

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

COMMONWEALTH : 1357-1359

VS :

MUMIA ABU-JAMAL : 1982

Room 613 City Hall
Philadelphia, Pa.

February 22, 1982

BEFORE: THE HONORABLE PAUL RIBNER, J.

APPEARANCES:

JOSEPH MCGILL, Esquire
For the Commonwealth

ANTHONY JACKSON, Esquire
For the Defendant

³*****

COURT CRIER: Commonwealth versus Jamal, Your Honor.

MR. JACKSON: Your Honor, the first matter before this Court is, I believe, another omnibus motion. I would like to file this with the Court. I have given a copy to Mr. McGill, counsel for the Commonwealth.

THE COURT: All right. This is a motion?

MR. JACKSON: Yes, sir.

THE COURT: This is your suppression motion?

MR. JACKSON: Suppression and discovery, that's right.

THE COURT: And discovery?

MR. JACKSON: Yes. There are several outstanding motions that have already been filed with the Court. One is dealing with regard to the lineup. Your Honor will recall, from the original lineup petition, that you denied the lineup request as to two, and then there were other witnesses, eyewitnesses.

Now, one of the matters that I believe is here for today is a motion to strike Cynthia White's testimony, who was one of the parties Your Honor denied the lineup request for. I don't know the name of whoever the second civilian was. So that is still an outstanding matter.

And the other matter is, Your Honor -- and I have spoken to Mr. McGill -- in previous motions and hearings, there

was a return of property hearing. There were some matters that were to be copied and turned over to us. Mr. McGill assures me now that he will turn over the copies of those items. He returned the things that he said he would return, but the copies of those documents have not been received as yet. Mr. McGill assures me now that they will be.

THE COURT: All right. Your motion to suppress, of course, will be held at the time of trial.

MR. JACKSON: Yes, sir.

THE COURT: Now, do you want any argument on the motion to suppress the testimony? Is that really proper now, or is it a matter for the trial judge?

MR. JACKSON: I don't see any necessity for arguing that motion now, Your Honor.

THE COURT: That really should either be part of your suppression motion or a motion to bar her testimony before the trial judge.

MR. JACKSON: Well, on that issue, Your Honor, we have several problems. One is a very practical problem: at each instance that we have a hearing I have to be certain that Mr. Jamal is shielded from the Press, from the taking of photographs. And that is a matter that has been plaguing me -- and, of course, my client as well. He has to come through the corridors with a coat over his head. And I would like to dispose of this matter as quickly as possible so that we can eliminate that kind of -- it's a very circus-type atmosphere, and I just don't think it's necessary. And if Your Honor could

just hear that motion, the motion with regard to Cynthia White, as well as the lineup motion, then probably from that point on we wouldn't have to go through this fighting with the Press.

THE COURT: You want me to hear the motion to strike her testimony?

MR. JACKSON: Yes.

THE COURT: Is that really appropriate at this time, or is it premature?

MR. JACKSON: I think it's appropriate, Your Honor, because it would obviously give me some idea of who it is who is going to testify at the trial. And, also, it would seem to me that the motion to suppress, while it goes to some other issue, may include this issue as well.

THE COURT: In other words, you are saying you have other reasons than a Constitutional question regarding her testimony?

MR. JACKSON: Yes, sir. Your Honor, if in fact her testimony, based on what representations were made at the lineup request hearing -- if that is in fact stricken, then there is some question as to whether or not the Commonwealth has enough at the preliminary hearing to even hold Mr. Jamal at this time.

If her testimony is stricken, it's a very serious question: Well, what else is there that holds Mr. Jamal?

THE COURT: Mr. McGill?

MR. MCGILL: Well, Your Honor, even if Your Honor would strike the testimony of Miss White, which I would maintain

there is really no basis for, there would be sufficient to hold Mr. Jamal, sir, from the testimony of Inspector Giordano himself, if you include both the stipulation as well as the testimony of Inspector Giordano that he had shot the policeman.

THE COURT: Are we getting into the merits of the motion to strike the testimony now?

MR. MCGILL: I'm just trying to respond to his point. I don't wish to get into it, Your Honor. I think perhaps this is not the appropriate forum for a motion to strike that testimony.

THE COURT: What's your basis for moving to strike her testimony at this time?

MR. JACKSON: Your Honor --

THE COURT: Normally, if you raise a Constitutional question, that, together with the suppression hearing -- is this the proper forum?

MR. JACKSON: Your Honor, I mentioned that there are other than Constitutional issues involved. Mr. McGill represented to the Court that Cynthia White was there, she was an eyewitness, never lost sight of whoever it was who shot the police officer. Now, I believe that at the bail revocation hearing as well as the preliminary hearing Miss White testified that she saw an individual who had dreadlocks coming across the street and that at the time that she saw someone shoot the police officer--that that person had a hat on.

So that raises two issues: one is that she lost sight of the person or that there were two people involved.

And from her testimony, Your Honor, she is never able to reconcile the two. She simply states that she saw one man who she says had the gun run across the street, that he had dreadlocks, and that at the time the officer was shot the man had a hat on, so that she wouldn't have seen any dreadlocks. Again, either the one who started walking across the street ran away or at some time when coming across the street he put a hat on. There is a question in my mind whether she saw what she testified to. And it just goes to the essence of the Commonwealth's representation. And it would seem to me that if in fact we had a lineup, then that issue would have been resolved at the lineup.

And it would go to any other witness that the Commonwealth might present.

I don't see the burden and inconvenience outweighing the right of Mr. Jamal to a lineup.

THE COURT: Well, actually, just normal inconsistencies in a witness' testimony or inconsistencies between the testimony of different witnesses, such issues really are matters for trial, and, after cross-examination, whatever remedy is appropriate can be applied.

Are you urging me to take the position that the testimony is so manifestly incredible that there is no reason to even allow it to stand?

MR. JACKSON: Your Honor, because the damage would be done if she testified, whether we get into the weight of the evidence, and that kind of thing. Because it would seem

to me that if in fact her testimony is incredible, if in fact an issue with regard to the identification is so substantial -- and I am suggesting to the Court that this is a substantial issue -- particularly since she is being allowed to testify without there having been a lineup -- it would seem to me that the defendant is being prejudiced. She has already seen him in court several times.

MR. MCGILL: If I may briefly respond, I think that the matters that Mr. Jackson points out to Your Honor -- I think they go to factual discrepancies in her testimony. Clearly, Your Honor, a factual matter is for the finder of fact at trial to determine. I think it would be inappropriate at this point for Your Honor -- and I think this is what Your Honor is saying -- to make a finding as to whether or not the testimony is such that it ought to be stricken completely.

THE COURT: I could only do that in a case where it would be obviously clear that the witness wasn't there. If it could be shown that the witness was not there that day, then you might not want to prejudice somebody by even holding them for trial. But this is more in the nature of an inconsistency in her testimony that you are alleging.

MR. JACKSON: Well, Your Honor, it would seem to me -- again, the point is that I am asking, in view of what happened -- I am asking for a lineup, in the first instance. We want a lineup as to all identification witnesses. And the Commonwealth says well, we don't need a lineup, because our witnesses are going to say this, that and the other. And I

am saying that the Commonwealth witnesses have not testified to what the Commonwealth has represented to Your Honor, and that for that reason it should be stricken.

If they are allowed to come in and say something that isn't developed, then it seems to me that they have to suffer from that defect.

THE COURT: In my original ruling denying the lineup, I think my thought there was that the identification was not the crucial thing to be testified to by her. She saw certain things, the police saw certain things, certain physical evidence was found, and so on. So even if she couldn't identify your client, that still wouldn't have affected the prima facie nature of the case.

MR. JACKSON: I can appreciate that, Your Honor. But she is being used as an identification witness, Your Honor, and there is no testimony that suggests that she was there even when he was arrested, just that she saw something happen.

So I understand what you are saying: "Well, she doesn't have to be used as an identification witness." But she is being used as an identification witness.

MR. MCGILL: Your Honor, I think, also, part of Your Honor's ruling was considering the fact that where prior decisions were concerned with a fleeting glance or a quick look at the shooter or the alleged doer in a particular factual situation, and then that individual takes off and is not apprehended until some time later, that there is where a lineup would be necessary. But in making Your Honor's ruling, I

believe Your Honor had relied pretty heavily on the fact that the defendant was arrested on the scene, was identified by one of the witnesses, a witness other than Miss White, as being on the scene and being in the wagon afterwards.

THE COURT: Basically, that was my ruling.

MR. JACKSON: But there was no testimony to that effect.

THE COURT: The identification question -- I don't think the Commonwealth relied on her picking out an individual. I don't think the identification relied solely on that. She was merely a link in a chain of events. In other words, there was someone on the side, someone found to have a bullet wound at the time, and --

MR. JACKSON: All right, Your Honor, if you are ruling that in fact she is not going to be used as an identification witness, then, fine, then maybe we have no problem. But she is in fact being used as an eyewitness. You are saying, "Well, he was arrested on the scene," and we go on with that. But she is being used as an identification witness.

THE COURT: You are saying she's going to be asked on the stand, "Can you identify the man you saw that night?"

MR. JACKSON: Your Honor, she has already been asked that on two separate -- she's being used as an eyewitness, and there is no --

THE COURT: An eyewitness to the event. Now, what you are saying is she is being used to pick out the

individual.

MR. JACKSON: She certainly has done it, Your Honor, at the preliminary hearing and at the hearing before Your Honor: "Yes, he is the one." And, again, it seems to me that there has been no testimony that she was present at the time he was arrested. All we know, at best, is that she saw this individual shoot once towards an officer's back and then over top of him. Well, maybe she didn't see it, but that's the gist of her testimony. Now, we don't know what happened to her at that point. We don't know what happened to her after that. We don't know if she left, went someplace, and after a while they had somebody else arrested. That has not been made a matter of record.

So we don't know that she was there at the time of his arrest. The Commonwealth has not met its burden.

MR. MCGILL: I'm not sure that I entirely understand counsel's position, but, if Your Honor pleases, if I may attempt to respond -- again -- and it seems we're going over the same ground -- Your Honor's ruling was based upon all of the facts that Your Honor had heard, sir, what I represented the witness would testify to and also a review of the statement saying that that was substantially consistent with what I represented the witness would say.

Also, it appears that there are specific factual discrepancies which, through cross-examination, Mr. Jackson feels he has developed. But they are very specific and very few.

On the basis of that, Your Honor, I would say that on its face, on the face of the record, there have not been sufficient substantial discrepancies even alleged so as to make any kind of identification ruling of Your Honor in reference to a lineup in any way in error. He had sufficient time to cross-examine the witness, as he will -- in fact, he had had two times -- as he will at trial.

So the position of the Commonwealth, Your Honor, as to this motion is, number one, that it is not appropriate before this Court, inasmuch as it's concerned with factual considerations and, number two, even if it were appropriate before this Court there have not been, even on its face, sufficient discrepancies alleged to this Court in order for this Court to find that her testimony was so substantially different from what was presented to Your Honor.

Now, if at another time Your Honor would want to review the notes, along with the statement of Miss White, and make your own decision concerning this issue, that would be fine. However, I suggest that even the matters alleged, the question of dreadlocks, the question of a hat on his head, the question of where he was at the time of the shooting, they are, at best, minor discrepancies in consideration of Your Honor's basis for the ruling regarding the lineup.

It should be mentioned, Your Honor, that not only was the individual, Mr. Jamal, testified to as being the shooter, he was right there at the time, sitting at the curb. And that was testified to, that he was there and that he was --

THE COURT: That was the basis of my ruling.

MR. MCGILL: -- and that he was taken to the wagon.

MR. JACKSON: But that's untrue, Your Honor.

That testimony counsel is presenting, that was not testified to, where he sat down and was immediately arrested. No one has ever testified to that. No one, Your Honor.

THE COURT: You do have the police inspector's testimony.

MR. JACKSON: That he was found in the wagon.

THE COURT: He was asked, "What did you do with the gun?" And he said, "I dropped it after the shooting."

So that alone would really establish a prima facie case. I'm not saying, you know, whether that's true or not.

MR. JACKSON: I understand.

THE COURT: But on the basis of that testimony there is enough to hold him.

MR. JACKSON: The thrust of my argument is really not to challenge the preliminary hearing, Your Honor, as to whether or not the Commonwealth has provided sufficient information --

THE COURT: You want to strike Cynthia White's testimony.

MR. JACKSON: Yes, sir. It seems to me, very simply, if the Commonwealth says, in advance: we have a witness who says that she saw a man come across the street who looked one way and by the time he got to the other side of the street he looked another way, and that she saw this man shoot and then

later on they had a man arrested and --

THE COURT: Aren't you really --

MR. JACKSON: -- and she identified him, is that

--

THE COURT: Aren't you really talking about a motion to suppress her in-court identification on the grounds of suggestivity?

MR. JACKSON: I think we're beyond that point, because I requested a lineup and that was denied. I suppose technically I could make that argument, but it seems to me, after we have requested a lineup -- where there's a request in advance that has been denied, it would seem to me that the Commonwealth would have to have the testimony comport to what it had represented to the Court. And I am saying that based on the testimony that's been presented I don't believe the Commonwealth has done that. And I don't believe that Your Honor would have allowed her to testify as an eyewitness, based on the defects in the testimony.

They have not presented -- there is no link between what she said she saw and the arrest. There's no link between who she said she saw running across the street and the person who pulled the trigger. And those are substantial defects.

It would seem to me that Your Honor, if you had that information at the time of the lineup request -- it seems to me that at least there would have been a substantial question in your mind whether she should be allowed to testify as an eyewitness.

It was only because of the police report that Your Honor read -- and I have not had the opportunity to read -- that there was something in the police report and the representations of counsel that suggested to you, "Oh, yes, a lineup is not in issue." But I am saying now, once we have had the hearing, it is in issue. And it seems to me it should not be allowed to continue.

THE COURT: Her testimony?

MR. JACKSON: Her testimony, that's right.

THE COURT: I think basically you are arguing about allowing her to testify to an in-court identification. And that's another issue. I don't think we can strike her testimony. If there is an inconsistency or inconsistencies in her testimony, that's an argument you have to make at the time of trial.

MR. JACKSON: Your Honor, I am not suggesting that it's an inconsistency. I am saying that it's a deficiency based on what the Commonwealth reported to you. It wasn't said. And it would seem to me, Your Honor, if the Commonwealth says she's going to say A, B and C and she comes in and says A -- you are saying, "Well, that's allowed." And I am suggesting to you that she did not testify to what the Commonwealth said she would testify to and that her testimony should be stricken. And when the Commonwealth says, "This is what she is going to say," and she then does not say it, that's wrong.

If the Commonwealth says a witness is going to say A, B and C, then the witness must say A, B and C. And if

not, then they have not met their burden.

THE COURT: Well, I understand the argument that you are making. But, you see --

MR. MCGILL: Your Honor, the basis of what I represented -- excuse me, I don't want to interrupt the Court.

THE COURT: All right.

MR. MCGILL: The basis of what I represented to the Court she would testify to, if asked, was substantially presented.

Using the analogy of Mr. Jackson, if A, B and C were represented to Your Honor and A and B were actually presented later, A, B and C were presented to Your Honor to alert this Court as to the factual basis for the Commonwealth's opposition to the petition for the lineup. And Your Honor viewed that along with the statement and made a finding that it was substantially as was represented by the Commonwealth. Fine. That was the ruling at that time.

And on the basis of that, the facts were presented to this Court.

Now, what I present at the preliminary hearing in order to prove -- in order to show the Court that a prima facie case exists -- as has been demonstrated -- does not have to include A, B and C and all the way to Z. It only has to include what I want to put on for the judge to review and determine whether or not a prima facie case is established.

So we are looking at two different things: a basis for Your Honor's finding and a basis for a prima facie

case, which are not the same thing, necessarily.

Now, if what I presented to this Court, A, B and C, or whatever, was substantially different -- or, in fact, completely different than in fact what was the testimony of Miss White, well, then, perhaps there is some view that, if anything, there may be a due process violation by the Commonwealth. None such was the case. And, as a matter of fact, the only factual discrepancies, as pointed out, or alleged, which are hardly substantial, considering the forty-five minutes or an hour that she testified.

THE COURT: I'm going to deny the motion based on the argument that there are inconsistencies. But Mr. Jackson raises another point.

If you are using Miss White to establish identity

--

MR. MCGILL: Yes, sir.

THE COURT: I denied a lineup on the grounds that she was not a necessary witness for identity, because my understanding at the time was that you had several links in the chain of identification there. You had a witness saying, "I saw a shooting," you had a police officer who came later and found the defendant, who obviously was wounded, you had a statement by the detective that the gun was dropped nearby, and so on. And you had all those things put together.

But are you saying she is being used basically to establish the identity of the defendant?

MR. MCGILL: She is an identification witness.

And I also represented to the Court that she was -- the situation was that she would be -- of course, in addition to an identification witness, -- she would be part of the complete picture. Because at every time from the beginning it was represented that she was -- and the primary reason is the fact of where she was, the proximity to the actual incident. She had actually moved forward, closer to the incident, after having observed it initially. So she is as close as ten or fifteen feet to the individual that she saw, the individual shooting the police officer and then going and sitting at the curb. And she is right there when they take him and put him in the wagon.

So she sees him constantly, throughout.

THE COURT: And your view of the law is that a lineup is not necessary?

MR. MCGILL: Yes, Your Honor, on that basis. Because, Your Honor, it's not at all like the cases -- like the Sexton case or the other cases -- where you have a fleeting look, a person sees an individual, he comes into a store, there's a robbery in the store, the witness has never seen him before, he takes off, he's gone.

That's not this case. In this case she sees him running across the street, then she goes forward, she's not more than ten or fifteen feet away, as close as he is to me --

MR. JACKSON: I'm going to object to this.

MR. MCGILL: May I finish?

MR. JACKSON: Your Honor, he's --

THE COURT: Let him finish.

MR. MCGILL: -- maybe three, ten feet. And she sees him then. And he's then taken to a wagon some distance away.

She has him in view constantly. As a matter of fact, she's saying as she walks over, "He shot the policeman. Can I tell somebody? Can I tell what happened?"

This is basically what she would testify to, if asked, Your Honor.

The question is completely a different issue from what Mr. Jackson is raising. I am now addressing the Court specifically as to why there would be no appropriate lineup in the case of Miss White.

Now, as to what was presented at the preliminary hearing, that has nothing to do with Your Honor's basis for deciding that a lineup is not appropriate in this case. The one has nothing to do with the other, Your Honor. What was presented at the preliminary hearing just had to do with the burden of proof that I had to establish at that time. Cynthia White very definitely is an ID witness, Your Honor.

MR. JACKSON: Your Honor -- and, again, I don't want to belabor this issue -- but counsel has represented a lot of which has never been testified to. I am hearing this for the first time. At the original lineup hearing I heard representations to that effect, but it was not testified to at the preliminary hearing.

Now, my point is that if the Commonwealth says they are going to present such and such, and a representation is made to this Court as to what they were going to present, and then they don't present it, Your Honor, and they come back and say, "Well, we didn't really have to present it," then where am I going to have the opportunity to test the credibility of the representations of the Commonwealth if they play games and say they're going to present this, that and the other at the preliminary hearing, we go to the preliminary hearing and they don't present it? And then they come back to you and they say, "Oh, well, Your Honor, we didn't have to present all of that at the preliminary hearing."

And that's essentially what counsel is arguing. And I am saying to you, Your Honor, whether the Commonwealth had such and such a burden on the issue of a prima facie case at the preliminary hearing is irrelevant to the argument that I am making. If they are saying she's going to testify to A, B and C, and if that's the basis of your ruling, Your Honor, then they have to have her testify to A, B and C. Because it's not just an insubstantial issue as to whether or not he had a hat on or there were dreadlocks.

And, again, the other issue, Your Honor, that she never testified that she was present when the man was arrested. And it seems to me that if they are saying that in fact it was an on-the-scene arrest -- we have not gotten any testimony from anyone to say that it was an on-the-scene arrest. The inspector says he was in the wagon when he arrived. And

this woman never testified after she said she saw the shooting.

So it would seem to me that the Commonwealth's representations are seriously defective. And I believe that counsel is saying that I should then argue this issue at the motion to suppress. And the damage would have been done at that point.

THE COURT: I understand the issue. What, basically, are you asking for at this time? Just to strike her testimony, or for a lineup?

MR. JACKSON: I am asking for both, to strike her testimony and --

THE COURT: Are you asking for another lineup now?

MR. JACKSON: Yes, I am, Your Honor, for all the eyewitnesses. I certainly am, Your Honor.

MR. MCGILL: I think today was not, as I understand it, a petition or request for a lineup for all eyewitnesses. I believe the petition -- at least which I am prepared to respond to, and which it is my understanding was specifically to be heard today, as Your Honor had it listed -- I believe the petition scheduled to be heard today was a petition to strike her testimony.

THE COURT: That was scheduled for today, yes.

MR. MCGILL: So that issue, Your Honor -- I think that is what is before Your Honor.

As to any other issue, any additional issue --

THE COURT: Part of Mr. Jackson's reason for that is that she testified to identification.

MR. JACKSON: That's right.

THE COURT: I am not going to strike her testimony for that reason. If you are going to petition for a lineup, that's another question.

MR. JACKSON: Well, Your Honor, as to her, Cynthia White, after she has seen him in court two or three times

--

THE COURT: That's what I want to know.

MR. JACKSON: My point is --

THE COURT: Are you asking for another lineup for her?

MR. JACKSON: That's my point: I can do that, Your Honor, but as a practical matter, what good does it do? That's my point. She has seen him two or three other times at least. So now are we saying, "Well, now we're going to find out whether she can identify him"?

That's just my point. And that's why I asked for a lineup for all eyewitnesses. And now it seems we're saying Cynthia White, can Cynthia White pick this man out of a lineup, Your Honor, when she has already seen him at least two times in court. And that's why I am saying I want a lineup for all eyewitnesses. And that's what I originally asked for.

THE COURT: Whether or not any in-court identification is allowed depends upon what opportunity she had to observe him at the scene, and so on. You can always

argue that point before she is allowed to testify.

MR. JACKSON: I understand that.

THE COURT: You are not foreclosed from taking that approach. That will depend upon whether the Commonwealth can establish a basis for the in-court identification.

MR. MCGILL: That's correct.

THE COURT: Based on what has been presented, I am going to deny the motion to strike the testimony.

MR. JACKSON: Would Your Honor consider certifying this question? I think it's very substantial, Your Honor.

THE COURT: Well, I don't know if it -- if it reaches that level.

MR. JACKSON: Well, Your Honor --

THE COURT: It would delay the trial for a long time.

MR. JACKSON: It may delay the trial, but it seems to me what I have is a delay versus the rights of Mr. Jamal.

MR. MCGILL: Your Honor --

MR. JACKSON: If that's the reason --

THE COURT: If you think any rulings have been wrong you will have the right to appeal if your client is found guilty.

MR. JACKSON: But that testimony may be so damaging it may involve a conviction. And I think this issue needs to be resolved. In all due respect to Your Honor, I differ with you with regard to the substantive nature of -- the characterization of the defects that I am suggesting the

Commonwealth has not met--again, Your Honor, with regard to the factual discrepancies as well as the deficiencies with regard to the on-the-scene arrest.

MR. MCGILL: I would oppose any certification at this time, Your Honor. I think the issue -- with due respect to Mr. Jackson's arguments -- is simply not substantial, the reason being, sir, that there is a clear -- and I repeat this again -- a clear distinction between factual presentations which form a basis for a decision by this Court -- and that decision being that there would or would not be a lineup for a certain witness -- that's one thing -- and the second thing is the amount of evidence which would be presented at a preliminary hearing for the purpose of showing a prima facie case to that Court.

Under no obligation is the Commonwealth to present all of the factual basis for an unrelated motion at the preliminary hearing.

That simply does not make sense. If he wished to bring it out on his own he could have done so on cross-examination.

If the presentation at the preliminary hearing was so completely different from what was presented -- not so completely different, but substantially different -- from what was presented to this Court, well, then you may have a due process issue. But in this case there were no such substantial discrepancies in the testimony that was presented before Judge Mekel--for over an hour. And I ask, in the interest of justice and in the interest of resolving this case, that it not be

delayed by any kind of --

MR. JACKSON: I'm not trying to delay the case.

THE COURT: I'm going to deny the motion to strike. On the motion to certify this question to the appellate court, if you had a novel question of law that had not been decided, and the case goes one way or the other based on it, then it would be appropriate to have it appealed immediately. But here you really don't have that. And a review of my ruling, based on the record, can always be reviewed later. So you are not being foreclosed from raising that at a later date.

MR. JACKSON: I appreciate that, Your Honor. But, Your Honor, in all due respect, I still think that it's not simply a matter -- well, I understand I have the opportunity to ask to have your ruling appealed at a later point, but, again, the testimony with regard to identification was a limited amount of the testimony throughout the hearing. And counsel is saying that there was no -- that it wasn't completely different. Most of the testimony surrounded the substantial facts as to what happened, and I am not arguing that. It's the limited area with regard to identification and being there at the scene. And I am saying to you, Your Honor, that even though counsel is arguing that they don't have to present all this and all that because that is not the issue, even though counsel first says they are going to -- in order for you, Your Honor, to deny my motion for a lineup, the Commonwealth says, "We are going to present 1, 2 and 3." That's what the Commonwealth said. And they didn't present it.

THE COURT: I understand your point.

MR. JACKSON: Now, whether that rises to the level of prosecutorial misconduct or not, Your Honor, it seems to me that that is an issue that's reviewable before we go through a trial.

MR. MCGILL: Do you think I should respond to that, Judge?

THE COURT: No. Because I understand the issue. If it's misconduct, you're going to have that in the record at a later date, anyway.

MR. MCGILL: Your Honor, I don't particularly care to hear the words "prosecutorial misconduct," whether I am dealing with Mr. Jackson or anyone else. What is a factual basis for a decision on a lineup is entirely different. And it was presented at the hearing before Your Honor.

THE COURT: There are cases of prosecutorial misconduct, of course, where the misconduct is so gross that the ruling is that the prosecution should be barred. There are cases where that has happened. This is not one of those cases.

MR. JACKSON: I agree it doesn't rise to that level.

THE COURT: We don't have a case where there has been a violation of any rights that you want to throw the case out.

MR. MCGILL: Judge there was no misconduct.

Mr. Jackson is confusing the issues involved. There has been no misconduct at all. What I presented to this Court at the lineup hearing was evidence to show why it would not be appropriate for the witness to be subjected to a lineup and those factual presentations she would state if she were asked.

THE COURT: I think I was correct in that ruling. So I don't think we can really --

MR. JACKSON: You are denying the motion to strike and denying the certification as well?

THE COURT: Yes, I'm going to deny the motion to certify. I don't think you have the kind of question that really has to be decided at this point. And, as I say, you are not foreclosed from appealing this decision at a later point if you feel you are correct.

MR. JACKSON: I understand that.

THE COURT: The motion to suppress will be heard at the time of trial.

MR. JACKSON: Sure.

THE COURT: On the discovery, you feel that you have not gotten all of the discovery?

MR. JACKSON: Haven't gotten any.

THE COURT: That should be in the mail, shouldn't it?

MR. MCGILL: It is, Your Honor. It is in the mail.

MR. JACKSON: Well, it may be in the mail, but

I don't have it.

MR. MCGILL: Well, it's quite extensive, Your Honor.

THE COURT: At the next hearing, if you still have not gotten the discovery materials, then we'll go into it in greater detail. I'm not going to sign an order now, because I don't know --

MR. JACKSON: I understand, Your Honor. There is one other --

MR. MCGILL: Your Honor is aware that we have turned over -- all the items that Your Honor ruled should be turned over, we have turned that over.

MR. JACKSON: But not copies of those documents Your Honor said should be copied.

THE COURT: You say that's going to be done?

MR. MCGILL: Yes, Your Honor, we can do that and we will do that.

MR. JACKSON: The other thing goes to this lineup request. It was my understanding that the original lineup request that I filed was not a final issue. Whether Your Honor wants me to file another lineup request -- I don't know who the other eyewitnesses are. Cynthia White is the only one that I know. The Commonwealth, again, has not given me any discovery as to that. I would like to argue that issue.

THE COURT: You are going to turn over the names of the eyewitnesses?

MR. MCGILL: Yes, sir.

THE COURT: What eyewitnesses you have?

MR. MCGILL: Yes, sir. At this point I am not prepared to respond. And I don't think he is making an oral motion at this time.

MR. JACKSON: No.

MR. MCGILL: Could we have a hearing on that?

THE COURT: You will have a hearing on that, yes.

MR. JACKSON: So I will not be precluded from doing that later on?

THE COURT: No.

MR. JACKSON: Fine.

THE COURT: I am making a note that after discovery is received, if you think there are any other motions to be filed, you have leave to file those.

MR. JACKSON: Thank you very much, Your Honor.

THE COURT: How much time do you think you will need to get all of the discovery records, and the motions, and so on?

MR. MCGILL: It really will not be very long, Your Honor. I would say maybe a few weeks.

Excuse me, Your Honor. Let me speak with Mr. Brodkin for a moment, if I may.

THE COURT: All right.

MR. MCGILL: Your Honor, three weeks. There will be no delay. We are anxious to move this case forward to trial.

THE COURT: How about if we set it up for around March 18th, Thursday the 18th?

MR. MCGILL: That's fine, Your Honor. Whatever you say.

MR. JACKSON: Is that the date when I will receive discovery?

THE COURT: Oh, no. I'm hopeful that you will get that within the next week or so. That will be a status listing, the 18th.

You will get the discovery in as soon as possible?

MR. MCGILL: Yes, sir.

THE COURT: Call Mr. Jackson and let him know when it is available, and he can arrange to get it right away, or maybe you can send it over to him. I would like him to have it before the hearing.

MR. MCGILL: I'll have it certainly before then. It's quite a volume of material.

THE COURT: Let Mr. Jackson have that before the next hearing.

MR. MCGILL: He will have it, sir.

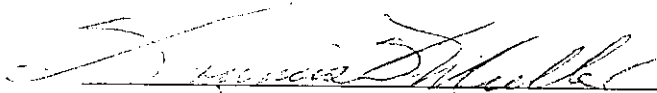
THE COURT: We'll reconvene on March 18th, then.

MR. JACKSON: Yes, sir.

MR. MCGILL: May I be excused, Your Honor?

THE COURT: Yes.

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.



Official Stenographer

7/31 19 95

Date

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

Judge