

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable William A. McKinnon, Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 2024-UP-371 (S.C. Ct. App. Filed October 30, 2024)

Lower Court Case No. 2019-CP-42-03664

BRIAN FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000724

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on December 2, 2024.

QUESTION PRESENTED

Whether the Court of appeals erred holding the trial court did not abuse its discretion in refusing to suppress multiple witnesses' in-court identifications of petitioner as the shooter where the photographic lineup used by law enforcement was suggestive and impermissible pursuant to *Neil v. Biggers*?¹

¹ 409 U.S. 188 (1972).

STATEMENT OF THE CASE

On May 14, 2018, a Spartanburg County grand jury indicted petitioner for murder, possession of a firearm or ammunition by a person convicted of a violent crime, three counts of attempted murder, and four counts of possession of a weapon during a violent crime. App. 13, l. 25-15, l. 12; 667-74. Petitioner's case was called to trial before the Honorable J. Derham Cole and a jury on April 8, 2019. App. 1. Petitioner was represented by Beverly Jones and the state was represented by assistant solicitors, Spenser Smith and Candace Clark. App. 1.

The jury convicted petitioner of murder, attempted murder, two counts of possession of a weapon during the commission of a violent crime, and possession of a firearm or ammunition by a person convicted of a violent crime. App. 550, l. 9-551, l. 1. The jury found petitioner was not guilty of two counts of attempted murder and two counts of possession of a weapon during a violent crime. App. 550, l. 9-551, l. 1. Judge Cole sentenced petitioner to life imprisonment for murder, thirty years' imprisonment for attempted murder, and five years' imprisonment for both weapon charges. App. 572-73.

Defense counsel filed an untimely notice of appeal on April 23, 2019, and the Court of Appeals dismissed the appeal. App. 575-77. On June 26, 2019, counsel filed a motion to reinstate the appeal, which was denied by written order. App. 578-79. The remittitur was issued October 3, 2019. App. 580.

Thereafter petitioner filed an application for PCR. App. 581-86. On June 7, 2022, an evidentiary hearing was held before the Honorable William A. McKinnon. App. 594-649. Petitioner was represented by Rodney Richey and the state was represented by Chelsey Marto. App. 594.

On March 22, 2023, Judge McKinnon signed an order granting belated appellate review

pursuant to *White v. State*, and denied PCR as to all other claims. App. 652-65. Judge McKinnon found petitioner was entitled to belated review of his conviction where counsel assumed responsibility for her failure to timely file and serve the notice of appeal. App. 664. Judge McKinnon found this failure denied petitioner an opportunity to seek appellate review of his convictions and that he had not knowingly, voluntarily, and intelligently waived that right. App. 664.

On October 30, 2024, the Court of Appeals affirmed petitioner's convictions and sentences. On November 14, 2024, petitioner filed a petition for rehearing with the Court of Appeals. By order dated December 2, 2024, the Court of Appeals denied rehearing. This petition for writ of certiorari follows.

ARGUMENT

The Court of appeals erred holding the trial court did not abuse its discretion in refusing to suppress multiple witnesses' in-court identifications of petitioner as the shooter where the photographic lineup used by law enforcement was suggestive and impermissible pursuant to *Neil v. Biggers*.

Introductory facts

On February 18, 2018, Eric Morris was shot and killed in his home. His friend Joel Campbell and his house mates, Joe Lewis and Thomas Koepke, were outside the house when the shooting occurred. Koepke entered the home to check on Morris and was shot and injured.

Pretrial hearing

Prior to trial a *Neil v. Biggers* hearing was held to determine the admissibility of the identifications of petitioner by Joel Campbell and Joe Lewis. App. 52-112. Testimony from the hearing is summarized below.

Officer Mark Gaddy claimed shortly after he arrived at the scene of the incident, he was given petitioner's name as the individual who was potentially responsible for the shooting. Gaddy said petitioner generally fit the description of the shooter that law enforcement had been given at that time. App. 52, l. 11-53, l. 6. Gaddy testified Joel Campbell described the shooter as "5'6" to 5'8", skinny with no facial hair, close on the sides with a mop-top haircut, dark skin with a hoodie, possibly blue and white." App. 59, ll. 15-21. A neighbor, Jim Moore, described the suspect as, "5'7" to 5'8", skinny with hair close on the sides with a mop top . . . black t-shirt with a white hand on it . . . black sweatpants." App. 59, l. 22-60, l. 1

Officer Gaddy testified he and Jon Guest generated the photographic lineup using "people with the same physical characteristics" as petitioner. App. 53, ll. 7-25; 684-94. Gaddy said he

and Guest showed the same photographic lineup to every witness. App. 54, ll. 15-21. He took a statement from neighbor, Jim Moore, and showed him the lineup to see if Moore could identify the person he saw shortly after the incident.² App. 54, l. 23-55, l. 6. Moore identified petitioner in the photographic lineup. App. 56, ll.

Joel Campbell was at Eric Morris's, home on the day of the incident. App. 82-87. Campbell testified at some point during the afternoon a man in a hoodie showed up and Morris told him he was a friend. App. 83, l. 15-84, l. 6. Campbell described the man as a young black man 5'6" to 5'8" skinny without facial hair and wearing a "possibly blue and white" hoodie. App. 84, ll. 9-12; 91, ll. 17-19. He claimed prior the shooting the man was outside for forty-five minutes to an hour. App. 85, ll. 16-21. After the incident, Campbell was shown the photographic lineup. Campbell testified he identified petitioner as the shooter, "as soon as [he] saw his eyes." App. 89, ll. 1-23.

Joe Lewis was also at Morris's home the day of the shooting. Lewis alleged he saw petitioner before that day because petitioner lived with Morris for a short time. He testified he had never spoken to petitioner. App. 99, ll. 22-25. Lewis did not know petitioner's name he just recognized him as someone he had seen before. App. 100, ll. 1-5; 101, ll. 1-3. He testified he did not interact with the man on the day of the incident but said they were both outside at Morris's house for around twenty minutes. App. 100, ll. 11-25; 103, ll. 20-23. Lewis claimed when he saw the photographic lineup, he recognized petitioner and was certain he was the shooter. App. 102, ll. 11-25.

Defense counsel argued both Campbell's and Lewis's identifications of petitioner were

² Moore's in-camera testimony was heard later, during trial, and was not a basis for the pretrial determination that Campbell's and Lewis's in-court identifications of petitioner were admissible.

inadmissible because the photographic lineup used by law enforcement was inherently suggestive based on the description Officer Gaddy said they used to generate the lineup. App. 108, ll. 9-13. Counsel asserted that law enforcement was told the shooter did not have facial hair and yet every individual used in the lineup had facial hair except petitioner. App. 108, ll. 11-1-13. The solicitor argued law enforcement did the best they could in this circumstance based on the photographs they had access to at the time. The solicitor contended each person who viewed the lineup was admonished not to pay attention to hair length or facial hair. App. 108, ll. 15-24. The solicitor averred the witness, Thomas Koepke, who arguably had the closest look at the shooter was unable to identify anyone in the lineup which the solicitor contended showed the lineup was not unduly suggestive. App. 108, ll. 18-21.

The trial court found the lineup was suggestive where petitioner was the only person in the lineup that was clean shaven and where he appeared “right in the middle of the lineup.” App. 110, ll. 3-11. However, the court found the identifications by the witnesses were admissible.

As to Lewis the trial court found the suggestiveness was “likely negligible” where Lewis knew petitioner. App. 110, l. 22-111, l. 15. As to Campbell the trial court noted he picked petitioner “immediately based upon his eyes.” The trial court also noted Campbell’s level of certainty was high that the shooter was petitioner. App. 111, l. 16-112, l. 8. The trial court found there was “no real corrupting influence” of the suggestive lineup based on the testimony and the other factors. The trial court stated:

[w]hile the procedure might have been somewhat suggestive, I find that their testimony is, nevertheless, credible and that their identification of the [petitioner] was not based upon any suggestive lineup but based upon their own certainty and recollection as to the events, the circumstances relating to that event and their ability to identify the [petitioner] as the perpetrator of the offense; and therefore the in-court identification shall be permitted.

App. 112, l. 23-113, l. 7.

In-court identifications

During trial Jim Moore, a resident that lived near Morris, testified in-camera. App. 207. Moore said that on the day of the incident a man entered his backyard saying someone had raped and killed his mother. App. 208, ll. 8-18. Moore went to get his home phone to call 911 for help. App. 208, ll. 19-25. Moore testified that while he was on the phone with 911, the man grabbed the phone and walked away. App. 209, ll. 1-6. He said that he heard the man asking someone to come get him. App. 209, ll. 7-16. Moore claimed that before law enforcement arrived the man left. App. 209-210. Moore estimated that the interaction with the man was twenty minutes and that they were standing only a few feet from each other. App. 211, ll. 2-5. Moore described the man as a young black man wearing black sweatpants and a black hoodie with a large white hand on it. App. 210, ll. 17-24. When law enforcement showed him the photographic lineup he chose petitioner. App. 212, ll. 1-17. (207-217)

After Moore's in-camera testimony, the court ruled Moore's identification of petitioner was admissible. The court again found the lineup was "arguably suggestive," but found that the identification of petitioner was "nevertheless, reliable." App. 215, ll. 20-25

All three witnesses made in-court identifications of petitioner as the shooter. App. 153, l. 1-154, l. 17; 179, ll. 18-25; 223, ll. 11-16. At trial, Thomas Koepke—who had not been able to identify petitioner from the lineup—testified he was one hundred percent sure petitioner was the person who killed decedent and shot him. App. 201, ll. 18-21; 203, l. 9-204, l. 21; 245, l. 19-246, l. 1.

Discussion

In affirming petitioner's convictions and sentences, the Court of Appeals 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 the opinion the Court correctly relied on South Carolina’s important identification cases but did not put forth any analysis on the specific facts of petitioner’s case other than to conclude the trial court had not abused its discretion. The South Carolina cases cited in the Court’s opinion, when applied to these facts, do 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 this Court held (1) the show-up procedure was unduly suggestive and (2) eyewitness identifications were unreliable as a matter of law. *Id.* This 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, this Court found the identification was unreliable as a matter of law. In coming to that decision, this 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 this 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 this 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, this Court was focused on the necessity of the show up procedure in these specific 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 lineup used by law enforcement. Moreover, there was absolutely no argued or actual necessity for law enforcement to use the suggestive photographic lineup used in this case.

Also cited by the Court was *State v. Collier*. 421 S.C. 426, 807 S.E.2d 206 (Ct. App. 2017). In that case the South Carolina Court of Appeals held a witness's in-court identification was not so tainted by allegedly suggestive pretrial photographic lineup as to require its suppression. *Id.* In that case the 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*, this 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 lineup. However, all the men in the lineup had facial hair and were muscular as the victim described. *Id.* at 127-28, 688 S.E.2d at 297. Unlike *Turner*, the photographic lineup in this case was suggestive where petitioner was the only face in the lineup without facial hair.

Here, the photographic lineup used by law enforcement was suggestive and created a substantial likelihood of irreparable misidentification. The trial court correctly found the lineup 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 lineup that did not have facial hair.

The trial court's reasoning was sound where it discussed that when generating a lineup law enforcement should include persons with similar characteristics that are based on witness' descriptions. Here Officer Mark Gaddy was informed the suspect did not have facial hair. Petitioner's photograph in the lineup showed him without facial hair. Notwithstanding those facts Officer Gaddy selected five additional individuals for the lineup that had facial hair. Accordingly, the lineup 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 despite the suggestive lineup the identifications were reliable under the *Biggers* factors. As to Joe 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 testimony he had seen him once or twice before in passing and the two had never spoken to each other. The trial court stated that the other factors—witness opportunity to view individual, degree of attention, level of certainty—were all considered. However, the trial 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 lineup you cannot see petitioner's build or weight. Petitioner is black as were all of the men shown in the lineup but his

photograph in the lineup depicts longer hair. Lewis was certain that petitioner was the person he saw at the house and the lineup was shown to him the same day as the incident. However, when considering all of the factors together and weighing those factors against the corrupting effect of the suggestive lineup Lewis's identification cannot be deemed reliable.

Regarding Joel 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 trial 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 lineup Campbell's identification cannot be deemed reliable.

As to Jim 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 lineup 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 lineup 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.

CONCLUSION

Based on the foregoing argument, petitioner respectfully requests this Court grant certiorari and order full briefing pursuant to Rule 242(i), SCACR. Petitioner ultimately requests this Court reverse his convictions and remand for a new trial.

Respectfully Submitted,



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of January, 2025.