

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

William Jeffrey Young, Circuit Court Judge

RECEIVED

AUG 02 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JOSEPH WADELL DUNBAR,

APPELLANT

APPELLATE CASE NO. 2011-203386

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT 5

CONCLUSION 8

PETITION TO BE RELIEVED AS COUNSEL 9

TABLE OF AUTHORITIES

Cases

Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) 6

Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)..... 5, 6

State v. Liverman, 727 S.E.2d 422 (2012)..... 6

State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000)..... 6

State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004) 5

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting in evidence an unduly suggestive photo line-up that was inherently unreliable and conducive to irreparable mistaken identification?

STATEMENT OF THE CASE

In May of 2010, the Sumter County Grand Jury indicted Dunbar, in a two count indictment, for burglary second degree and armed robbery, indictment #2010-GS-43-0543. On November 7, 2011, Dunbar proceeded to jury trial before the Honorable William J. Young. Attorney Will Brunson represented Dunbar at trial. Attorney Ryan Kirk Griffin prosecuted the case on behalf of the State. The jury returned verdicts of guilty and Judge Young sentenced Dunbar to thirty (30) years for armed robbery and fifteen (15) years concurrent for burglary second degree. A timely notice of intent to appeal was served on November 17, 2011. This appeal follows.

ARGUMENT

The trial court erred in admitting in evidence an unduly suggestive photo line-up that was inherently unreliable and conducive to irreparable mistaken identification.

The jury found Appellant guilty of the burglary and robbery of Untouchable Cuts, a beauty/barber shop owned by Mary Pollard. Detective William Lyons of the Sumter Police Department developed Appellant as a suspect and asked the South Carolina Law Enforcement Division [SLED] to compile a six person photo line-up. (R. p. 43, line 3 – p. 31 lines 1-20). Detective Lyons showed the photo line-up to Mary Pollard who identified Appellant as one of the men who entered her shop and robbed her. (R. pp. 44 – 48).

Prior to trial Appellant moved to suppress the photo line-up. (R. p. 20, lines 23-25). The court held a hearing pursuant to Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). (R. pp. 20-58). The trial court found the identification reliable stating, “I am looking at the lineup. Four of them are very similar. The other are two are darker but, yet, the hair would fall into the description. So based on – the key factor here is reliability. I think that being the linchpin, that the photo lineup will come in. Based on that, your in-court identification will be allowed at this point.” (R. p. 59, lines 12-20). Appellant renewed the objection when the State moved to admit the photo line-up in front of the jury. (R. p. 223, lines 1-12). The judge erred in admitting the photo line-up.

“A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification.” State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable

misidentification. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). First, a court must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id.

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).

First, the trial court should have determined that the identification process was unduly suggestive. According to Detective Lyons, Mary Pollard described one of the

men as, "Light skinned black with pits or pimples, what-have-you, facial acne around his cheekbone area, short, light weight – not heavysset. Hair, not long braids but hair that could be twistable or braidable, long enough to braid his hair." (R. p. 53, lines 11-16). Detective Lyons admitted that only four of the six men in the photo line-up were light skinned. (R. p. 54, lines 1-12). In ruling the trial court noted that four of the photos were similar but that two were darker. (R. p. 59, lines 12-20). The content of the photo line-up rendered it unduly suggestive.


Given the unduly suggestive identification procedure, the identification was not so reliable that no substantial likelihood of misidentification existed. Although the trial court considered the reliability factors, (R. p. 58, line 22 – p. 59, lines 1-11), he considered those factors without finding that the content of the line-up was unduly suggestive. The trial court erred.

The error in admitting the line-up was not harmless. The State's sole evidence placing Appellant at the scene was the identification made by Mary Pollard. Based on the totality of the circumstances surrounding the suggestive identification procedure, there is a substantial likelihood that appellant was irreparably misidentified and the identification is unreliable as a matter of law.

CONCLUSION

Based on the above argument, Mr. Dunbar's convictions and sentences should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH WADELL DUNBAR,

APPELLANT

APPELLATE CASE NO. 2011-203386

RECEIVED

AUG 02 2013

PETITION TO BE RELIEVED AS COUNSEL


SC Court of Appeals

Counsel for Joseph Wadell Dunbar states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge William Jeffrey Young, which was held on November 9, 2011, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Joseph Wadell Dunbar.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH WADELL DUNBAR,

APPELLANT

APPELLATE CASE NO. 2011-203386

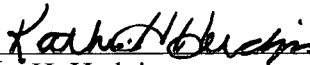
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments and sentencing sheets;
- (2) Jury Selection transcript transcribed by Court Reporter Diane A. Rutledge;
- (3) Trial transcript transcribed by Deborah Garrison;
- (4) Trial testimony of Maqueda Duncan transcribed by Margaret T. Sullivan (inadvertently omitted from original trial transcript);
- (5) State's Exhibit #1 – Photo;
- (6) State's Exhibit #2 – Photo Line-up. (To be transported as copy too dark).

I certify that this designation contains no matter which is irrelevant to this appeal.

August 2nd, 2013



Kathrine H. Hudgins
Appellate Defender

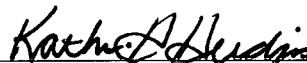
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 2, 2013



Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED

AUG 02 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

AUG 02 2013

SC Court of Appeals

Appeal from Sumter County
William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH WADELL DUNBAR,

APPELLANT

APPELLATE CASE NO. 2011-203386

CERTIFICATE OF SERVICE

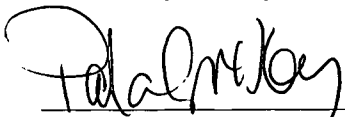
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Joseph Wadell Dunbar, #348569 at Lee Correctional Institution, this 2ND day of August, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of August, 2013.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.