

purposes of fixing alimony because such benefits were not subject to attachment, levy or execution. The Pennsylvania Superior Court rejected his argument on two grounds; (1) his wife was not a "creditor" within the meaning of the statute and (2) the action was not one of attachment or garnishment. the *Parker* court analogized veterans' benefits with other nonattachable government benefits, including Social Security, and cited with approval sister jurisdictions specifically holding that Social Security is "income" for the purposes of fixing alimony, in spite of 42 U.S.C. §407. See *Brown v. Brown*, 32 Ohio App. 2d 139, 288 N.E. 2d 852 (1972) and cases cited therein.

This court adopts the rationale and precedent cited by the *Parker* court and incorporates by reference its original opinion and order issued on February 20, 1987, in reaffirming its position with regard to the present issue.

COMMONWEALTH V. DAVIS, C.P. Franklin County Branch,  
Crim. Action No. 680 of 1987

*Rape - Probable Cause - On Scene Identification - In-Court Identification*

1. General Descriptions of a suspect which are equally applicable to large numbers of people usually do not support finding of probable cause.
2. Where a defendant is stopped within ten minutes after the crime is reported, six minutes after police were given the description and withing walking distance of the victim's residence, probable cause for arrest is shown.
3. An In-custody at-the-scene identification made shortly after the commission of a crime does not offend the notions of due process.
4. Even an in-court identification which is suggestive is permissible if the victim has an independent origin for identification.
5. Where the victim could not identify defendant at a line-up seven weeks after the crime, there is not independent origin for an in-court identification.

*John F. Nelson, Esq., District Attorney, Counsel for the Commonwealth*

*Douglas W. Herman, Esq., Assistant Public Defender, Counsel for the Defendant*

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This matter is before the court on pre-trial motions. The defendant, William Earl Davis, is charged with rape, burglary, and theft. In his pre-trial motions, the defendant raises three (3) objections. The objections are individually discussed below, and for the reasons stated the first two objections are overruled and the third objection is granted.

The facts relevant to the pre-trial objections are not set forth. In the early morning of August 8, 1987, Mrs. Violet Truett called the Chambersburg Police Department to report that she had just been raped in her home. Police Department records show that the call was logged at 5:49 a.m. Two officers responded to the scene. Police reports indicated that the last officer to arrive did so at 5:53 a.m. Mrs. Truett described the rapist to the police officers as a black male wearing blue jeans, a white long sleeve T-shirt type shirt and sneakers. Mr. Truett also told the officers that the rapist had headed left (west on Liberty Street) when he left the house. Immediately thereafter, one officer left the scene of the crime and headed west on Liberty Street to look for anyone matching the description given by Mrs. Truett. After seeing four or five people standing at the County Market, the officer noticed the defendant near the J.C. Penney's in the Southgate Mall, which is in walking distance of the Truett residence. The defendant was located at 5:59 a.m. Of the people seen by the officer, only the defendant matched the description.

The officer radioed that she was stopping someone who met the victim's description, and requested that the victim be transported to the scene to make an identification of the person stopped. The officer then effectuated the stop, and asked for identification. The defendant was not handcuffed, or placed in a police vehicle. Rather, the defendant remained standing in the parking lot.

Approximately five (5) minutes later, Mrs. Truett arrived at the parking lot. As the police car transporting Mrs. Truett entered the parking lot, Mrs. Truett spontaneously identified the defendant as her attacker. Once the officer who made the stop was informed of the positive identification made by Mrs. Truett, the defendant was arrested and a search of his person begun.

On September 24, 1987, a line-up was held at the Chambersburg Police Department. At this line-up, the victim, Mrs. Truett, failed to identify the defendant as her attacker.

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OWNER OR REPUTED OWNER	DESCRIPTION	UPSET PRICE
	WASHINGTON	
BEELEER, Paul E. and Jane V.	23 Q-17-44	97.87
BEELEER, Paul E. and Jane V.	23 Q-17-44-LO1 TR 1956 Homemaker	216.66
BEELEER, Paul E. and Jane V.	23 Q-17-44-LO2 TR 1963 Atlas	432.65
BROWN, John E., Jr. and Shirley	23 Q-14-71 Rt. 28068	1,429.12
BURCKER, Luther and Shawnee	23 Q-14-53-8 TR 1979 Flemingo	740.56
BURKETT, Franklin E. and Linda D.	23 Q-19-46 12751 Old Pen-Mar Road	762.00
COWDRICK, James R. and Esther M.	23 Q-29-54 Rt. 664	2,488.00
Davis, James	23 Q-19-6-30 TR 1973 Parkwood	289.86
Davis, Joseph	23 Q-20-117-LR1 TR 1972 Mark IV	575.64
Davis, William C.	23 Q-19B-2-9 TR 1971 Kennelworth	338.58
DEWEASE, Richard E.	23 Q-19-6-34 TR 1980 Oakbrook	616.24
EAST, David A. and Susan L.	23 Q-8-67 10076 Old Forge Road	2,559.94
FARROW, C. Randall Sr. and Mary Jane	23 Q-10-37 Lot 5, LR 28004	2,408.84
HAMPTON, Frances C.	23 Q-13M-16-LR TR 1972 Fairmont	558.63
HAMPTON, Robert	23 Q-13M-16-LO TR 1965 Rambrandt 8	504.63
HAMPTON, Robert E. and Mary M.	23 Q-13M-16	234.64
HARBAUGH, Martin Jr. and Pamela	23 Q-19B-2-28 TR 1971 Marriott	486.64
HARBAUGH, Timothy L. and Beulah V.	23 Q-20P-22-LR TR 1972 Atlantic	368.42
HULL, Edward H. and Patricia A.	23 Q-19A-84 Rt. 16	1,734.01
KOONTZ, George and Gladys	23 Q-19-243 Buena Vista Road	82.99
KREPS, Samuel Henry Et. Al. c/o Louise Butler	23 Q-19A-19 Rouzerville	363.70
LAMAN, Ronald and Dorothy	23 Q-11-12A-LR TR 1975 Nashua	184.95
LAMAN, Ronald E. and Dorothy E.	23 Q-11-12A	90.42
LIGHT, Donna Mae	23 Q-7-190 Lot C Sect. C	1,846.42
LONG, Donald D. and Judith E.	23 Q-8-159 Lot 17	1,409.93
MCCLEAF, Earl	23 Q-19B-49-3 TR 1980 Commrade	882.61
MCKENRICK, Kenneth and Wilma	23 Q-13R-7-LO TR 1964 Monarch	217.63
MCKENRICK, Kenneth A.	23 Q-13R-7 13223 N. Mentzer Gap Road	179.43
MCKENRICK, Kenneth A. and Wilma L.	23 Q-13R-14 13252 Mentzer Gap Road	85.53
MCSHERRY, Danny L. and Cathy L.	23 Q-19B-55 117945 Pen-Mar Road	1,496.33
MILLER, Galen D. and Doris J.	23 Q-13-28 Lot 11	1,334.36
MILTER, Willard H., Jr. and Thelma R.	23 Q-20K-13 E. Pen Mar	1,091.75
MOHN, Edwin L., Jr.	23 Q-89K-LR TR 1982 Brigadier	909.59
QUEEN, Robert A., Jr. and Janice G.	23 Q-20Q-1 E. Side Monterey Avenue	3,892.63
QUEEN, Robert A., Jr. and Janice G.	23 Q-20Q-44 13560 Monterey Lane	1,003.90
REED, Floyd P., Sr.	23 Q-20F-2 13220 Pennersville Road	947.38
RICHARDSON, Robert	23 Q-5-14-96 TR 1983 Skyline	909.59
SHOCKEY, Daniel F. and Betty S.	23 Q-20K-34 Blue Ridge S.	689.13
SHOCKEY, Elmer A. and Louella J.	23 Q-20K-36A-LO TR 1981 Brigadier	519.64
SHOCKEY, Elmer A., Sr. and Lovella J.	23 Q-20K-36A	112.95
TAMAGNI, Joseph N. and Lena M.	23 Q-19F-1 N. Side 28026	446.22
THARP, Ronald E.	23 Q-19F-27-LO TR 1978 Witchcraft	801.61
THARP, Ronald E. and Grace V.	23 Q-19F-27 13564 Waterloo Road	192.38
WETZEL, Bryan R. and Angela I.	23 Q-5-74 11865 Village Heights Drive	1,649.07
	WAYNESBORO BORO	
DIFFENDERFER, Marian L.	26 5C-15-109A 310 Park Street	464.31
GUYER, Larry Gene and Mary Lou	25 5B-57-41 121 N. Potomac Street	1,142.60
HENSON, Joseph E., Jr. and Sylvia M.	25 5B-57-115 3 W. King Street	2,083.73
HILL, Michael R. and Barbara A.	25 5B-49-54A 403 N. Potomac Street	1,961.39
KENNEDY, Jerome L., Sr. and Cheryl C.	26 5C-15-101 212 W. Fourth Street	830.40
KNOTT, Randall W. and Earlene D.	24 5D-2-23 232 N. Broad Street	1,738.37
KOONTZ, George C. and Gladys	25 5B-57-88A 110 N. Church Street	737.73
LEONAROZYK, Edward A. and Frances	25 5B-57-42 123 N. Potomac Street	1,364.26
MANN, Richard D. and Joyce L.	24 5D-2-43 54 N. Broad Street	834.02
MCLUCAS, Ronnie L. and Karen L.	26 5C-7-34 112 Hamilton Avenue	477.31
MORNINGSTAR, Harry G., Jr.	24 5C32-78A 26 E. Fifth Street	482.24
OWENS, William C. and Charla Y.	25 5B-49-87 232 Wayne Avenue	964.20
REED, Wallace E., Jr. and Lisa A.	26 5A-63-41 28 Fairview Avenue	941.89
RIHEL, Shirley A. and Paul S.	24 5C-32-27 343 S. Church Street	362.01
SANDERS, Brent W. Et. Al.	24 5D-1-54 47 N. Church Street	2,321.94
SHAFFER, Harry O. and Fay A.	26 5C-8-153 149 Snider Avenue	1,808.46
SNADER, David E.	24 5D-17-58 150 E. Second Street	1,073.08
WAGAMAN, Paul L.	26 5C-14-85 420 N. Fifth Street	1,557.32

A preliminary hearing was held on October 1, 1987, before District Justice J. William Stover. The defendant was identified by Mrs. Truett as her attacker at the preliminary hearing.

The first objection the defendant raises is that his arrest was not supported by probable cause. The Supreme Court of Pennsylvania has observed that there are two situations in which a police officer is justified in stopping and searching an individual. *Commonwealth v. King*, 247 Pa. Super. 443, 372 A.2d 908 (1977). The first situation is where the police officer has probable cause to arrest. *Commonwealth v. Hicks*, 434 Pa. 153, 253 A.2d 276 (1969). Under such circumstances, the search is justified as incident to a lawful arrest. *See also Chimel v. California*, 395 U.S. 752 (1969).

When a police officer lacks probable cause to arrest, he need not ignore suspicious conduct. An investigatory stop is justified by unusual conduct on the part of an individual or other suspicious circumstances. *Commonwealth v. Everett*, 234 Pa. Super. 249, 338 A.2d 662 (1975). In an investigatory stop, a limited search for weapons is justifiable to protect the police officer's safety, if the officer reasonably believes that the individual may be armed or dangerous. *Terry v. Ohio*, 392 U.S. 1 (1968).

In the present case, the court finds that the police had probable cause to arrest the defendant. As such, the court will not address the issue of whether the police officer was justified in making an investigatory stop.

The well-settled test for determining the presence of probable cause is whether, at the time of the initial apprehension, there were facts available which would justify a man of reasonable caution in the belief that a crime had been committed and that the individual arrested was the probable perpetrator. *Commonwealth v. Sabb*, 269 Pa. Super. 206, 212, 409 A.2d 437, 440 (1979). When considering probable cause, the court deals with a common sense determination of reasonableness. *Commonwealth v. Hall*, 456 Pa. 243, 317 A.2d 891 (1974), not without certainties. *Commonwealth v. Tolbert*, 235 Pa. Super. 227, 341 A.2d 198 (1975).

General descriptions of a suspect which are equally applicable to large numbers of people will not usually support a finding a probable cause, particularly where the arrest does not immediately follow the crime. *Commonwealth v. Jackson*, 459 Pa. 669, 331 A.2d 189 (1975); *Commonwealth v. Richards*, 458 Pa. 455, 327, A.2d 63 (1974). However, each case must be analyzed in light of its own particular circumstances, since probable cause for arrest depends upon the particular facts of the case. *Commonwealth v. Youngblood*, 241 Pa. Super. 72, 359 A.2d 456 (1976).

In the instant case, the description supplied to the police by the victim was: black male, wearing blue jeans, a white long sleeve T-shirt type shirt, and sneakers, who headed left [west] on Liberty Street upon leaving the scene of the crime. The defendant, matching the description, was stopped ten (10) minutes after the victim reported the crime to the police, and six (6) minutes after the police were given the description. The stop of the defendant occurred in front of J.C. Penney's at Southgate Mall. The Mall is within walking distance of the crime scene, and is reached by walking west on Liberty Street from the scene of the crime. Thus, this case closely resembles those cases where Pennsylvania courts have found probable cause based upon a very detailed description or a description coupled with circumstances.

In *Commonwealth v. Bynum*, 265 Pa. Super. 13, 401 A.2d 776 (1979), the Superior Court affirmed a finding of probable cause where an arrest was made based upon the description given the police and the circumstances of the arrest. The description which was provided to the police of two perpetrators of a robbery was: two men, one wearing a white hat and a black coat, and the other wearing a black coat, dungarees, and sneakers. *Id.* at 15, 401 A.2d at 777.

The Superior Court found that the arresting officer knew more than most people what the defendants were wearing. The officer also knew in which direction and street the men were walking. Significantly, since the officer had been told by the victim of the crime, the officer had reason to believe that a crime had been committed, and the officer also believed that the suspects were the perpetrators of the crime. Additionally, the defendant were found only ten minutes walking distance from the crime scene. The Superior Court also considered the police officer's testimony that these two men were the only people he saw on the street who matched the victim's description. *Id.* at 16-17, 401 A.2d at 778. These particular circumstances, the Superior Court believed, were sufficient to justify probable cause to arrest the defendants.

In *Commonwealth v. King*, 247 Pa. Super. 443, 372 A.2d 908 (1977), also a robbery case, the Superior Court upheld a finding of probable cause to arrest where the description of the perpetrator given by the victim was "negro male of a stated height with blue pants, blue hat, of a 'flop type' and waist length jacket." *Id.* at 445, 372 A.2d at 909. In affirming the finding of probable cause, the Superior Court considered the short amount of time that had elapsed between the stop of the defendant and the broadcast of the description over the police radio. An additional consideration

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BAR NEWS ITEM  
ANNOUNCEMENT

United States District Judge Sylvia H. Rambo announces that training will be provided for defense attorneys situated in the twenty-four county Harrisburg/Williamsport/Lewisburg Division of the Middle District of Pennsylvania. The training program will focus on the recently enacted United States Sentencing Guidelines and the role of defense counsel in the amended sentencing procedures. The training session will be conducted on August 26, 1988 from 1:00 p.m. to 5:00 p.m. in Courtroom II at the United States Courthouse, Third and Walnut Streets, Harrisburg, Pennsylvania. Those planning to attend are asked to notify Probation Officer Edward J. Kosheba (717-782-2259) by August 22, 1988. 8/12, 8/19/88

was that the place of the stop was no more than one block from the crime scene. The Superior Court believed that these particular circumstances were sufficient to justify probable cause to arrest the defendants.

In the instant case, as in *Bynum* and *King*, the arresting officer had reason to believe that a crime had been committed. The officer had been told of the crime by the victim. The officer also had reason to believe that the defendant was the perpetrator of that crime. The officer testified that she was given a description of the perpetrator by the victim, and then left the scene of the crime heading in the same direction as the perpetrator did when he left the crime scene. As the officer drove west on Liberty Street at approximately 6:00 a.m., looking for the perpetrator, the streets were nearly deserted and the only people she saw were four or five people standing in front of the County Market, and the defendant at the Southgate Mall. The defendant was the only person in the handful the officer saw who matched the victim's description. Additionally, the defendant was located ten (10) minutes after the victim reported the crime to the police, and only six (6) minutes after the description of the attacker was given by the victim, and within walking distance from the scene of the crime.

The description provided by the victim, taken together with the short amount of time that passed between the crime and the locating of the defendant, the proximity of the defendant to the crime scene, and the very early hour of the morning would justify a man of reasonable caution in the belief that a crime had been committed and that the individual arrested was the probable perpetrator. Consequently, the court finds that the police officer had probable cause to arrest the defendant, and overrules the defendant's objection.

The second objection which the defendant raises is that the one-on-one confrontation in the parking lot of Southgate Mall was unnecessary and unnecessarily suggestive and violates the defendant's right to due process. It is well settled in Pennsylvania that, by itself, an in-custody at-the-scene identification made shortly after the commission of a crime does not offend the notions of due process. *Commonwealth v. Turner*, 454 Pa. 520, 314 A.2d 496 (1974). The policies and considerations behind on-the-scene identifications include not only the inherent reliability in such an immediate identification, but also the desire to effectuate the rapid release of a mistaken suspect and to resume the search for the actual offender. *Russell v. United States*, F.2d 1280 (D.C. Cir.), cert. denied 395 U.S. 928 (1969); *Commonwealth v. Turner, Supra*.



The Courts in Pennsylvania do not concern themselves with whether an on-the-scene confrontation was unnecessary. Rather, the courts are concerned with whether

“the circumstances of the pre-trial confrontation were so infected by suggestiveness as to give rise to an irreparable likelihood of misidentification.” *Turner*, 454 Pa. at 523, 378 A.2d at 361.

Unless special elements of unfairness are present, prompt on-the-scene confrontations do not fall within the ambit of suggestiveness. *Id.* However, the identification of a suspect is not impermissibly suggestive merely because the identification was made away from the crime scene. *Commonwealth v. Ray*, 445 Pa. 43, 315 A.2d 634 (1974).

The instant case is analogous to *Commonwealth v. Wojciechowski*, 285 Pa. Super. 1, 426 A.2d 674 (1981). In this case, a woman was raped and reported the crime to the police. Approximately thirty (30) minutes after the crime was reported, the police stopped a van which fit the description the victim had given. The police then transported the victim to the location where the defendant had been stopped, which was in the general area of the crime scene. The defendant was not handcuffed, nor was the defendant contained in a police vehicle. Rather the defendant was standing outside of the vehicle he had been driving. As soon as the victim saw the defendant, the victim identified the defendant as her attacker. This identification was spontaneous. The Superior Court held that this identification, made shortly after the crime, and in the general area of the crime scene, was in no way suggestive.

In the instant case, the defendant was stopped ten (10) minutes after the crime had been reported, and six (6) minutes after the victim gave a description to the police. The police then transported the victim to the South Gate Mall, the place where the defendant was stopped, which was in walking distance of the crime scene. The victim arrived approximately five (5) minutes after the stop and fifteen (15) minutes after reporting the crime to the police. The defendant was not handcuffed, nor sitting in a police vehicle. Rather, the defendant was standing in the parking lot when the victim arrived. As soon as the police car containing the victim pulled into the parking lot, the victim spontaneously identified the victim's attacker. This case is nearly identical to *Wojciechowski*.

The court does not find any special elements of unfairness in the circumstances of this case which would have made the

identification of the defendant unnecessarily suggestive. To quote *Wojciechowski*: “[T]he identification procedure employed did not present elements of unfairness or suggestiveness and was clearly proper.” 285 Pa. Super. at 4, 426 A.2d at 675. Therefore, the defendant's objection is overruled.

The third issue that the defendant raises concerns the in-court identification of the defendant by the victim at the preliminary hearing. The defendant contends that the in-court identification was based upon the suggestive manner of the confrontation. The contention is not without merit.

Pennsylvania cases which address the suppression of in-court identifications are concerned with whether the identification has an “independent origin” in the witness's observations of the crime, or whether the identification is tainted by improper procedures. *Commonwealth v. Fowler*, 466 Pa. 198, 352 A.2d 17 (1976). Thus, the questions in the instant case is whether the in-court identification has an “independent origin” or was based upon the suggestiveness of the proceedings.

A case which discusses the suggestiveness of the preliminary hearing is *Commonwealth v. James*, 506 Pa. 526, 486 A.2d 376, (1986). In this case, the Supreme Court did not suppress an in-court identification made subsequent to the preliminary hearing, even though the Supreme Court admitted that the preliminary hearing was suggestive. The reason for this decision was that the in-court identification had an independent origin. The Supreme Court believed that a major factor which supported this conclusion was that the victim was able to identify the defendant as her attacker, albeit by photo, some six (6) weeks after the assault had occurred.

In the present case, the defendant was the only black male who was seated beside defense counsel wearing prison garb at the time of the preliminary hearing. Certainly, the confrontation which occurred was suggestive. However, suggestive proceedings are allowed, if an independent origin for the in-court identification exists. *James, Id.*

A major factor for consideration in determining if an independent origin for the in-court identification exists is the prior identification of the defendant by the witness a substantial amount of time after the crime has occurred. *James, Id.* In the case at bar, the victim was unable to identify the defendant in a physical line-up conducted some seven (7) weeks after the crime had

occurred. Thus, it appears as if the in-court identification of the defendant made by the victim at the preliminary hearing does not have an independent origin in the victim's observations at the time of the crime, but was based upon the suggestive manner of the preliminary hearing. Therefore, the court feels that the ends of justice would best be served by suppressing the in-court identification of the defendant made by the victim on October 1, 1987.

#### ORDER OF COURT

January 12, 1988, the court dismisses the defendant's first two motions to suppress since the officer did have probable cause to arrest the defendant and the on-the-scene identification was proper.

The court does grant the defendant's third motion to suppress the in-court identification of the defendant by the victim at the preliminary hearing on October 1, 1987.

**WILDERS AND WIFE vs. COMMUNITY REFUSE SERVICE, INC., ET AL., C.P. Franklin County Branch, No. A.D. 1985-194**

*Accident - Punitive Damages - Broken Warning Buzzer*

1. Punitive damages may be awarded if defendant's actions are outrageous, wilful, wanton, the result of bad motive, or in reckless disregard of the rights of others.
2. Pennsylvania law does not require a garbage truck to have a warning buzzer sound while backing up and failure of defendant to repair a broken buzzer is not outrageous or reckless behavior.
3. Backing into a parking lot without a full view of the area behind the truck may be negligence but not the subject of punitive damages because most vehicles have a blind spot.

*John N. Keller, Esquire, Counsel for plaintiffs*  
*Thomas J. Finucane, Esquire, Counsel for defendants*

#### OPINION AND ORDER

WALKER, J., April 14, 1986:

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