

ORIGINAL

FILED

04/16/2019

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 17-0154

DA 17-0154

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 88N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JUSTIN EUGENE HETRICK,

Defendant and Appellant.

FILED

APR 16 2019

Bowen Greenwood
Clerk of Supreme Court
State of Montana

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC 15-269(C)
Honorable Heidi Ulbricht, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Lisa S. Korchinski, Assistant Appellate
Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Mardell Ployhar, Assistant
Attorney General, Helena, Montana

Ed Corrigan, Flathead County Attorney, Andrew C. Clegg, Deputy
County Attorney, Kalispell, Montana

Submitted on Briefs: March 6, 2019

Decided: April 16, 2019

Filed:


Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Justin Eugene Hetrick (Hetrick) appeals from an order of the Eleventh Judicial District Court, Flathead County, denying his motion to exclude eyewitness identifications for improper photographic lineup procedure. We affirm.

¶3 Around 9:00 p.m. on March 28, 2014, a man confronted a woman, Suzanne, in a Columbia Falls grocery store parking lot. The man grabbed Suzanne's purse and used a knife to cut the purse's strap, cutting Suzanne's thumb in the process. The man fled on foot. Two people, Julian and Jamie, witnessed the robbery and briefly interacted with the man as the robbery was occurring and as the perpetrator fled. Responding officers eventually identified Hetrick as a suspect.

¶4 Officers later asked Suzanne, Julian, and Jamie to look at a photographic lineup. The officers compiled a six-photograph lineup with Hetrick's photograph in the last position, number six. There exists little documentation about how the officers presented the lineups to each witness, and we rely on Hetrick's recitation of the facts to describe the process. Suzanne was initially unable to make an identification but eventually indicated that the person who robbed her was either number four (another individual) or number six

(Hetrick). Suzanne later stated that an officer indicated that two or three of the pictured men “were definitely not suspects” and that the officer “seemed to want [her] to pick somebody out” of the photographic lineup. Julian did not identify a suspect. Jamie selected number six (Hetrick) but, according to the officers, she waffled between number six and another photograph for a period of time. Jamie and the officers later disagreed as to how long she looked at the photographs—Jamie said she looked at the photographs for a few minutes while the officers said she looked at them between ten and fifteen minutes. The officers reported that less than a week later, Jamie returned for a second review of the photographic lineup, with the same six photographs. Jamie did not recall that second meeting.

¶5 In July 2015, the State charged Hetrick with felony robbery and felony assault with a weapon based on its belief that he committed the Columbia Falls robbery. Hetrick pleaded not guilty. In October 2015, the District Court issued a scheduling order. The order scheduled an omnibus hearing in November 2015, a pretrial hearing in December 2015, and a jury trial in January 2016. The order stated, “All motions with accompanying briefs, other than Motions in Limine, shall be filed at or before the omnibus hearing pursuant to statute.” At the November 2015 omnibus hearing, Hetrick indicated that he had received full discovery from the State except for information he requested regarding the photographic lineup procedure. He also indicated that he planned to rely on the defense of mistaken identity and that he planned to move to suppress evidence from the photographic lineups based on improper procedure.

¶6 In December 2015, the District Court continued the scheduled trial at Hetrick's request. The court issued an amended scheduling order, scheduling another omnibus hearing in early-March 2016. The order again stated, "All motions with accompanying briefs, other than Motions in Limine, shall be filed at or before the omnibus hearing pursuant to statute." The court scheduled a pretrial hearing in mid-March 2016 and a jury trial in May 2016.

¶7 Prior to the March 2016 omnibus hearing, Hetrick filed a notice of defense, indicating he intended to rely on the defense of mistaken identity. At the March 2016 omnibus hearing, Hetrick indicated he received discovery and that it was ongoing. Unlike at the November 2015 omnibus hearing, where Hetrick stated that he planned to move to suppress evidence from the photographic lineups based on improper procedure, at the March 2015 omnibus hearing, Hetrick did not mention the photographic lineup procedure nor did he otherwise move or indicate that he planned to move to suppress the evidence from the lineups.

¶8 In April 2016, the State filed an unopposed motion to continue the May trial because its main witness, Suzanne, was unavailable for the scheduled trial. The District Court granted the State's motion and issued an amended abbreviated scheduling order. In its amended abbreviated scheduling order, the court did not schedule another omnibus hearing. Instead, it scheduled a pretrial hearing in July 2016 and a jury trial in September 2016. Also in April 2016, Hetrick learned that, a few days before the Columbia Falls robbery occurred, a similar robbery took place in Kalispell. The perpetrator wore similar

clothing, made similar actions, and used similar threats. An anonymous informant identified a suspect in the Kalispell robbery who was not Hetrick. Officers apparently knew about the Kalispell robbery early on in their investigation, around the time they had Suzanne, Julian, and Jamie look at the photographic lineups, but Hetrick did not learn about the robbery until April 2016.

¶9 In June 2016, the public defender's office assigned Hetrick new counsel. At the July 2016 pretrial hearing, Hetrick's new counsel stated that, when he reviewed Hetrick's case file, he noticed that Hetrick's former counsel indicated he planned to move to suppress evidence from the photographic lineups based on improper procedure at the November 2015 omnibus hearing but never filed the motion. Counsel candidly stated that the motion "arguably should have been filed by" the omnibus hearing. Nevertheless, Hetrick's new counsel stated that he filed a motion to the exclude the eyewitness identifications earlier in the day. In Hetrick's motion to exclude eyewitness identifications, he argued that the photographic lineup procedure utilized by the officers violated best practices, specifically identifying three main concerns. First, he criticized officers for not utilizing a double-blind testing procedure. Second, he criticized the use of a simultaneous photographic line-up, where multiple images are shown to a witness at once, over a sequential photographic line-up, where images are shown to a witness one at a time. Third, Hetrick argued that a photographic lineup was generally inappropriate in this case, were the robber used a weapon, because weapons draw visual attention away from the perpetrator's face and affect an eyewitness's ability to identify the perpetrator. Hetrick noted that the motion required

an evidentiary hearing. The District Court indicated it would wait to see whether the State opposed the motion's timing and then set an evidentiary hearing if needed.

¶10 The State responded to Hetrick's motion, arguing the motion was untimely pursuant to the schedule set by the court and § 46-13-101, MCA. Section 46-13-101(1), MCA, establishes pretrial motion timing requirements in criminal cases and provides, "Except for good cause shown, any . . . request that is capable of determination without trial of the general issue must be raised at or before the omnibus hearing" A party's failure to make a request constitutes waiver of the request, but the court, for good cause shown, may grant relief from any such waiver. Section 46-13-101(2)-(3), MCA. The State argued that, because Hetrick filed his motion to exclude eyewitness identifications after the March 2016 omnibus hearing, he waived the issue unless good cause to pardon the delay existed. The State contended good cause did not exist because Hetrick's motion was not based on newly discovered information—he could and should have presented the issue at or before the March 2016 omnibus hearing.

¶11 Hetrick replied, contending good cause existed under § 46-13-101, MCA, to excuse his failure to timely file the motion. He argued that, based on Hetrick's representations at the November 2015 omnibus hearing, both the State and District Court were aware Hetrick intended to move to suppress the eyewitness identifications. Hetrick argued his prior counsel timely raised the issue, but simply erred by not filing an appropriate accompanying brief on time. Hetrick also argued that he only discovered the majority of the information upon which he based his motion after the March 2016 omnibus hearing—Hetrick noted he

did not find out about Suzanne's interactions with the officers during the photographic lineup or about the similar Kalispell robbery until April 2016. Hetrick argued that, because officers had identified a suspect in the similar Kalispell robbery, they should have included that man's photograph in the photographic lineup presented to Suzanne, Julian, and Jamie.

¶12 The District Court initially set an evidentiary hearing to consider Hetrick's motion to exclude, but later vacated the scheduled hearing and issued an order denying Hetrick's motion as untimely pursuant to § 46-13-101, MCA. The District Court reasoned good cause excusing a waiver for failure to timely raise an issue is a "threshold issue" and faulted Hetrick for not arguing good cause in his initial motion and brief in support. The District Court further reasoned that, Hetrick's failure to show good cause in his initial motion aside, good cause for the delay did not exist because the information Hetrick relied on was largely discoverable before the March 2016 omnibus hearing. The court also reasoned that the new information Hetrick learned in April 2016 was "merely ancillary to his central argument that the lineup procedure did not comport with best practices, *e.g.*, the use of a double-blind testing procedure and a sequential lineup." The District Court concluded that, even though Hetrick indicated he would move to suppress the eyewitness identifications at the November 2015 omnibus hearing, his failure to do so at or before the March 2016 omnibus hearing constituted a waiver. The District Court denied Hetrick's motion as untimely. The case proceeded to trial during which a jury found Hetrick guilty of both charges. Hetrick now appeals the District Court's denial of his motion to exclude eyewitness identifications based on improper lineup procedure.

¶13 On appeal, Hetrick argues the District Court erred in its interpretation of § 46-13-101, MCA. Section 46-13-101, MCA requires pretrial motions to be raised at or before the omnibus hearing to ensure the “orderly and fair administration of the criminal justice system.” *State v. VonBergen*, 2003 MT 265, ¶ 16, 317 Mont. 445, 77 P.3d 537 (quoting *United States v. Sisca*, 503 F.2d 1337, 1349 (2nd Cir. 1974)). Accordingly, if a defendant fails to present his pretrial motion at or before the omnibus hearing, or by a later date set by the court, he waives the issue. Section 46-13-101(2), MCA; *VonBergen*, ¶ 11. The court may, however, excuse the defendant’s failure to timely raise a request for good cause shown. Section 46-13-101(1), (3), MCA.

¶14 Hetrick criticizes the manner in which the District Court applied § 46-13-101, MCA, to his motion. Hetrick argues the District Court wrongly referred to good cause as a “threshold issue” and faulted Hetrick for failing to argue it in his initial motion. The State concedes this point and agrees the District Court incorrectly stated Hetrick needed to demonstrate good cause in his original motion. We agree with Hetrick and the State. The District Court improperly referred to good cause as a threshold issue. “Good cause is a response to the defense of waiver,” and Hetrick appropriately raised good cause in his reply brief. *See State v. Ankeny*, 2018 MT 91, ¶ 23 n.4, 391 Mont. 176, 417 P.3d 275. We accordingly conclude the District Court incorrectly interpreted § 46-13-101, MCA, as requiring Hetrick to make a threshold good-cause showing in his initial motion and brief.

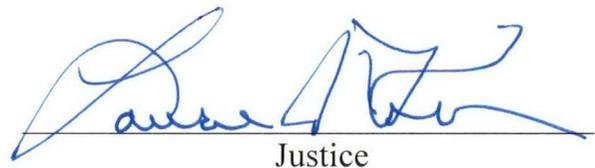
¶15 That error, however, was inconsequential. Despite faulting Hetrick for not raising good cause in his initial motion, the District Court nevertheless reasoned that good cause

did not actually exist to excuse Hetrick's failure to timely file the motion to exclude. Hetrick's three main arguments in his motion to exclude—double blind procedure, simultaneous versus sequential photographic line-ups, and the perpetrator's use of a weapon—were based on facts available to Hetrick before the March 2016 omnibus hearing. The information he learned in April 2016 regarding the similar Kalispell robbery and Suzanne's interactions with police had no bearing on his central argument that the officers' photographic lineup procedures did not comport with best practices.

¶16 We therefore conclude the District Court did not abuse its discretion when it determined Hetrick failed to show good cause for the delay. *See Ankeny*, ¶ 16 (stating that we review a district court's determination of whether to grant relief from waiver under § 46-13-101(3), MCA, for an abuse of discretion). Because Hetrick did not demonstrate good cause for his failure to timely file his motion to exclude, he waived the issue pursuant to § 46-13-101, MCA.

¶17 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶18 Affirmed.



Justice

We concur:

James Jeremiah Green

Peter Parker

Reginald Mustaf

Jan Rice

Justices