STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

James C. Williams, Jr., Circuit Court Judge

RICARDO JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED

Whether the PCR court erred by ruling trial counsel was effective where trial counsel not only failed to request an *in camera* hearing on the matter pursuant to Neil v. Biggers,[1] but also waived the opportunity for such a hearing when offered by the trial court.

[1] 409 U.S. 188, 93 S.Ct. 375 (1972).

STATEMENT

Ricardo Johnson was indicted in July 2001 by the Orangeburg County Grand Jury for first degree burglary and armed robbery. Johnson was represented by Edgar Warren Dickson; J. Angela Garrick represented the State. On September 4–5, 2001, he was tried before the Honorable Luke N. Brown and a jury, and found guilty of both charges. Johnson was sentenced to concurrent terms of imprisonment totaling twenty-three years.

Johnson timely filed his direct appeal. Former appellate counsel Aileen P. Claire submitted an Anders brief on behalf of Johnson, arguing that the trial court erred by not conducting a separate hearing to determine the reliability of indirect in-court identifications. Johnson's appeal was dismissed by the South Carolina Court of Appeals on November 27, 2002.

On August 27, 2003, Johnson filed his application for post-conviction relief (PCR). An evidentiary hearing was held in Orangeburg County before the Honorable James C. Williams, Jr., on December 11, 2004.[2] Johnson was represented by Scott W. Palmer, and the State was represented by Paula S. Magargle. Johnson's PCR application included the claim that trial counsel was ineffective for failing to request a hearing regarding a suggestive photo line-up and subsequent in-court identification. App. 308; App. 310-16. On January 27, 2005, the PCR court filed its Order dismissing Johnson's application. Specifically, the court determined trial counsel

[2] Although the orders from both the first and second PCR courts state that the evidentiary hearing was held on December 11, 2004, no transcript exists from that date. App. 327; App. 374. Additional efforts were taken to secure the transcript. This Court denied Johnson's motion to reconstruct the first PCR hearing, and ordered Johnson's current PCR arguments and issues to be drafted using the trial transcript, records from Petitioner's direct appeal, the 2005 Order of Dismissal, and any other available materials that were before the circuit court. App. 377; App. 482.

was not ineffective because the trial record indicated counsel made a motion to challenge the photo line-up and in-court identification. App. 329. The PCR court further found the issue was raised on Johnson's direct appeal, and was dismissed. App. 330.

Johnson filed a subsequent PCR application on June 12, 2007. An evidentiary hearing on this matter was held in Orangeburg County before Judge Williams on May 21, 2008.[3] Johnson was represented by Joshua Koger, Jr., and the State was represented by Lance S. Boozer.

The second PCR court filed its order granting Johnson belated appellate review of his first PCR application. App. 376. Specifically, the second PCR court affirmatively found as follows:

> The State conceded and this Court affirmatively finds that the Applicant did not knowingly and voluntarily waive his right to appellate review. After consulting with Applicant's prior PCR counsel, the State submitted to this Court that the Applicant was not advised of his right to appeal. The Court concludes that the Applicant is entitled to a belated review of the denial of his first application.

App. 375. Thus, the court concluded that Johnson did not knowingly and voluntarily waive his right to directly appeal his first PCR application, and granted Johnson a belated review of his previous application for PCR pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991).[4]

This petition follows.

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[3] The second PCR evidentiary hearing transcript indicates more testimony was to be admitted on the following day. App. 371. However, the court reporter later indicated Johnson's PCR evidentiary hearing was held only on May 21, 2008.App. 486. This is supported by the PCR court's findings in the Order supporting its grant of relief for Johnson. App. 375.

[4] Neither Johnson nor the State filed a post-trial motion pursuant to Rule 59(e), SCRCP.

ARGUMENT

The PCR court erred by ruling trial counsel was effective where trial counsel not only failed to request an in *camera hearing* on the matter pursuant to Neil v. Biggers, but also waived the opportunity for such a hearing when offered by the trial court.

The PCR court erred in its ruling that the photo line-up and in-court identification issue was raised and ruled upon to the trial court and appellate court on direct appeal.[5] App. 330. Rather, the motion the trial court ruled upon was simply an objection to the photo spread. App. 55, ll. 21-25. When offered an opportunity for a hearing by the trial court on whether the photo line-up was suggestive or prejudicial, trial counsel waived the opportunity to do so. App. 56, ln. 21—Tr. 57, ln. 22. It is trial counsel's failure to request a hearing—and subsequent waiver of such hearing when offered *sua sponte* by the court—that Johnson complained of in his PCR application.

Further, because the conduct complained of by Johnson arose out of an error made by trial counsel rather than the State or the trial court, Johnson's issue is one for collateral attack rather than direct appeal. The trial court did not make a ruling pursuant to a Biggers hearing, and no testimonial evidence was proffered regarding the matter; consequently, it was not possible for the Court of Appeals to reach the issue of whether the trial court's ruling pursuant a Biggers hearing was correct, as it was not properly raised to or ruled upon by the trial court. See, e.g. State v. Carlson, 363 S.C. 586, 595-96, 611 S.E.2d 283, 287 (2005) (refusing to address Defendant's claim that trial court failed to conduct proper hearing pursuant to Bigggers where the matter was not

[5] Johnson's appeal was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). App. 297-98. "[A] decision of the Court of Appeals dismissing an appeal after conducting a review pursuant to Anders is not a decision on the merits of the appeal, but simply reflects that the appellate court was unable to ascertain a non-frivolous issue which would require counsel to file a merits brief." State v. Lyles, 381 S.C. 442, 445, 673 S.E.2d 811, 813 (2009).

properly preserved). Accordingly, this specific issue was properly raised in Johnson's PCR application, yet erroneously dismissed by the PCR court.

Turning to the merits of the matter, Johnson asserts that the in-court identification by the complaining witness, Stack Williams, deprived him of his right to due process of law. Specifically, the out-of-court procedure leading to Johnson's identification by Williams on January 31, 2001, was unduly suggestive, and created a substantial likelihood of misidentification.

Sometime between 5:00 and 6:30 pm on January 27, 2001, Williams received a knock on the door of his trailer at the Elloree Training Center. App. 43, ln. 21—App. 44, ln. 6; App. 62, ln. 25—App. 63, ln. 6; App. 66, ln. 20—App. 67, ln. 4. One to two people were out front and asked if a man named Danny Rivers was inside, to which Williams responded, no. App. 48, ln. 11-18; App. 69, ll. 18—App. 71, ln. 12. Minutes later, there was another knock at the door. Williams looked through the window beside the door, and same two men were at the door again asking for Danny Rivers. App. 49, ln. 14-15. When he opened the door, the two men entered with guns—one was a light skinned black male, and the other was a dark skinned black male. App. 49, ll. 18-15; App. 87, ln. 13-20. The two took approximately $290 and a revolver, and left Williams with his face in a chair. App. 52, ll. 12—App. 53, ln. 11; App. 79, ln. 10—App. 80, ln. 10. The incident occurred over a span of approximately four to ten minutes. App. 80, ll. 1-4.

Several witnesses testified for the State, but only Williams' eyewitness identification placed Johnson at the crime scene committing the offense. Further, the defense produced several witnesses, including Johnson, his wife Treena Johnson, and his acquaintance Ms. Daisy Randolph, in support of Johnson's alibi defense, demonstrating he was at a local laundromat at the time of the

offense. App. 173, ll. 14-17; App. 174, ln. 25—App. 176, ln. 12; App. 191, ln. 20—App. 193, ln. 19; App. 200, ln. 17—App. 201, ln. 14.

"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)). "Where identification is concerned, the general rule is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous identification or confrontation." State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (citing State v. Cash, 257 S.C. 249 185 S.E.2d 525 (1971)).

In the present case, Johnson's trial attorney objected to the admissibility of Williams' out-of-court identification as well as his in-court identification of Johnson. App. 24, ll. 22-23; App. 55, ll. 21-25. However, counsel failed to seek—or accept when offered—an *in camera* evidentiary hearing regarding the suggestiveness of the photo line-up, or the reliability of Williams' identification of Johnson. He simply relied upon his legal argument that the photo line-up was prejudicial because Johnson's photograph was the top, left-hand photo on the top line, which he claimed without any evidentiary basis is the first place that people will look based on their training since childhood. App. 56, ln.8—App. 57, ln. 11. Thus, trial counsel's performance was deficient, as it deprived Johnson of his right to proffer evidence to the trial court showing how Williams' identification of him was improper. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984) (establishing the two-prong test required to prove ineffective assistance of counsel).

Further, Johnson was prejudiced by trial counsel's failure to seek an *in camera* evidentiary hearing regarding the identification by Williams; Johnson was deprived of the opportunity to suppress identification testimony from the only witness that placed him at the crime scene committing the offense. Had trial counsel sought an *in camera* hearing pursuant to Biggers, he would have had the opportunity to competently substantiate his claim to the trial court that the placement of Johnson's photograph in the line-up was unduly suggestive beyond the mere legal argument which he posited.[6] App. 56, ln.8—App. 57, ln. 11. Counsel's argument that people are trained from childhood to examine documents starting from the top left position—which would draw immediate attention to Johnson's photograph in the present line-up— should have been supported with expert testimony on the matter at a hearing. Further, expert testimony on the unreliability of eyewitness identifications would also have aided Johnson in his *in camera* identification hearing. See, e.g., State v. Whaley, 305 S.C. 138, 143, 406 S.C. 369, 372 (1991).

If Johnson's attorney properly established the identification as unduly suggestive, then the trial court would have determined whether there was a substantial likelihood of irreparable misidentification under the totality of the circumstances. Several factors should be considered when evaluating the totality of the circumstances to determine the likelihood of misidentification, including the following: (1) the witness' opportunity to view the perpetrator at the time of the offense; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the

[6] Although the first PCR court's Order of Dismissal indicates both Johnson and his trial counsel testified at the PCR evidentiary hearing, no transcript of that PCR hearing is available to determine whether additional witnesses testified. App. 329; App. 377; App. 482.

length of time between the offense and confrontation. Traylor, 360 S.C. at 82, 600 S E.2d at 527. "Only after a determination as to the reliability of a witness' identification has been made by the trial court may the witness testify before the jury." Moore, 343 S.C. at 289, 540 S.E.2d at 449 (citing State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)).

In the case at bar, Williams' testimony indicated he was uncertain whether the offense occurred over approximately four, five, or possibly ten minutes. App. 81, ll. 1-4. Williams also exhibited a lack of attention to the faces of his assailants, as indicated by his generic description of Johnson: a dark skinned black male about five foot seven inches tall, about 175 pounds, and wearing a black sweater cap and dark clothing. App. 119, ln. 23—App. 120, ln. 8. Additionally, Williams' lack of detail might also be explained by his admittedly poor eyesight. Williams stated he cannot see well, and although he needs glasses, he has none. App. 74, ll. 18-22; App. 85, ll. 8-11.

Also, despite the high level of certainty Williams showed identifying Johnson at trial, he admitted he had problems identifying Johnson from the photo line-up three days after the incident, and took minutes to do so. App. 78, ln. 9-17. Thus, the present scenario is not a case where the assailant was immediately identified by the victim; rather, it is more akin to a scenario where the victim of a crime mulled over a line-up of photographs provided by law enforcement, and decided to go forward with one of the pictures presented to him.

Moreover, despite not knowing Johnson before to the incident, Williams testified that he learned from his long-time friend, Danny Rivers, sometime prior to seeing Johnson at trial that Johnson had a light skinned brother. App. 65, ln. 5—App. 66, ln. 19. This admission indicates Rivers imparted knowledge of Johnson as well. Whether Williams gained this knowledge before

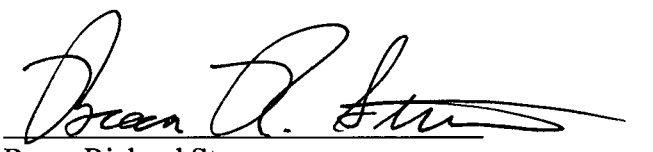
the photo line-up is unclear, but the possibility exists that he did—a possibility which could have been flushed out at an *in camera* identification hearing. If Williams knew this information prior to the photo line-up, then both his out-of-court and in-court identifications would be tainted, thereby sapping any reliability from them. See, e.g., State v. Chen, *** A.3d ***, WL 368387 (N.J. 2011) (holding a private actor's suggestive words or conduct would require a preliminary hearing under State rules of evidence in appropriate cases to test the admissibility of identification evidence). Therefore, under the totality of circumstances, Williams' identification should not be deemed so reliable as to remove the specter of misidentification; Williams should not have been permitted to identify Johnson as a perpetrator at trial.

The prejudice against Johnson flows directly from Williams' identification of him as one of the two perpetrators. Although other witnesses stated Johnson was at the trailer park where Williams lived, Williams was the only witness placing Johnson at the victim's trailer and actually committing the crimes in a case where the defendant asserted an alibi defense. Had trial counsel sought a Biggers hearing, and competently marshaled the appropriate evidence in support, then Williams' identification of Johnson would likely have been suppressed. In that event, the only eyewitnesses remaining who saw Johnson at the time the offense occurred would have been his two alibi witnesses. Accordingly, Johnson was prejudiced by trial counsel's failure to seek a Biggers hearing. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052.

CONCLUSION

For the foregoing reasons, Ricardo Johnson respectfully requests that this Court grant his petition for certiorari, reverse the first PCR court's Order dismissing his application, reverse his convictions, and remand his case for a new trial.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of September, 2011.

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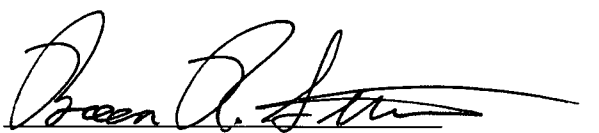
CERTIFICATE OF SERVICE

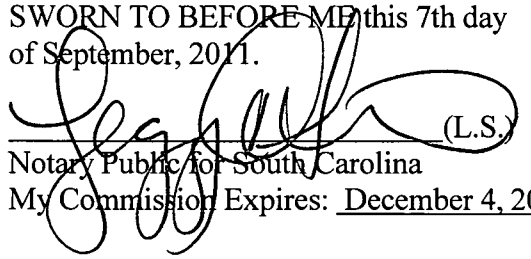
I certify that a true copy of the petition for writ of certiorari pursuant to Austin v. State in this case have been served on Mary S. Williams, Esquire and Ricardo Johnson, this 7th day of September, 2011.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day of September, 2011.



(L.S.)

Notary Public for South Carolina
My Commission Expires: December 4, 2017.