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No. _____

AUG 29 2022

IN THE S.C. SUPREME COURT
SUPREME COURT OF THE UNITED STATES

JUSTIN JAMAL WARNER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant is entitled to an in camera hearing pursuant to Neil v. Biggers, 408 U.S. 188 (1972) on the reliability of an out-of-court identification where the identification is made by a person who was not physically present at the scene of the crime but identified the defendant through the use of video technology under unnecessarily suggestive circumstances arranged by law enforcement?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Justin Warner respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is reported at State v. Warner, 436 S.C. 395, 872 S.E.2d 638 (2022). App. 1-12. The opinion of the Court of Appeals of South Carolina is reported at State v. Warner, 430 S.C. 76, 842 S.E.2d 361 (Ct. App. 2020).

JURISDICTION

The Supreme Court of South Carolina issued its opinion on April 13, 2022. Petitioner timely filed a petition for rehearing which was denied on June 7, 2022. App. 13. This Court has jurisdiction pursuant to 28 U.S.C §1257(a), because Petitioner is asserting the deprivation of a right guaranteed by the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution which provides in relevant part, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV.

STATEMENT OF THE CASE

The trial

Petitioner was accused of the attempted armed robbery and murder of a woman working at a BP gas station she owned with her husband in Anderson County, South Carolina. A black male was seen on the surveillance video, but he was wearing

sunglasses and a hat.¹ Investigators with local law enforcement released the surveillance video to the media and received a tip that Petitioner was the perpetrator of the murder. Investigators also learned that Petitioner was on probation in Georgia. Petitioner's probation agent in Georgia, Nathan Goolsby, was shown the video by the investigators who asked if the man in the video was Petitioner. Goolsby claimed that it was.

How the federal issue was raised below

Defense counsel requested a hearing pursuant to Neil v. Biggers² so that an in camera judicial determination could be made as to the reliability of the out-of-court identification made by Agent Goolsby. R. 58, ll. 11 – 21. The identification procedure here, which was arranged by law enforcement, looked unnecessarily suggestive because, as defense counsel told the judge, Petitioner's probation agent was provided with a clip of the surveillance video and the investigators asked Goolsby if the man in the video was Petitioner. R. 59, l. 10 – 61, l. 3.

The man in the video was a black male wearing a hat and glasses. Goolsby admitted that with the hat and sunglasses "it was hard to see the face" but he maintained he identified Petitioner because of "the way that he walked, the way he carried himself, and he exhibited the same signs." R. 226, l. 23 – 227, l. 9. However, Goolsby never provided the alleged specific distinguishing aspects of Petitioner's gait

¹ At the time of the murder, the only two people physically inside the gas station were the victim and the black male.

² 409 U.S. 188 (1972).

that led him to believe the man in the video was Petitioner. R. 228, l. 11 – 229, l. 8; R. 58, l. 19 – 61, l. 10.

The solicitor said that a Neil v. Biggers hearing was not necessary because Goolsby was not an eyewitness and because he knew Petitioner. The trial judge found this reasoning persuasive and ruled that a Neil v. Biggers hearing was not required. R. 58, l. 15 – 62, l. 19. Thus, Goolsby's identification of Petitioner where investigators asked him if the man in the video clip was Petitioner, and where Goolsby claimed that it was Petitioner based on the way he walked and how he "carried himself," was never subject to an in camera judicial determination of reliability, which Petitioner submits is required by Neil v. Biggers and the due process clause of the Fourteenth Amendment.

Petitioner was found guilty as charged and sentenced to life imprisonment.

Direct Appeal

Petitioner argued to the Court of Appeals of South Carolina that the trial judge erred in refusing to give him a hearing pursuant to Neil v. Biggers. The Court of Appeals affirmed the trial judge's decision in refusing to hold a hearing:

Like the eyewitness in Liverman, [398 S.C. 130, 727 S.E.2d 422 (2012)] Goolsby knew the defendant before the crime. Unlike the witness in Liverman, Goolsby was not an eyewitness to the crime. This court has held the Neil v. Biggers due process inquiry does not apply to a non-eyewitness. State v. McGee, 408 S.C. 278, 286–87, 758 S.E.2d 730, 734–35 (Ct. App. 2014). Further, even if delivery of the surveillance video here amounted to "state action," we disagree it was unnecessary. The State did not create the video. The State's use of it was necessary under the circumstances. At the time of their contact with Goolsby, the police had just received the Crimestoppers' tip, and the investigation was at a critical point. The armed perpetrator of a violent crime was still on the run and had already traveled between at least two states. It would have

been impractical for the police to produce an array of videos recreating the crime scene, casting different actors as the perpetrator, before sending them to Goolsby. See Wyatt, 421 S.C. at 314–15, 806 S.E.2d at 712³ (questioning whether less suggestive procedures were realistic alternatives, as under the circumstances “a lineup would be unworkable”); see also Simmons v. United States, 390 U.S. 377, 384–85, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) (police display of photos of bank robbery suspects to bank employee victims day after robbery necessary; it was “essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities”); United States v. Sanders, 708 F.3d 976, 987 (7th Cir. 2013) (holding single photographic “show-up” was necessary when armed felon at large as police “could not have produced a significantly less suggestive procedure without sacrificing critical time”); see generally LaFave, et al., Criminal Procedure § 7.4(b) (4th ed. 2003).

Even if sending the video to Goolsby was unnecessarily suggestive, we are confident Goolsby's identification was reliable. See Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (“[R]eliability is the linchpin” of the due process inquiry). Without disclosing he was Warner's probation officer, Goolsby told the jury he had spent time with Warner every month over the past nine or so months, usually for fifteen to thirty minutes each time. He testified he was sure of his identification because he was familiar with Warner's gait, the way he carried himself, and the way he held his hands and shoulders, and Warner had the same height and build as the person on the video. See, e.g., State v. Hall, 940 A.2d 645, 650, 653–54 (R.I. 2008) (single photo of suspect shown to police officer who identified defendant as suspect was neither suggestive nor unnecessary; suspect was object of ongoing manhunt, and experienced officer was less likely to be affected by a “suggestive procedure”). As Liverman noted, a witness's prior knowledge of the accused “remains a significant factor in determining reliability” and mitigates even the extreme suggestiveness of a show-up. 398 S.C. at 135, 141–42, 727 S.E.2d at 424, 427–28 (concluding eyewitness's in-court identification had origins independent of suggestive taint of police orchestrated show-up, as eyewitness was acquaintance and former neighbor of defendant and had known him since elementary school). We affirm.

State v. Warner, 430 S.C. at 91-92, 842 S.E.2d at 368-69.

³ State v. Wyatt, 421 S.C. 306, 806 S.E.2d 708 (2017).

Petitioner filed a petition for writ of certiorari on this issue in the Supreme Court of South Carolina which was granted. The state supreme court agreed with Petitioner that the out-of-court identification procedure that law enforcement used in this case to get Goolsby to identify Petitioner in a video of the crime scene was suggestive. However, the court ultimately determined that Petitioner was not entitled to a Neil v. Biggers hearing because Goolsby, the only person who identified Petitioner as the shooter, was not an “eyewitness.” State v. Warner, 436 S.C. 395, ___, 872 S.E.2d 638, 643 (2022); App. 3.

That Court held that “[t]he dangers of misidentification associated with eyewitness identification that threaten ‘fundamental conceptions of justice’ are simply not present in a situation like the one in this case.” Id. at ___, 872 S.E.2d at 644; App. 9. The Court further noted that this Court “has given no reason to believe it would extend the Biggers analysis beyond eyewitnesses.” Id. at ___, 872 S.E.2d at 643; App. 9.

REASONS FOR GRANTING THE PETITION

This case presents this Court an opportunity to determine whether a trial court can deny a defendant a *Neil v. Biggers* hearing, where a preliminary judicial determination is made as to the reliability of an out-of-court identification, simply because the critical witness identifying the defendant as the perpetrator of the crime was not physically present at the scene of the crime but instead identified the defendant from a surveillance videotape. This question should be answered by this Court because of the rapid increase in the use of surveillance videotapes in criminal prosecutions and because unreliable identifications of defendants create a great risk that innocent persons will be convicted and imprisoned.

In the modern digital age where surveillance cameras are ubiquitous, identifications taking place using video technology are much more frequent. For example, the highly publicized events that occurred on January 6, 2021, at the United States Capitol have resulted in the arrests of more than 800 people in 48 states, many of whom were identified through the use of cell phone and surveillance videos. See *Capitol riot arrests: See who's been charged across the U.S.*, USA Today News, Jan. 15, 2021, at <https://www.usatoday.com/storytelling/capitol-riot-mob-arrests/> (regularly updated website which lists every defendant who has been charged in connection with January 6, including the offenses for which they were accused, the manner in which they were identified, and still shots from cell phone or surveillance video footage that aided in their arrest); see also <https://www.wistv.com/2021/03/16/two-more-south-carolina-men-arrested-jan->

capitol-riot/ (local news story about two South Carolina men who were arrested in connection to January 6 who were identified through security footage and photographs posted online). The risk that an out-of-court identification procured by unnecessarily suggestive circumstances arranged by law enforcement may create a risk of irreparable misidentification of a defendant is just as likely where the identification is made by a person viewing a videotape of the crime as it is when the identification is made by a person who was physically present at the scene of the crime. For these reasons, denying a defendant a Neil v. Biggers hearing on the sole basis that the identifying witness was not physically present at the scene of the crime is not justified.

The minimal cost of an in camera hearing on identification is small in relation to the irreparable harm of a misidentification where that substantial likelihood of misidentification can be avoided by a relatively brief in camera hearing on the surveillance video identification. Moreover, the surveillance video identification that was done in this case was extremely problematic since the person on the video was wearing sunglasses and a hat, deliberately obscuring their identity.

The due process clause of the Fourteenth Amendment protects against unfair trials and wrongful convictions which predictably result from the use of unreliable eyewitness identification testimony. This Court has long acknowledged the dangers inherent in such testimony. See U.S. v. Wade, 388 U.S. 218, 228 (1967) (“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification”). “[T]he confrontation compelled by the State

between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.” Id. One of the main factors that contributes to incorrect eyewitness identifications is the degree of suggestive circumstances under which the identification of the defendant is made – both intentional, and unintentional. Id.

As a result of these dangers, this Court has established well-reasoned principles governing due process claims that relate to eyewitness identification. See Perry v. New Hampshire, 565 U.S. 228, 232 (2012); Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. U.S., 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967). In Stovall, this Court stated that “a recognized ground of attack” against a criminal conviction is that an out-of-court identification procedure was “so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law.” Stovall, at 301-02. This Court further instructed that the determination as to whether due process was violated depends on the “totality of the circumstances” surrounding the identification of the defendant. Id. This Court expounded upon the holding in Stovall the following year when it held that “convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” Simmons, 390 U.S. at 384.

In Neil v. Biggers, 409 U.S. 188 (1972), this Court considered whether an out-of-court identification was automatically inadmissible when it was procured by unnecessarily suggestive circumstances. This Court determined that a suggestive identification procedure did not automatically require a positive identification of a defendant to be excluded. Instead, due process requires courts to assess whether an out-of-court identification that was procured by unnecessarily suggestive police procedures was nevertheless so reliable that no likelihood of misidentification existed. Biggers, 409 U.S. at 198. What this Court made clear in Biggers is that “[i]t is the likelihood of misidentification which violates a defendant’s right to due process.” Id. In other words, the constitutional violation stems from the admission into evidence of an unreliable identification of the defendant which is substantially likely to result in a wrongful conviction.

Then, in Manson v. Brathwaite, 432 U.S. 98, 114 (1977), this Court held that “reliability is the linchpin in determining the admissibility of identification testimony.” The factors to be considered in evaluating the reliability of the out-of-court identification “include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.” Id. These factors must be weighed against the suggestiveness of the out-of-court identification procedure in order to determine whether the identification is irreparably tainted. Id.

This Court's decision in Perry v. New Hampshire, 565 U.S. 228, 232 (2012) made clear that trial judges must conduct a pretrial hearing to determine the reliability of an out-of-court identification if the identification was procured under unnecessarily suggestive circumstances arranged by law enforcement. In Perry, the defendant requested this Court to extend the Biggers framework to all out-of-court identifications that were procured under unnecessarily suggestive circumstances, even those that were not the product of law enforcement actions.

This Court declined Perry's request and, in reviewing its past decisions on this issue, noted that due process concerns are only implicated where law enforcement used unnecessarily suggestive identification procedures. Perry, 565 U.S. at 238-39. Again, even where law enforcement uses such procedures to procure an identification of a defendant, the identification is still subject to an in camera reliability determination before it can be admitted or excluded. Id. The "Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" Id. at 239 (quoting Biggers, 409 U.S. at 201). This Court in Perry noted that "[a] primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place." Id. at 241. However, where an identification is made under the use of unnecessarily suggestive procedures that were arranged by law enforcement, the trial judge must conduct an in camera Biggers hearing to determine the reliability of that identification before allowing it to be used against the defendant at trial.

The Supreme Court of South Carolina held that the reliability factors enunciated in Biggers and Manson are not implicated where a government witness, a probation officer, who did not view the crime in real time identifies a camouflaged suspect through the use of a video recording even where the identification was made under unnecessarily suggestive circumstances procured by law enforcement. This is incorrect, and it should not be allowed to serve as bad precedent in other cases in this country. Although a surveillance tape identification witness who did not see the crime live *may* not be under the same stressors as a witness who did, it is still possible that their identification is unreliable.

The denial of Petitioner's right to a Biggers hearing left defense counsel without a chance to fully explore Goolsby's opportunity to view the video. For instance, it is not known whether Goolsby watched the video one time or a dozen times, nor is it known whether he viewed the video on a large screen in high definition or on a smaller screen such as his cell phone. It is also unknown whether Agent Goolsby had a high degree of attention to the video as he watched it or whether he was distracted by phone calls, emails, or another probationer seated in his office while he was viewing the video.

The Supreme Court of South Carolina held that the application of Neil v. Biggers is limited to an identification witness who "observed the crime take place in real time." This is far too narrow of a definition in the modern digital age where live streaming of events and video recordings are everywhere. At the oral argument of Petitioner's case before the Supreme Court of South Carolina, one of the justices

asked counsel for the state whether an individual who was watching the oral argument through a live video was an eyewitness to the argument.⁴ Counsel for the state conceded at oral argument that a person viewing a live feed of the oral argument could be properly considered an eyewitness to the argument. If a person viewing a live feed video, such as the oral argument in this case, or a live streamed sporting event could be considered an eyewitness, then it is a very small and reasonable step to say that a person viewing a video recording is on equal footing.

The important fact here is that Goolsby served the function of an eyewitness by identifying Petitioner from the surveillance video as the person who committed the attempted armed robbery and murder. The fact that Goolsby did not view the crime in real time should not have been the deciding factor in determining whether an in camera preliminary identification hearing was necessary where Goolsby's identification of Petitioner from the film clip was critical evidence for the state during Petitioner's trial.

In our modern day, surveillance videotapes are ever present in businesses and private homes. Identifications from surveillance tapes and video recordings will continue to grow. Some surveillance tapes will undoubtedly be grainy and hard to view, while others may be relatively clear. Some witnesses may have the opportunity to view a recording numerous times and at varying speeds or even "frame-by-frame" while others may only have an opportunity to view a video a single time before

⁴ The Supreme Court of South Carolina partnered with South Carolina Educational Television live streams, records, and archives its oral arguments for the benefit and education of the state bar and public at large. The video of the oral argument in this case is available at: <https://media.sccourts.org/videos/2020-000930.mp4>.

making an identification. Still others may be seated alone in a quiet room where they can focus solely on the video while others may only view the video in a loud or distracting environment hampering their attention and ability to view what is taking place on the screen. Therefore, a one size fits all rule that all identifications from surveillance tapes do not require an in camera hearing because the identifying witness was not physically present at the scene of the crime does not satisfy due process.

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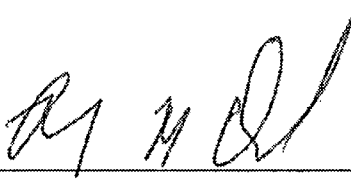
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S.C. SUPREME COURT

CONCLUSION

By reason of the foregoing arguments, the petition for writ of certiorari should be granted.

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