

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Jun 18 2024

Certiorari to the Court of Appeals
Appeal from Florence County
Court Of General Sessions
The Honorable H. Steven DeBerry, IV, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2024-000824

The State Respondent,

v.

Sean Devon James,Petitioner.

RETURN OF STATE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether any special and important reasons exist for this Court to issue a writ?
2. Whether the Court of Appeals correctly held that the trial court did not abuse its discretion in refusing to suppress the victim's identification?
3. Whether the Court of Appeals correctly determined that the trial court's 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.
4. Whether, as an additional sustaining ground, the out of court identification of Petitioner in a show-up was neither prejudicial nor unnecessary, and the circuit court should have made such a finding.

STATEMENT OF THE CASE

As to the procedural history, the State concurs in the first paragraph of the Petitioner's Statement of the Case and the last two substantive paragraphs of the Statement on page 8 of the Petition. The pertinent facts are set forth in the argument below.

ARGUMENT

I

NO SPECIAL AND IMPORTANT REASONS EXIST TO GRANT THE WRIT

No special and important reasons exist to grant certiorari in this case. Rule 242(b), SCACR. None of following factors are present in this case to warrant consideration of granting the writ: novel questions of law, a dissent in the Court of Appeals decision, a conflict with a prior opinion of the South Carolina or United States Supreme Court or a substantial constitutional issue. Rule 242 (b)(1-4).

II

THE COURT OF APPEALS CORRECTLY FOUND THAT THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SUPPRESS THE VICTIM'S IDENTIFICATION

The following standards apply to the identification of Petitioner:

“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. 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.” *Id.* “Single person show-ups are particularly disfavored in the law.” *Moore*, 343 S.C. at 287, 540 S.E.2d at 448.

In *Neil v. Biggers* [409 U.S. 188], the United States Supreme Court set forth a two-pronged test to determine whether due process requires the suppression of an eyewitness identification. 409 U.S. at 198–200, 93 S.Ct. 375. To ensure due process, *Neil v. Biggers* requires courts to assess, on a case-by-case basis, the following: (1) whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, (2) whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012).

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.

State v. Davis, 420 S.C. 50, 63–64, 800 S.E.2d 138, 144–45 (Ct. App. 2017).

In this case, the circuit court judge found that the show-up was suggestive and unnecessary but that the identifications were reliable under the *Biggers* factors. Although, the conviction should be affirmed based upon his finding of reliability, it could also have been affirmed under the additional sustaining grounds that the identification was neither suggestive nor unnecessary.

A

The Identification Was Reliable

In the *in camera* proceeding, Ms. Eaddy testified that one of the three robbers had tattoos on his face, was right beside the driver door in which she was in the driver's seat, had a pistol in his hand pointed at her and was there about 10 minutes which "seemed like eternity." R. p. 20, l. 23-p. 24, l. 1; p. 37, l. 7 – p. 38, l. 6. At trial, Ms. Eaddy testified that Petitioner was in her face without a mask, and that he reached through her open car window to grab her car keys from the ignition, the money she was counting and her cell phone. R. p. 130, l. 1 – p. 132, l. 10. She said that "it seem like it was between 10 to 20 minutes, but it seem like eternity when somebody got a gun to your head." R. p. 141, ll.9-11.

Most certainly, her testimony satisfies the *Biggers* factors of opportunity to view Petitioner and her degree of attention. As found by the trial judge:

her opportunity to view the Defendant in this matter, during this identification at the time of the incident, by all accounts, was -- was lengthy. Her degree of attention, certainly, she testified that this Defendant was within less than two feet of her for an extended period of time. Certainly also believe, out of the totality of the circumstances, that she was in the best position to see everything. And she was in this situation for the entire duration of the time that it took place . . .

R. p. 87, l. 17 – p. 88, l. 1.

Although not detailed, as found by the trial judge, "[t]he accuracy of any prior description, certainly, two black males and one that was light skinned male, certainly is consistent, at least." R. p. 88, ll. 4-6; see also R. p. 33, l. 20 -p. 34, l. 2 (Two black males and a "high yellow" or white man.). She said she was "terrified" and "shocked" at the time she talked to officers. R. p. 30, ll. 6-8, p. 31, ll. 1 & 2.

Ms. Eaddy's testimony certainly demonstrates a high level of certainty at the

confrontation. Her car was stolen and spotted a month after the November robbery. R. p. 189, l. 22 – p. 191, l. 7; p. 133, ll. 7 – 20. On December 20, shortly after it was stolen, Ms. Eaddy’s vehicle was located via a tracking device in the car at a home along with three individuals including Petitioner. R. p. (Tr. p. 55, l. 2 – p. 56, l. 4.; p. 169, l. 15 – p. 171, 4. The individuals were charged with possession of a stolen vehicle. R. p. 56, ll. 3-5. To verify that the men did not have permission to use the vehicle, the investigator followed a usual procedure. He texted photos of them to Ms. Eaddy along with the notation that one of them had a tattoo, information that she had not provided. R. p. 56, l. 3 – p. 57, l. 2; p. 59, ll. 8-20; 62, ll. 2 – 22. The investigator testified that, after he texted Ms. Eaddy the photos of the men found with her car, she called back to say spontaneously that “those are the same three guys that robbed [her] a month ago.” R. p. 199, ll. 7 – 25. Ms. Eaddy identified Petitioner as being in one of the photos. R. p. 34, l. 24 – p. 35, l. 4. The investigator had not said anything about the individuals being associated with the armed robbery. *Id.* At trial, she identified her car and an image of the key from the scene in December as being consistent with the key taken from her. R. p. 188, ll. 12-23. She identified Petitioner in the courtroom, recognized him immediately and had no doubt it was he. R. p. 35, ll. 5- 19; p. 131, l. 20 – p. 132, l. 3; p. 167, ll. 5- 8.

The Court found the above identification to be reliable and credible as to the confrontation and as to the lapse of time as set forth below:

Ms. Eaddy's level of certainty, how she testified yesterday to the events and to the identity of Mr. Sean James in the courtroom, seem credible to me. And then finally, the time between the crime and the confrontation, being in this matter about 32 days, she testified that she was being held at gunpoint for what seemed like an eternity, that her assailant was close in proximity to her, and I think it's -- it's reliable and certainly credible to believe that you wouldn't forget such an event within just 32 days, or the details of that event during that time period.

R. p. 88, ll. 7-18.

The record shows that the circuit court did not abuse its discretion in allowing identification. Under the totality of the circumstances (*Davis, supra*), the identification was clearly reliable.

B

As An Additional Sustaining Ground, The Show-Up Was Neither Unnecessary Nor Unusually Suggestive

The circuit court judge found that the show-up was suggestive and unnecessary. Respectfully, it was neither. As noted above, the individuals were charged with possession of a stolen vehicle. R. p. 56, ll. 3-5. To verify that the men did not have permission to use the vehicle, a usual procedure, Investigator Davis texted photos of them to Ms. Eaddy along with the notation that one of them had a tattoo. R. p. 56, l. 3 – p. 57, l. 2; p. 59, ll. 8-20; p. 62, ll. 2 – 22. A photo lineup can take up to a week, and a show-up saves law enforcement time and the accused their freedom if they had permission to use the vehicle. (Tr. p. 59, ll. 8 – 20; p. 63, ll. 1-10. The investigator added the notation that Petitioner had a tattoo, but he was not informed then of any description of the suspects in the earlier armed robbery. R. p. 206, l. 18 – p. 207, l. 1. Ms. Eaddy texted back immediately that the men did not have permission to use the car and had, in fact, had robbed her the month before. R. p. 199, ll. 7 – 25. The investigator had not said anything about the individuals being associated with the armed robbery. *Id.* Ms. Eaddy's identification of them as being the robbers was spontaneous. The show-up did not suggest that response from her.

What is important to note here is that the show-up was not for the purpose of identifying Petitioner as a suspect in the November robbery of Ms. Eaddy. It was to determine if Petitioner and the other suspects had permission to use her car stolen thirty days later in December. This show-up in December, therefore, was not suggestive of Petitioner as being a suspect in the

November robbery. Moreover, this show-up was necessary to determine whether the three men had permission to use the vehicle found in December. If so, they could be released. *See, State v. Wyatt*, 421 S.C. 306, 313, 806 S.E.2d 708, 712 (2017)(“By conducting the showup procedure immediately, Kirkley was able to quickly determine whether Wyatt was the person who threw the contraband into the prison, or whether Wyatt should be released because he was innocent . . .”). Accordingly, as additional sustaining ground the show-up satisfies the two-part first prong of *Biggers*, as being neither suggestive nor unnecessary.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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