

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2009-0590, State of New Hampshire v. Barion Perry, the court on November 18, 2010, issued the following order:

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm.

The defendant was convicted of theft by unauthorized taking. On appeal, he contends that the admission of a witness's out-of-court identification of him violated his right to due process under the State and Federal Constitutions. See N.H. CONST. pt. I, art. 15; U.S. CONST. amend. XIV. We first address the defendant's claim under the State Constitution, and cite federal opinions for guidance only. See State v. Ball, 124 N.H. 226, 231-33 (1983).

The admissibility of identification evidence over a due process objection is governed by the Biggers test. See Neil v. Biggers, 409 U.S. 188 (1972). The Biggers test requires a two-step analysis. State v. King, 156 N.H. 371, 373-74 (2007). In King, we articulated the analysis as follows:

Initially, we inquire into whether the identification procedure was impermissibly or unnecessarily suggestive. At this stage of the inquiry, the defendant has the burden of proof. Only if the defendant has met his burden must we then consider the factors enumerated in Neil v. Biggers . . . to determine whether the identification procedure was so suggestive as to render the identification unreliable and, hence, inadmissible. At this stage of the inquiry, the State bears the burden.

Id. at 374 (quotation omitted). We will overturn the trial court's ruling only if its decision was contrary to the weight of the evidence. State v. Bell-Rogers, 159 N.H. 178, 181 (2009).

Here, the trial court found that the witness's identification of the defendant was not derived from any suggestive technique employed by the police. As the trial court found, the witness pointed out the defendant from her apartment window without any inducement from the police. The defendant, relying upon decisions of the First Circuit Court of Appeals in United States v. Bouthot, 878 F.2d 1506 (1st Cir. 1989), and United States v. De Leon-

Quinones, 588 F.3d 748 (1st Cir. 2009), argues that a suggestive scenario remains suggestive even if it is not intentionally orchestrated by the police in order to produce an identification. We recently rejected this argument, however, stating: “We decline to adopt the First Circuit’s reasoning that a Biggers analysis is required in all ‘suggestive identification procedures.’ Bouthot, 878 F.2d at 1516. Instead, we hold that the Biggers analysis does not apply to a potentially suggestive out-of-court identification where there is a complete absence of improper state action.” State v. Addison, 160 N.H. ___, ___ (decided October 19, 2010). Because the evidence supports the trial court’s finding that the defendant failed to carry his burden of proof on the first step of the Biggers analysis, we need not consider the second step. See King, 156 N.H. at 374.

In Addison, we also concluded that the Federal Constitution provides no greater protection than does the State Constitution under these circumstances. See Addison, 160 N.H. at ___. Accordingly, we reach the same result under the Federal Constitution as we do under the State Constitution.

Affirmed.

Dalianis, Duggan, Hicks and Conboy, JJ., concurred.

**Eileen Fox,
Clerk**

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