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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

HENRY JERMAINE DUKES,

APPELLANT

APPELLATE CASE NO 2011-196667

Appeal from Horry County

Steven H. John, Circuit Court Judge

Opinion No. 5148

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Henry Jermaine Dukes petitions the Court for rehearing. Counsel respectfully submits that the Court overlooked the fact that due process requires the State, as the proponent of the identification testimony, to initially establish what identification procedure was used by law enforcement. Due to the unavailability of the officer in the present case, the State was unable to establish what identification procedure was used. The testimony that was presented at the Neil v. Biggers[1] hearing was contradictory and failed to establish if the eye-witness identified Dukes by accidentally viewing photos inside the officer's case file or if the officer

showed the eye-witness several photographs one at a time and the eye-witness selected the photograph of Dukes. Importantly, the photographs viewed by the eye-witness were not introduced in evidence. Dukes did not have the opportunity to cross examine the officer. The unavailability of the officer and the photographs make this case analogous to a case where a photo line-up has been lost prior to trial. See United States v. Honer, 225 F.3d 549 (5th Cir. 2000) (When government fails to preserve photographic array used in pre-trial line-up, there shall exist presumption that array is impermissibly suggestive, even if record discloses no evidence of bad faith on part of government); Grady v. Commonwealth, 325 S.W.3d 333 (Kentucky, 2010)(Pre-trial lineup materials lost before defendant had an opportunity to scrutinize their content would be presumed to be unduly suggestive.). Based on the State's inability to establish details in regard to how the identification was made and Dukes' inability to cross examine the officer, the identification procedure should be presumed impermissibly suggestive.

The eye-witness, Cornelius Ford, testified, "When I went to get a interview I was giving – telling them what happened, and while I was talking – while I was talking to them they said they was going to get some pictures, like a photo book or whatever, but I seen like some pictures on the table, and when I seen the pictures on the table I pointed him out, because I knew that's who it was." (R. p. 34, lines 24 – p. 35, lines 1-5). Ford testified that the detective opened up his file to take notes and Ford saw three or four pictures inside the detective's file. (R. p. 35, lines 12 – p. 36, 37, line 1). Ford's father, Rasheed Muhammad, testified that the officer placed some photos on the table and Ford identified Dukes. (R. p. 44, line 17 – p. 45, lines 1-13). Counsel for Dukes noted that the officer's report indicates, "Based on this information, several photos were obtained. They included Ronnie Atkinson, Jeremy Rush, Steve Wilson and Henry Dukes. The photos were

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[1] 409 U.S. 188, 93 S.Ct. 375 (1972).

presented to Cornelius Ford one at a time, and then he, without hesitation, took the photograph of Mr. Dukes . . ." (R. p. 51, lines 12-16). Counsel argued that he needed to be able to question the officer about how the photographs were presented. (R. p. 51, lines 17 – 25).

The judge refused to suppress the identification based on the absence of the officer stating, "All right, so with that circumstance, the Court does not find it obviously, number one, within the court's power to have him here. Secondly, I find it is not necessary for the court to make the determination on your motion to suppress the identification to have the testimony of the officer in this particular case." (R. p. 52, lines 20-25). The judge erred. The officer's absence from the identification hearing violated Dukes' due process rights.

In State v. Liverman, 727 S.E.2d 422 (2012), the South Carolina Supreme Court overruled State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973) creating a bright line rule excusing a Neil v. Biggers hearing where the eye witness knows the accused. In Liverman the defense requested a Neil v. Biggers hearing and the State objected, based on McLeod, because the witnesses knew the accused. The judge required the State to proffer the testimony of the witness. The judge first found the identification testimony admissible pursuant to Mcleod. The judge then made a secondary finding that, under the totality of the circumstances, the identification testimony was admissible. The identification in Liverman involved an individual show up identification. In discussing the evidence presented in regard to the identification testimony the Court wrote, "While the trial court required the State to submit evidence that has many of the traditional features of a Neil v. Biggers hearing (and the trial court made concomitant Neil v. Biggers findings), we decline to hold that the pretrial hearing fully comported with due process requirements." State v. Liverman, 727 S.E.2d at 427. The Court in Liverman then found that any error in the insufficient Neil v. Biggers hearing was harmless.

The identification hearing in the present case which included the testimony of the eye-witness and his father was the equivalent of the proffered testimony of the eye witness in Liverman. The police who conducted the identification procedures in both Liverman and the present case failed to testify at the pre-trial hearings. As the South Carolina Supreme Court declined to find that the pre-trial hearing in Liverman comported with due process requirements, this Court should find that the identification hearing in the present case failed to comport with due process requirements. Unlike Liverman, the error was not harmless.

This Court found that the "trial court afforded Dukes all that due process required in this particular situation." This Court wrote:

> The trial court gave Dukes notice of the hearing and the opportunity to be present. The court also gave him the opportunity to cross-examine the State's witnesses, offer his own evidence, and argue his position. Dukes argued the specific reasons Addison's testimony was essential, but the trial court determined otherwise, specifically stating, "I find it is not necessary for the court to make the determination on your motion to suppress the identification to have the testimony of the officer in this particular case." Thus, the trial court was able to determine from the testimony of the State's witnesses that nothing the police did was suggestive. Finally, this appeal is Dukes' opportunity for judicial review. We find the hearing did not violate Dukes' due process rights.

State v. Dukes, 2013 WL 3199992, 3 (S.C.App.,2013).

The opinion fails to address the fact that Dukes was unable to cross examine the law enforcement officer who conducted the identification procedure about the manner in which the photographs were presented to the eye witness. The State's failure to establish the procedure used to obtain the identification precluded Dukes from demonstrating that the identification procedure was impermissibly suggestive and deprived Dukes of due process of law. Requiring Dukes to prove that the identification procedure was impermissibly suggestive without the presence of the officer or the photographs to determine what procedure was used is the equivalent of requiring a defendant to prove prejudice from a photo line-up without requiring the State to produce the photo line up.

This Court distinguished the present case from Liverman based on the fact that the identification procedure in Liverman involved an unduly suggestive show up identification. This Court wrote:

> Liverman arose, therefore, under the second prong of Biggers—reliability. We decide this appeal under the first prong—suggestiveness. Under Perry and Liverman, judicial inquiry into reliability is required *every* time the police orchestrate a suggestive identification procedure. Under Perry and cases like Sanders, however, judicial inquiry into reliability is never required unless (1) the police (2) orchestrated an identification procedure (3) that was impermissibly suggestive. Perry and Sanders remove this case from the ambit of Liverman because the trial court here found there was no impermissibly suggestive police conduct.

State v. Dukes, 2013 WL 3199992, 4 (S.C.App.,2013).

In Perry v. New Hampshire, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012), the United States Supreme Court held that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. There is no question that the identification procedure in the present case was arranged by law enforcement. The problem in the present case is the State's failure to initially establish the procedure used by law enforcement to obtain the identification. It is this precise failure on the part of the State that deprived Dukes of due process of law and precluded Dukes from meeting his burden to show that the identification procedure was unduly suggestive. The identification procedure should be presumed suggestive under the unique circumstances of this case. See United States v. Honer; Grady v. Commonwealth.

This Court's decision in regard to the sufficiency of the hearing hinges on the trial court's finding that the identification procedure was not suggestive. The trial judge stated:

> It does not appear, even taking into consideration the report of the investigator, that there was any corrupting effect, that there was any intentional act, that there was any deliberate act, that there was any

> act by the police of a suggestive manner. The witness had already identified the Defendant prior to the – looking at the photographs. The seeing of the photographs was either done accidentally through the looking at a file or in a process that the Court finds was not suggestive in – in any manner, and therefore, based upon all that, the motion to suppress the identification is denied.

(R. p. 54, line 16 – p. 55, line 1).

The State, however, failed to establish what procedure was used to obtain the identification. As this Court noted, "In this case, the trial court was not able to determine exactly what [the officer] Addison did. However, the court was able to determine that either Ford saw the photographs accidentally or Addison showed them to him one at a time. The court then determined that neither of those alternatives involved suggestive police conduct." State v. Dukes, 2013 WL 3199992, 4 (S.C.App.,2013). Finding that the eye witness either accidentally saw the photos or the officer showed the eye witness the photos, without more information about the manner in which either alternative was accomplished, fails to support the finding that the identification procedure was not unduly suggestive. First, even if inadvertent, allowing the witness to view a photograph of the defendant contained in the case file of the officer investigating the shooting is an unduly suggestive identification procedure. Second, the evidence is insufficient to find that the procedure was not unduly suggestive when the State failed to present testimony from the officer or even copies of the photos shown.

In regard to the suggestiveness of the identification procedure, this Court declined to resolve whether the trial court properly applied the burden of proof but wrote, "First, our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions regarding federal constitutional law are binding on us, has held that the defendant bears the burden of proving the identification procedure was impermissibly suggestive." State v. Dukes, 2013 WL 3199992, 5 (S.C.App.,2013) (footnotes and citations

omitted). In a footnote this Court cites State v. Ford Motor Co., 208 S.C. 379, 390, 38 S.E.2d 242,247 (1946) for the proposition that decisions by the United States Court of Appeals regarding federal constitutional law are binding on the South Carolina appellate courts. The full sentence from that decision reads, "Painstaking study of the authorities, state and federal, which latter are controlling of the meaning and effect of the Federal Constitution, has convinced us that appellant is doing business in South Carolina, under the facts of this case, sufficient to subject it to the jurisdiction of our courts, obtainable by service of process through the Secretary of State pursuant to the pertinent statute; but the business shown is interstate commerce and appellant, as long as it so confines its activities, cannot be forced to domesticate or pay the penalty for failure, without unconstitutional burden upon that commerce." State v. Ford Motor Co. 208 S.C. 379, 390-391, 38 S.E.2d 242, 247 (1946). Counsel respectfully submits that this Court's reliance on State v. Ford Motor Co. is misplaced.

Addressing the substantive issue of the suggestive nature of the identification procedure, this Court wrote:

> Notwithstanding the existence of contradictory evidence, the trial court had the responsibility to determine whether the identification procedure was suggestive. We find evidence to support the trial court's decision, and thus the court did not abuse its discretion in ruling the procedure was not impermissibly suggestive. See Liverman, 398 S.C. at 138, 727 S.E.2d at 425 (stating "the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion").

State v. Dukes, 2013 WL 3199992, 5 (S.C.App.,2013).

Counsel respectfully submits that the contradictory evidence from the identification hearing was insufficient to allow the trial court to make a finding as to suggestiveness. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265

(2006). The trial court's finding that the identification procedure was not suggestive constitutes an abuse of discretion as the finding lacks evidentiary support.

Counsel respectfully submits that the identification procedure should have been presumed suggestive and this Court should have considered the second prong of Neil v. Biggers and found that the identification was not so reliable that no substantial likelihood of misidentification existed. In State v. Liverman, 727 S.E.2d 422, 426 (2012) the South Carolina Supreme Court wrote:

> In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S.Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

Considering the five Neil v. Biggers factors in the present case, the out-of-court identification, resulting from the presumptive unduly suggestive identification procedure, created a substantial likelihood of irreparable misidentification. Ford testified that he was in the hallway when the gun was pulled. (R. p. 32, lines 12 – 21). Ford testified, "Yes. I stood up when I seen him pull the gun out, and then he pointed the gun at me, and the victim - - -" (R. p. 33, lines 2-3). While Ford was certain of his identification, the only description given by Ford was that the

shooter had a funny accent and a big smile or big mouth. (R. p. 34, lines 3-8). Ford identified Dukes four to five hours after the shooting and after Ford fled the scene. (R. p. 34, lines 13-17). Ford testified that he had seen Dukes briefly on two prior occasions but there is no evidence that he knew Dukes. (R. pp. 30 – 31). In contrast, the witness in Liverman knew the person he identified and provided police with that person's nickname.

Based on the totality of the circumstances, the out of court identification procedure was not so reliable that no substantial likelihood of misidentification existed. Both the out of court identification and the in court identification should have been suppressed. Petitioner respectfully seeks rehearing.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

This 11th day of July, 2013.

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APPELLATE CASE NO 2011-196667

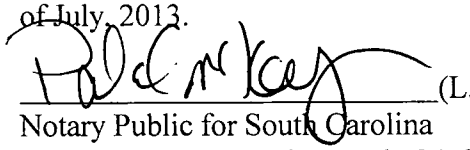
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also upon Mr. Henry Jermaine Dukes Lieber Correctional Institution PO Box 205 Ridgeville, SC 29472 this 11th day of July, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 11th day of July, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .