

NOTICE

*Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JEFFREY ERIC BRIGMAN,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12727  
Trial Court No. 3AN-13-09635 CR

MEMORANDUM OPINION

No. 6860 — February 12, 2020

Appeal from the Superior Court, Third Judicial District,  
Anchorage, Paul E. Olson, Judge.

Appearances: Gavin Kentch, Law Office of Gavin Kentch,  
LLC, under contract with the Public Defender Agency, and  
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.  
Eric A. Ringsmuth, Assistant Attorney General, Office of  
Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney  
General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Mannheimer,  
Senior Judge.\*

Judge MANNHEIMER.

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\* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Jeffrey Eric Brigman was convicted of felony driving under the influence based on evidence that he crashed a car in downtown Anchorage.

The driver of this car left the scene on foot immediately after the crash, and a few minutes later the police found Brigman only a short distance away. The police then conducted a “show-up” identification procedure, in which Brigman was displayed to a man who had witnessed the crash. This witness identified Brigman as the driver.

After Brigman was indicted, his attorney asked the superior court to suppress the results of this show-up identification, arguing that the procedure was improperly suggestive, and that the resulting identification was unreliable.

The superior court held an evidentiary hearing on this matter and, based on the evidence presented at the hearing, the court denied Brigman’s suppression motion. In making this ruling, the court relied on the legal test set forth in *Anderson v. State*, 123 P.3d 1110, 1116 (Alaska App. 2005), and *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

But after the superior court made its ruling, the Alaska Supreme Court adopted a new test for evaluating the reliability of out-of-court police identification procedures: see *Young v. State*, 374 P.3d 395 (Alaska 2016). The State concedes that the *Young* test is controlling, and that the reliability of Brigman’s out-of-court identification should be evaluated under that test.

The State nevertheless argues that, even though it was error for the superior court to apply the *Anderson/Brathwaite* test, this error was harmless beyond a reasonable doubt — because (according to the State) the evidence that Brigman was the driver of the car was essentially incontrovertible. We disagree. While the evidence was certainly sufficient to support a finding that Brigman was the driver, this was not a foregone conclusion; there were potential reasons to doubt whether Brigman was the driver.

We therefore remand Brigman's case to the superior court, directing the superior court to re-evaluate the show-up identification procedure using the test set forth in *Young v. State*.

Brigman makes one further claim on appeal: he challenges the superior court's denial of his mid-trial motion for a mistrial. Brigman's mistrial motion arose in the following way:

In addition to being charged with felony DUI, Brigman was initially also charged with vehicle theft. But just before Brigman's trial began, the State discovered that the owner of the vehicle was unavailable to testify, so the State dismissed the vehicle theft charge. The prosecutor, the defense attorney, and the trial judge then agreed that the State would not introduce any evidence that Brigman had been driving a stolen car.

After this discussion, the State called Officer Angelina Fraize (one of the responding officers) to the stand. During an early stage of Fraize's testimony, she referred to the fact that her dispatcher had broadcast information about a stolen car being involved in a collision:

*Prosecutor:* And when you were traveling on Ingra [Street] going northbound ... in your squad car, was there anything you were hearing on your radio?

*Officer Fraize:* Yeah. So, I'd heard a call earlier for a stolen vehicle, and then I'd heard that that same vehicle was involved in a collision.

Brigman's attorney immediately requested a bench conference. At this bench conference, the attorney objected to Fraize's reference to a stolen vehicle, and he asked the trial judge to declare a mistrial.

The judge agreed that the officer's reference to a stolen car was problematic, but the judge denied the defense attorney's request for a mistrial. Instead, the judge gave the jury the following curative instruction:

During Officer Fraize's testimony, she mentioned hearing some radio traffic regarding a suspected vehicle theft somewhere in Anchorage. I'm instructing you here that [the officer's] statement is not relevant to any of the issues before you in this case, and you are to disregard that statement, because it doesn't have anything to do with this case. It was just radio traffic over there. You're not to use that statement when evaluating the evidence, or mention it in your deliberations, because it doesn't have anything to do with this case. Okay?

The curative effect of this instruction was reinforced by the prosecutor's follow-up questioning of Officer Fraize. When Brigman's trial resumed, the prosecutor asked Fraize if she had ever made it to the scene of the vehicle collision that she had just referred to; Fraize stated that she had not. The prosecutor then asked Fraize if she had received a separate call from the dispatcher regarding a DUI suspect, and if she had stopped Brigman based on this other call. Fraize said that this was correct.

Given this record, we conclude that the trial judge did not abuse his discretion when he denied Brigman's request for a mistrial.

### *Conclusion*

We remand Brigman's case to the superior court, directing that court to re-evaluate the show-up identification using the test set forth in *Young v. State*.

The superior court shall conduct this evaluation within 120 days of the issuance of this opinion, although the superior court may seek an extension of this deadline for good cause.

If the superior court again upholds the identification procedure, Brigman shall have 30 days to file a notice that he intends to appeal the superior court's ruling, and to designate any supplemental record under Alaska Appellate Rule 210. If Brigman does not file such a notice, we will close this case.

If the superior court rules that the identification procedure was improper, the State shall have 30 days to seek review of the superior court's ruling. If the State does not seek review, we will close this case.