews that had been conducted. What apparently

b. Degree of attention; opportunity to view the suspect.

The transaction was a trivial one. Armbrister worked on commission. The sale in question included no expensive items; it represented virtually no commission to him, so he indicated that he did not want to "waste time on it." T.p.2-23.

In contrast, by Armbrister's April grand jury appearance, he claimed that the sale had been notable because the customer had given him a hard time providing the customer's address. T.p. 2-27. Armbrister admitted, however, that it was not unusual for customers to grow impatient with the paperwork following a sale; it was not unusual for customers not to want to give their names and addresses to him. T.p.2-83. The transaction simply did not stick in his mind until five months--and a number of ATF visits--later. T.p. 2-84.

To be sure, Armbrister claimed that the customer in question was in the store for almost fifteen minutes, during which time Armbrister presumably had an opportunity to observe him. However, if there was nothing notable about the sale, or the customer, there would have been no reason to focus on it during that period of time. The customer was seeking out inexpensive, small items. He was not seeking Armbrister's help at all. Given the fact that there was virtually no commission involved, Armbrister was not

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jogged that "independent" memory is unclear. The efforts of the agents, they would argue, had no impact on his "independent" memory. See below section (c)(2)(e).

likely to offer much help.<sup>4</sup>

c. Time lapse between the "crime" and the identification.

The event sought to be reconstructed was October 18, 1991. The suggestive identification procedures began on February 20, 1992 and continued into March and early April. In between, Armbrister had waited on 30 customers in October, 30 in November, 42 in December. T.p. 2-73. Just before New Years, his grandfather passed away and he traveled to Florida by bus to be with his family. T.p. 2-27. Indeed, that was a momentous event. He had been quite close to his grandfather. He did not return to his Radio Shack job until mid-February of 1992.

A crime or a personal emergency might stick in one's mind for months afterwards. A trivial event will not, especially when the intervening months were filled with a procession of customers, and then a momentous occasion, the death of a beloved relative. By February of 1992, Armbrister's mind was a tabula rasa, enormously

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<sup>4</sup> The problems with reconstructing a trivial and not particularly noteworthy event are particularly clear in this case. The second salesman in the Radio Shack on October 18, 1991, Alan Kingsbury has reconstructed a completely different transaction (matching the receipt, Exhibit 1), and totally different individuals in it. Alan Kingsbury remembers that the customer gave Armbrister a hard time with the address, but he also remembers that he (Kingsbury) found boxes for the customer and spent the time gathering the material the customer needed. Moreover, notwithstanding two grand jury appearances, a visit by S/A Kerr between the first grand jury appearance and the second, and even discussions with Armbrister, Kingsbury stuck by his description of the people associated with the sale. The man involved was shorter than Armbrister (who reported that the man involved was taller than he), and Middle Eastern. Armbrister's description is one hundred and eighty degrees opposite.

vulnerable to the suggestion of the agents. <sup>5</sup>

d) Degree of certainty

By April 7, 1992, Armbrister was certain that he could identify Tom Shay as the individual who had been in the Radio Shack store on October 18, 1991, purchasing the items listed in Exhibit 1. That is not sufficient. Indeed, his degree of certainty after multiple ATF visits, and the showing of numerous photographs reflects the prejudice and suggestiveness of these procedures; it does not disprove it.

From February 20, 1991, Armbrister had become invested in the Roslindale investigation. He was so involved that he and S\A Kerr went to speak to Alan Kingsbury after Kingsbury had described the customer at issue in a fashion totally different from Armbrister. A fair inference is that Armbrister and S\A Kerr were seeking to dissuade Kingsbury from his position. T.p. 2-43. More than an indicia of reliability, Armbrister's behavior reflects the persuasiveness of the government agents.

e) An independent indicator of reliability; remembering a feature that presumably were not reflected in the pictures that had been shown to him.

Suddenly, on the eve of his grand jury appearance, Armbrister

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<sup>5</sup> Alternatively, when Armbrister returned in February of 1992, he learned all about the Roslindale investigation from the media and from the agents who had been in the store previously to gather receipts. (In fact, Alan Kingsbury suggested that Tom Shay had been in the apartment of the store manager, a friend of Armbrister's, apparently before October of 1991). Armbrister's failure to remember Shay at all before being shown an individual photograph is telling. See e.g. United States v. Bouthot, 878 F. 2d 1506, 1514 (1st Cir. 1989).

put it all together. He remembered that the individual in the single photograph had in fact participated in the transaction on October 18, 1991. The Government would have the Court believe that this linkage was wholly independent of government pressure, and independently reliable.

The case for reliability derives from Armbrister's testimony about a scar that he remembered on Shay's face. S/A Kerr testified that when he heard Armbrister describe the man in the transaction as having a scar, he looked at the picture he believed that Armbrister had been shown, the "small" picture, Exhibit 4, and found that it showed no scar. He then looked at a blow up of Exhibit 4, Exhibit 11, and concluded that it showed Shay's face with a scar on his lip. Since Exhibit 11 had never been shown to Armbrister, Kerr concluded (and would have this Court conclude), that Armbrister had an independent memory of the receipt transaction.

These conclusions rest on two findings: 1) that Armbrister had never been shown Exhibit 11 and 2) that Shay in fact had a scar on his lip at the time in question.

The Government cannot establish with any certainty which photograph Armbrister was shown at which time; it surely cannot establish that he had never seen the blow up of Exhibit 4. Armbrister says that the picture he had been shown in February or March was "around the same size" as Exhibit 4, T.p.2-35 or at best,

"a similar size." T.p. 2-49.<sup>6</sup> At one point, Armbrister says plaintively: "I saw so many picture, the dates, I can't come straight out and distinguish whether this one was on this day and that date." T.p. 2-62. Indeed.

To the extent that the evidence supports any particular position, it supports the view that Armbrister had been shown Exhibit 11 prior to his meeting with S\A Kerr and AUSA Kelly on April 7, 1992. In response to questions during the hearing about the photograph that the female agent showed to him, he said that he told her that the person reflected in the photograph was "tall and wearing jeans, that the person had a scar on his lip." T.p. 2-70.

But his most striking testimony is before the grand jury (Exhibit 33, p. 25):

Q. Now after being shown a second photo spread, apparently the first time they came and talked to you, the agents then showed you an individual photograph of a person and you recognized that person when you were shown an individual photograph, correct.

A. Correct.

Q. And what was it about that individual photograph that you recognized.

A. Well I remember his face. His face, basically the fellow's face. And the scar he had on his mouth, because I was looking up at him when he was in the store.<sup>7</sup>

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<sup>6</sup> Armbrister's grief apparently did not stop him from attempting to remember which photograph he had been shown. In fact, by April 8 he had been shown numerous pictures. Even the agents could not remember what was shown when. See testimony of Agent LaCourse.

<sup>7</sup> Later on, Armbrister says (at p. 27):

Q. And was this picture here [apparently referring to Exhibit 8] this was not the same individual shot that was shown to you by the agents when they first visited you back in February.

Finally, what is perhaps most significant is that the Government cannot establish that Shay had a scar at all during the period in question. There is absolutely no proof that it existed. In the papers routinely filled out during an arrest, where the officer is to report visible injuries, the officer said, "none". Exhibit 19. Officer Thomas testified that the arresting officer was supposed to list injuries as well as disfigurements that could form the basis for a later identification--like a scar. A scar cannot be seen on the videotape of Shay on October 31, 1991.

In contrast, Armbrister describes this "scar" in graphic terms. He says that Shay had a "busted lip"; it was "like straight up and down slit on his lip." T.p. 2-76. It was, in short, remarkable.

The scar that S\A Kerr saw on Exhibit 11 was nothing more than an imperfection in the photograph. The fact that Armbrister fell for it underscores the suggestiveness of the identification.

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A. No it wasn't.

Q. That was a different, blurrier, larger photo correct.

A. Mm-mm. Blown up.

To be sure, counsel did not introduce this colloquy at the hearing, but would seek to do so now, under the same terms as Exhibit 33. The goal here is to find out what happened in February, March and April of 1992. If counsel erred in the presentation, by not introducing this transcript reference, defendant should not be harmed. As the court noted when the hearing on these motions began, counsel had sought a continuance because she was in the midst of another hearing and had additional contemporaneous obligations in still another case. The court indicated that she would take notice of these issues; the implication was that the court would make adjustments if counsel had had difficulties in the presentation of evidence because of her schedule. T.p. 10-11.

D. Conclusion

For all of the above reasons, the identifications must be suppressed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by mail (by hand) on May 28, 1993.

