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Nov 14 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

Opinion No. 2024-UP-371

BRIAN FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000724

PETITION FOR REHEARING

On October 30, 2024, this Court affirmed petitioner's convictions and sentences where petitioner argued the trial court erred in allowing multiple witnesses to make in-court identifications of petitioner because the photographic line-up used by law enforcement was unduly suggestive and impermissible pursuant to *Neil v. Biggers*.¹ *Foster v. State*, Op. No. 2024-UP-371 (S.C. Ct. App. Filed Oct. 30, 2024). Pursuant to Rule 221(a), SCACR, Brian Cornelius Foster requests this Court grant rehearing considering the significant points overlooked and/or misapprehended by this Court discussed below.

¹ 409 U.S. 188 (1972).

In affirming petitioner’s convictions and sentences, this Court upheld the trial court’s decision that the witnesses’ identifications were reliable under the totality of the circumstances and were supported by the evidence and therefore not an abuse of discretion. *Foster v. State*, Op. No. 2024-UP-371 (S.C. Ct. App. Filed October 30, 2024). In its opinion this Court correctly relied on South Carolina’s significant identification cases. Below petitioner will show why the South Carolina law cited in this Court’s opinion, when applied to these facts, does not support the Court’s decision to affirm.

In the opinion the Court cited *State v. Moore*. 343 S.C. 282, 540 S.E.2d 445 (2000). In that case the Supreme Court of South Carolina held (1) the show-up procedure was unduly suggestive and (2) eyewitness identifications were unreliable as a matter of law. *Id.* The Court first found the trial court ruling the show-up procedure was not suggestive—where the two suspects were the only persons around not in a police uniform when the witness positively identified them—was error. *Id.* At 287, 540 S.E.2d at 448.

In that case, the Court also found the identification was unreliable as a matter of law. In coming to that decision, the Court cited *Caver v. Alabama*, 537 F.2d 1333, 1335 (5th Cir.1976), cert. denied, 430 U.S. 910, 97 S.Ct. 1183, 51 L.Ed.2d 587 (1977), for the proposition “an eyewitness identification which is unreliable because of suggestive line-up procedure is constitutionally inadmissible as a matter of law.” *Id.* Next the Court analyzed the *Neil v. Biggers* factors application to the facts of the case and ultimately found under the totality of the circumstances there was a substantial likelihood of irreparable misidentification such that the identifications were unreliable as a matter of law. *Id.* at 289-90 540 S.E.2d at 449.

The Court also cited *State v. Wyatt*. 421 S.C. 306, 806 S.E.2d 708 (2017). In that case our Supreme Court held an identification by correctional officer at his post in a watch tower

during single person show up procedure was suggestive but that the use of suggestive procedure was necessary. *Id.* In that case, the Court focused on necessity of this procedure in these circumstances.

Wyatt is readily distinguishable from the case at hand where the witnesses making the in-court identifications were not law enforcement. Neither was the suggestive procedure a single person show up. Here, it was a photographic line-up used by law enforcement. Moreover, there was absolutely no necessity for law enforcement to use the suggestive photographic line-up used in this case.

Also cited by this Court was *State v. Collier*. 421 S.C. 426, 807 S.E.2d 206 (Ct. App. 2017). In that case this Court held a witness's in-court identification was not so tainted by allegedly suggestive pretrial photographic line-up as to require its suppression. *Id.* In that case this Court noted "the trial court gave adequate consideration to the requisite facts in deciding to admit [the witness's] in-court identification of Collier." *Id.* at 441, 807 S.E.2d at 214

In *State v. Turner*, our Supreme Court held the photographic lineup from which the victim identified defendant as her assailant was not unduly suggestive and regardless, the identification was reliable. 373 S.C. 121, 644 S.E.2d 693 (2007). In that case the suggestive procedure used was a variation in the background colors on the photographic line-up. However, all the men in the line-up had facial hair and were muscular as the victim described. *Id.* at 127-28, 688 S.E.2d at 297. Unlike *Turner*, the photographic line-up in this case was suggestive where petitioner was the only face in the line-up without facial hair.

Here, the photographic line-up used by law enforcement was suggestive and created a substantial likelihood of irreparable misidentification. The trial court correctly found that line-up used by law enforcement was suggestive where the suspect had been described as not having

facial hair and the petitioner was the only individual depicted in the line-up that did not have facial hair. Additionally, the trial court's reasoning was sound where it discussed that when generating a line-up law enforcement should include persons with similar characteristics that are based on witness' descriptions. Here law enforcement was informed the suspect did *not* have facial hair. Petitioner's photograph in the line-up showed him without facial hair. Notwithstanding those facts law enforcement selected five additional individuals for the line-up that had facial hair. Accordingly, the line-up was suggestive where, as the trial court noted, "an important part of the description was that the perpetrator was clean shaven," and all the other photographs included were of individuals that had facial hair.

The trial court erred finding that despite the suggestive line-up the identifications were reliable under the *Biggers* factors. As to Lewis the court relied heavily on the fact that Lewis knew petitioner. However, Lewis's testimony was not that he knew petitioner it was that he had seen him before. In fact, Lewis did not know petitioner at all. Lewis did not even know petitioner's name as he had admittedly only seen petitioner one time before. This is not a situation where these two men were well acquainted and there would be no mistaking petitioner for someone else. According to Lewis's own testimony he had seen him once or twice before in passing and the two had never spoken to each other. The court stated that the other factors—witness opportunity to view individual, degree of attention, level of certainty—were all considered. However, the court failed to make specific findings as to the listed factors.

As to the first factor Lewis testified that he did not interact at all with petitioner on that day although they were both outside for about twenty minutes. Lewis did not testify at all about the second factor, his degree of attention. As to the third factor, Lewis previously described the individual as skinny, medium build, black guy with short hair. In the line-up you cannot see

petitioner's build or weight. Petitioner is black as were all of the men shown in the line-up but his photograph in the line-up depicts longer hair. Lewis was certain that petitioner was the person he saw at the house and the line-up was shown to him the same day as the incident. However, when considering all of the factors together and weigh those factors against the corrupting effect of the suggestive line-up Lewis's identification cannot be deemed reliable.

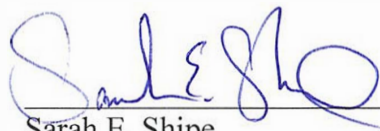
Regarding Campbell's identification of petitioner, the trial court apparently relied solely on Campbell's level of certainty that petitioner was the shooter because of the way his eyes looked. However, Campbell admitted he did not give any description of the man's eyes to law enforcement on the day of the incident. App. 91-92. The court also noted the short time between the incident and the identification. Campbell testified that he and the man were outside Morris's home together for less than an hour. Campbell claimed at one point the man was staring at him but also testified that he was not really involved in the conversation because he was working on Morris's moped. App. 83, ll. 15-86, l. 12. However, the court did not make any specific findings as to the first three *Biggers* factors and when considering all the factors together and weighing those factors against the corrupting effect of the suggestive line-up Campbell's identification cannot be deemed reliable.

As to Moore's identification of petitioner the trial court did not make specific findings as to the *Biggers* factors although he summarily stated he considered them. Only two *Biggers* factors establish any degree of reliability in Moore's identification. Moore claimed he was around the man for twenty minutes and that they were standing very close. Moore's testimony was completely silent as to his "degree of attention." Moore's description was vague at best and did not match the clothing description of the other witnesses. Accordingly, when considering all of the factors together and weighing those factors against the corrupting effect of the suggestive

line-up Moore's identification cannot be deemed reliable.

The in-court identifications made by Lewis, Campbell, and Moore, were incredibly damaging to petitioner. The out of court identifications of petitioner by all three witnesses violated petitioner's due process rights and should have been suppressed where the photographic line-up used by law enforcement was impermissibly suggestive and conducive to a substantial likelihood of misidentification.

The trial court's failure to make specific findings of fact in this case was an abuse of discretion. Accordingly, petitioner respectfully requests this Court reverse petitioner's convictions based on the trial court's erroneous admission of in-court identifications made by Lewis, Campbell, and Moore.



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ATTORNEY FOR PETITIONER

This 14th day of November, 2024.

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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 Petition for Rehearing in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Brian Cornelius Foster, #371789, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 14th day of November, 2024.



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ATTORNEY FOR PETITIONER

From: [Warren, Kaylynn](#)
To: [Mark Farthing](#)
Cc: [Shipe, Sarah](#); [Caroline Collins](#)
Subject: 2023-000724 Brian Foster v. The State
Date: Thursday, November 14, 2024 9:45:00 AM
Attachments: [2023-000724 Brian Foster v. The State Petition for Rehearing.pdf](#)

Good Morning,

Attached for service in the above-referenced case is the Petition for Rehearing which will be filed today, November 14, 2024, with the Court of Appeals via email filing.

Respectfully,

Kaylynn

Kaylynn Warren

Administrative Assistant

South Carolina Commission on Indigent Defense

Division of Appellate Defense

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