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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Florence County
H. Steven DeBerry IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SEAN DEVON JAMES,

APPELLANT

Opinion No. 2024-UP-070 (S.C. Ct. App. Filed March 6, 2024)
APPELLATE CASE NO. 2022-001279

APPENDIX

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

J. EMORY SMITH, JR.
Deputy Solicitor General
S.C. Bar No. 5262

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3680; Email: esmith@scag.gov

E.L. CLEMENTS III
Solicitor, Twelfth Judicial Circuit

ATTORNEYS FOR RESPONDENT

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE 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
Steven DeBerry, IV, Circuit Court Judge

Unpublished Opinion No. 2024-UP-070
Submitted February 1, 2024 – Filed March 6, 2024

AFFIRMED

Appellate Defender Breen Richard Stevens, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, and Deputy Solicitor General J. Emory Smith, Jr., all of Columbia; and Solicitor Edgar Lewis Clements, III, of Florence, all for Respondent.

PER CURIAM: Sean Devon James appeals his convictions for armed robbery and grand larceny and sentence of twenty years' imprisonment. On appeal, James

argues the trial court erred by failing to suppress the victim's identification of him pursuant to *Neil v. Biggers*.[1] We affirm pursuant to Rule 220(b), SCACR.

We hold the trial court did not abuse its discretion in refusing to suppress the victim's identification. *See State v. Liverman*, 398 S.C. 130, 137-38, 727 S.E.2d 422, 425 (2012) ("Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact."); *id.* at 138, 727 S.E.2d. at 425 ("In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court."); *id.* ("Generally, the decision to admit an eyewitness identification is at the trial [court]'s discretion and will not be disturbed on appeal absent an abuse of discretion."). Although the trial court found the identification procedure used by police was suggestive and unnecessary, its finding that the victim's identification was reliable, under the totality of the circumstances, was supported by the evidence and therefore not an abuse of discretion. *See State v. Moore*, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000) ("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."); *id.* at 287, 540 S.E.2d. at 447 (explaining courts utilize a two-prong inquiry to determine the admissibility of eyewitness identification testimony, asking first "whether the identification process was unduly suggestive," and if so, "whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed" (quoting *Curtis v. Commonwealth*, 396 S.E.2d 386, 388 (Va. Ct. App. 1990))); *State v. Brown*, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003) ("Single person show-ups are disfavored because they are suggestive by their nature."); *State v. Wyatt*, 421 S.C. 306, 313, 806 S.E.2d 708, 711 (2017) (holding circumstances that "may make suggestive police identification procedures necessary [include]: 'where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching.'" (quoting *Gibbs v. State*, 403 S.C. 484, 494, 744 S.E.2d 170, 175 (2013))); *Moore*, 343 S.C. at 289, 540 S.E.2d at 448-49 (explaining the factors to be considered in evaluating whether the identification was sufficiently reliable, such that no substantial likelihood of misidentification existed include: "[t]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation,

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[1] 409 U.S. 188 (1972).

and the length of time between the crime and the confrontation." (quoting *Neil v. Biggers*, 409 U.S. at 199-200)); *State v. Patterson*, 337 S.C. 215, 229, 522 S.E.2d 845, 852 (Ct. App. 1999) ("Reliability is the linchpin in determining the admissibility of identification testimony.").

AFFIRMED.[2]

GEATHERS, HEWITT, and VINSON, JJ., concur.

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[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

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

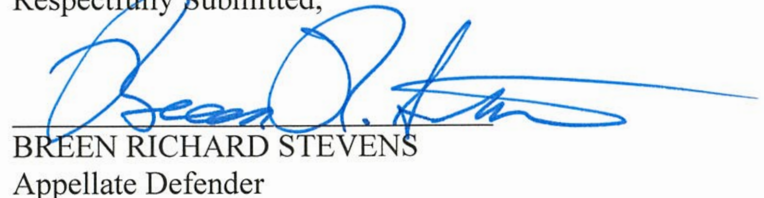
three suspects—two black males, and one white male—directly to her to identify them and determine whether or not they had permission to drive her stolen vehicle after the key to that vehicle was stolen one month prior by three robbers—two black males, and one light skinned male. Under such circumstances, 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.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable H. Steven DeBerry IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SEAN DEVON JAMES,

APPELLANT

APPELLATE CASE NO. 2022-001279

CERTIFICATE OF SERVICE

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

The South Carolina Court of Appeals

The State, Respondent,

v.

Sean Devon James, Appellant.

Appellate Case No. 2022-001279

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

J.

J.

J.

Columbia, South Carolina

cc:
Breen Richard Stevens, Esquire
Alan McCrory Wilson, Esquire
J. Emory Smith, Jr., Esquire
Robert D. Cook, Esquire
Edgar Lewis Clements, III, Esquire
The Honorable H. Steven DeBerry, IV

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