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Jun 03 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable G.D. Morgan, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TOMMY L. LONG,

APPELLANT

APPELLATE CASE NO. 2023-001183

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in refusing to suppress the identification of appellant by Malik Norris because his identification was tainted by mugshot photographs and the use of a surveillance photograph by the solicitor's investigator?

STATEMENT OF THE CASE

Appellant was indicted in Greenville County for murder, first-degree burglary, kidnapping, first-degree assault and battery, attempted armed robbery, conspiracy, and a weapons charge and on July 10, 2023, he was tried before the Honorable G. D. Morgan and a jury. R. 1. Seth Johnson and Courtney Landsverk represented the State. R. 1. Craig Pringle represented appellant. R. 1. The jury acquitted appellant of murder, but convicted him on the remaining charges. R. 555-56. Judge Morgan sentenced appellant to a total of thirty-five years' imprisonment. R. 561-62. This appeal follows.

STANDARD OF REVIEW

Legal issues related to improper identifications are mixed questions of law and fact reviewed for abuse of discretion or prejudicial legal error. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000).

ARGUMENT

The trial court erred in refusing to suppress the identification of appellant by Malik Norris because his identification was tainted by mugshot photographs and the use of a surveillance photograph by the solicitor's investigator.

Three men burst into an apartment in Greenville County in an attempt to rob the decedent, who posted photographs of himself on social media with cash. R. 121-25. Right before the men entered the apartment, two women, Natasha Booker and Javonda Dillard, left. R. 119-21. Booker helped the men set up the robbery. R. 174. Dillard claimed she did not know the purpose of their visit to the apartment. R. 236.

Two of the men who broke into the apartment were brothers, Darius Rhodes and Jaylan Fair. R. 268. Both testified for the State. Rhodes and Fair both claimed that appellant was the third participant in the robbery. R. 268. R. 298-306. Rhodes told the police that his brother was the shooter. R. 287. At trial, Rhodes claimed to be outside of the apartment when he heard gunshots. R. 136. Fair admitted he told Dillard that he shot the decedent. R. 315. But Fair testified that appellant was the shooter because he and his brother ran from the apartment and then heard the gunshots. R. 312-13. The jury acquitted appellant of murder.¹ R. 555.

Rhodes said appellant wore a mask during the robbery, but that he thought appellant "lost it or something." R. 275. Fair testified appellant did not wear a mask. R. 325. Malik Norris was in the apartment with the decedent when the men entered. R. 121-22. Before trial, appellant moved to suppress Norris' identification of appellant. R. 21. During the pretrial hearing, Norris

¹ The State opposed appellant's request for a voluntary manslaughter charge even though it let both Fair and Rhodes plead guilty to voluntary manslaughter with sentencing deferred until after they testified against appellant. R. 425-26. R. 296-97. R. 266.

initially said he did not know who was wearing a mask. R. 53. Norris then said one of the men took off their mask and identified that person as appellant. R. 54.

Norris did not know appellant at the time of the incident. R. 61. He told police immediately afterwards that he could not identify any of the men. R. 61. He also claimed not to know Rhodes or Fair. R. 61. Norris said that he saw the defendants' mugshots on television after they were arrested and recognized appellant. R. 55.

A year after seeing the mugshots, he met with the solicitors' investigator. R. 55-56. The investigator showed Norris photographs of "The people that—the robbers." R. 56. He told the investigator that it was "not the guy in the red hood because" he knew that person was Fair. R. 64. Norris claimed to remember all three men's names from the news. R. 64-65. Norris knew appellant had been charged at the time he looked at the photos. R. 66.

Judge Morgan denied appellant's motion to suppress Norris' identification. R. 71-74. The court found that Norris seeing the mugshots on the news was not a deliberate act by the State. R. 71-74. The court ruled that the identification was made before he viewed the pictures from the investigator. R. 71-74. Even if the investigator's actions were suggestive, the judge found that the identification was still reliable enough to be admitted. R. 71-74.

The trial court erred in admitting Norris' identification. First, providing mugshots to the news media is a deliberate act by the State and should be viewed as suggestiveness induced by state action. Second, the investigator's act of showing surveillance photographs is analytically the same as a single person "show up" identification, which is disfavored in the law. Stovall v. Denno, 388 U.S. 293 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000).

A criminal defendant may be deprived of due process of law by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000). 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 (1977).

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Biggers, 409 U.S. 188. First, “[a] court must first determine whether the identification process was unduly suggestive.” Id., 409 U.S. at 198; Moore 343 S.C. at 286-287, 540 S.E.2d at 447. The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed ... only if [the procedure] was suggestive need the court consider the second question—whether there was a substantial likelihood of irreparable misidentification. Id. See also See State v. Wyatt, 421 S.C. 306, 310-11, 806 S.E.2d 708, 710 (2017).

The State introduced no evidence of a traditional lineup. The State never explained why it did not use a lineup instead of the surveillance photos after Norris knew the defendants had been charged. Norris’ identification was the product of an unduly and unnecessarily suggestive procedure and was not reliable. The court erred and this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand for a new trial.

s/David Alexander
David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of June, 2024.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tommy L. Long states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge G.D. Morgan, Jr., which was held on July 11-12, 2023, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, he asks the Court to relieve him as counsel for Tommy L. Long.

Respectfully Submitted,

s/David Alexander
David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

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

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

- (1) True-billed indictment(s):
- (2) Trial transcript

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

s/David Alexander
David Alexander
Appellate Defender

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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 April 15, 2014, order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

s/David Alexander
David Alexander
Appellate Defender

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Tommy L. Long, #391479, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 3rd day of June, 2024.

s/David Alexander
David Alexander
Appellate Defender

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