PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2856

CLAYTON THOMAS

v.

BEN VARNER, SUPERINTENDENT; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 02-cv-04778)
District Judge: Honorable Bruce W. Kauffman

Argued April 22, 2005

Before: ROTH, FUENTES, and STAPLETON, Circuit Judges.

(Opinion Filed: November 4, 2005)

Helen T. Kane (Argued)
Assistant District Attorney
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ATTORNEYS FOR APPELLANTS

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ATTORNEY FOR APPELLEE

ORDER AMENDING PUBLISHED OPINION

FUENTES, Circuit Judge

IT IS NOW ORDERED that the published Opinion in the above case filed November 4, 2005, be amended as follows:

On page 16, beginning on the tenth line of the page, delete the two sentences and footnote that follow "Id." Replace the deleted text and footnote with the following:

> Here, Fuller testified that the detective insisted that he look "real good" at the photograph of Thomas after failing to get an identification on several prior occasions. The Commonwealth notes that the detective's trial testimony conflicted directly with Fuller's account of the identification. However, the Commonwealth declined to develop the record further before the Magistrate Judge, despite the opportunity to do so. Accordingly, the Commonwealth did not establish by a preponderance of the evidence that the photo array was not improperly suggestive. At the hearing before the Magistrate, the relevant issue was whether or not a motion to suppress would have been successful in the state court if Thomas's trial counsel had made such a motion. If trial counsel had filed a suppression motion, the burden would have been on the Commonwealth to establish that Fuller's identification was not the result of undue suggestiveness. See Pa. R. Crim. P. 581(H) ("The Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not

obtained in violation of defendant's rights."); Commonwealth v. Culp, 548 A.2d 578, 581 (Pa. Super. 1988). Because the Commonwealth did not carry its burden, the Magistrate did not err in accepting Thomas's position.

By the Court,

/s/ Julio M. Fuentes

Dated: January 18, 2006