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**Mar 21 2024**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

SEAN DEVON JAMES,

APPELLANT

APPELLATE CASE NO. 2022-001279

Appeal from Florence County

Honorable H. Steven DeBerry IV, Circuit Court Judge

Opinion No. 2024-UP-070

PETITION FOR REHEARING

Pursuant to Rule 221(a), Petitioner Sean Devon James respectfully petitions this Court for rehearing on the following basis: that the out-of-court identification of Petitioner by the sole eyewitness placing him at the incident was not only unduly suggestive, but also, under the totality of the circumstances, it created a very substantial likelihood of irreparable misidentification.

Petitioner respectfully submits that the Court overlooked or misapprehended the fact that, after the trial court correctly held that the out-of-court identification procedure was unduly suggestive, the eyewitness's generic description of the assailants as two black males and a light skinned male, coupled with her self-admitted unfocused mind at the time of the robbery, was so

impacted by the overtly suggestive identification procedure that it created a very substantial likelihood of irreparable misidentification.

First, the out-of-court identification procedure utilized by Investigator Davis (Inv. Davis) was overtly suggestive. See, e.g., State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000); State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000); Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). “A criminal defendant may be deprived of due process of law by an identification procedure 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) (citing State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000)). Inv. Davis not only sent individual photographs of the suspects to Ms. Carla Eaddy (Eaddy), but also included the text message, “This one has a cross tattoo between his eyes” beneath Petitioner’s photograph when he sent it. According to Inv. Davis, he included the text regarding the tattoo because it was not visible in the photograph, and “it’s important for proper identification.” R. 27, ll. 10—R. 28, ln. 24; R. 58, ll. 16-23; R. 138, ll. 1-11; R. 207, ll. 12-17; (Defendant’s Ex. #1). As in Moore, “it is patent the show-up procedure used was unduly suggestive.” Moore, 343 S.C. at 287, 540 S.E.2d at 248. Not only did he send the individual pictures, but he also specifically called attention to an identifiable feature of one suspect—Petitioner—that was not even visible in the photograph. Accordingly, the procedure used here was unquestionably suggestive.

As such, the issue turns upon the reliability of Eaddy’s identification of Petitioner. See Manson v. Braithwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977) (citing Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382 (1972)) (listing factors to consider when evaluating the totality of the circumstances to determine the likelihood of misidentification); see also Traylor, 360 S.C. at 82, 600 S.E.2d at 527. “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.” Traylor, 360 S.C. at 81, 600 S.E.2d at 526. Here, the circumstances taken as a whole militate toward suppression. First, even though Eaddy was close to the assailant for approximately ten to twenty minutes, she was under circumstances of emotional and mental stress; rather than sharpen her focus and memory, the situation caused her focus and recollection to become frantic and impaired. According to her own testimony, “[w]hen you go through something that traumatic, sometimes your mind is, you know, not there.” R. 136, ll. 12-13. Under such highly stressful and traumatic circumstances, Eaddy’s attention to detail and mind were admittedly “all over the place.” R. 136, ln. 10. This admission cuts at the root of reliability in Eaddy’s later out-of-court identification.

Next, the accuracy of Eaddy’s prior description of the perpetrator highlights not only the lack of reliability of her memory, but also the likelihood of misidentification due directly to the highly suggestive out-of-court identification procedure used. The only description Eaddy mustered on November 17, 2019 of the person standing next to her with a gun was that he was a black male. Further, although Eaddy later claimed during the suppression hearing that her assailant had facial tattoos, this detail was never reported to police on the night of the incident, or over the following month. Rather, she claimed that the included text message regarding a facial tattoo “kind of refreshed my memories.” R. 22, ll. 13-20; R. 33, ln. 20—R. 34, ln. 15. In other words, Eaddy’s ardent belief that she remembered and identified Petitioner was likely the product of the extremely suggestive photograph sent to her with the concomitant text message beneath it.

This also goes to the next factor: certainty. Although Eaddy indicated a high level of certainty at the time, as indicated above, this certainty was likely born of the totality of circumstances under which Petitioner’s likeness was presented. Eaddy was sent the photographs of

three suspects—two black males, and one white male—directly to her to identify them and determine whether or not they had permission to drive her stolen vehicle after the key to that vehicle was stolen one month prior by three robbers—two black males, and one light skinned male. Under such circumstances, it was both highly suggestive and highly predictable that Eaddy would identify them—especially Petitioner—as one of the robbers. In fact, Eaddy acknowledged them because “all three of them was together.” As such, Eaddy’s certainty is both unsurprising, and an example of why the identification procedure used by Inv. Davis—effectively a show-up coupled with overtly suggestive language beneath Petitioner’s photograph—is disfavored in the law.

Finally, the length of time between the offense and show-up confrontation strongly militates against reliability. Unlike a typical “show-up” occurring within minutes or hours of an incident, the highly suggestive photographs here were shown to Eaddy over a full month after the incident. Eaddy had time to finish talking with police at the incident location on November 17, 2019, leave, go to her own home in Florence, and then leave again for Baltimore to attend a funeral. Then, after over a full month had passed since the incident, she received a text message from Florence Police Department—the same department investigating the robbery—on December 20, 2019, asking her to identify the three photographs sent to her. As she told the court, nothing occurred during that time period that would improve her memory or ability to recall the three robbers. R. 30, ll. 9-12. To the contrary, she was subjected to more stress, including the unrelated death of her family member, traveling to Baltimore for a funeral, and learning that her car was stolen the same morning that she was sent three pictures of suspects. In other words, the incident was far from “fresh” in her memory when asked to identify three individual photographs of three individual suspects sent to her on December 20, 2019, as was any description beyond the generic statement of two black males and one light skinned male.

In light of all circumstances involved, Eaddy’s identification of Petitioner was unreliable. She was unable to provide anything more than a generic description—gender and race—of the three robbers on the night of the incident, as both her mind and focus were “all over the place.” R. 136, ln. 10. Over a full month later, she was sent three photographs of three suspects—two black males, and one white male—with one including a message describing details not seen in Petitioner’s photograph. Eaddy indicated she did not previously recall tattoos, but the included text message regarding a facial tattoo “kind of refreshed my memories.” Under such circumstances, it cannot be said that the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. See Moore, 343 S.C. at 287, 540 S.E.2d at 447; see also Neil v. Biggers, 409 U.S. at 198-200, 93 S.Ct. at 382 (1972). To the contrary, the totality of the circumstances show that Eaddy’s recollection and identification of Petitioner was likely the product of the highly suggestive identification procedure used in this case. Therefore, Eaddy’s identification of Petitioner as one of the robbers was inadmissible, as it violated Petitioner’s fundamental due process rights. See, e.g., Moore, 343 S.C. at 288, 540 S.E.2d at 448 (citing Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir.1976) (“[A]n eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law.”)).

Accordingly, Petitioner Sean Devon James respectfully requests this Court to grant his Petition for Rehearing.

Respectfully Submitted,

  
BREEN RICHARD STEVENS  
Appellate Defender

This 21st day of March, 2024.

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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Emory Smith, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Sean Devon James, #360217, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 21st day of March, 2024.



Breen Richard Stevens  
Appellate Defender

ATTORNEY FOR APPELLANT

**From:** [Leverett, Scott](#)  
**To:** [Emory Smith](#)  
**Cc:** [SC - COLLINS CAROLINE](#); [Stevens, Breen](#)  
**Subject:** Sean D. James - Petition for Rehearing - Appellate Case No. 2022-001279  
**Date:** Thursday, March 21, 2024 2:07:00 PM  
**Attachments:** [Sean D. James - Petition for Rehearing - Appellate Case No. 2022-001279.pdf](#)

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Dear Mr. Smith,

Attached please find a copy of the Petition for Rehearing in the above referenced case that is being filed today with the Court of Appeals.

-Scott Leverett  
Admin. Asst. for Breen Stevens  
Appellate Defense