STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Steven H. John, Circuit Court Judge

Opinion No. 5148 (S.C. Ct. App. filed 6/26/2013)

08-GS-26-2911

THE STATE,

RESPONDENT,

V.

HENRY JERMAINE DUKES,

APPELLANT

APPELLATE CASE NO. 2013-001798

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 7/24/2013.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in refusing to find that the trial judge erred in finding that the pre-trial hearing in regard to identification met the requirements of due process when the detective who conducted the identification procedure was not available to testify at trial?

2. Did the Court of Appeals err in failing to address the issue in regard to the reliability of the in court identification testimony when the out of court identification procedure used created a substantial likelihood of irreparable misidentification?

STATEMENT OF THE CASE

In August of 2008, the Horry County Grand Jury indicted Dukes for murder, indictment #2008-GS-26-2911. On July 20, 2011, the Honorable Steven H. John heard pretrial motions. On August 1, 2011, Dukes proceeded to jury trial before Judge John. Attorney Jonathan Eric Fox represented Dukes during the pre-trial hearing and at trial. The jury found Dukes guilty and Judge John sentenced Dukes to 47 years. A timely notice of intent to appeal was filed on August 3, 2011 and the direct appeal perfected.

On April 3, 2013, a three judge panel of the South Carolina Court of Appeals heard arguments in the case. On June 26, 2013, the Court of Appeals issued a written opinion affirming the conviction. State v. Dukes, 404 S.C. 553, 745 S.E.2d 137 (Ct.App. 2013). (App. pp. 1-9). A timely petition for rehearing was filed and denied on July 24, 2013. (App. pp. 10-20). This petition for writ of certiorari follows.

ARGUMENT

1. The Court of Appeals erred in refusing to find that the trial judge erred in finding that the pre-trial hearing in regard to identification met the requirements of due process when the detective who conducted the identification procedure was not available to testify at trial.

The jury convicted Petitioner of the murder of Andrico Gowans. The State's case against Dukes was based primarily on the identification testimony of Cornelius Ford. There was no forensic evidence linking Dukes to the murder. Prior to trial during the pre-trial hearing, Dukes argued that the State could not meet its burden in regard to the admission of Ford's identification testimony when Detective Addison, the detective who conducted the identification procedure, was not available at trial. (R. p. 11, lines 15 – p. 12, lines 1-13). The judge found that he could not make that determination until he heard the testimony of Ford. (R. p. 12, lines 14-16). In a separate motion, Dukes then moved to suppress identification testimony of Ford based on the unduly suggestive identification procedure used that created a substantial likelihood of misidentification. (R. p. 29, lines 3-15).

The judge held a hearing pursuant to Neil v. Biggers[1]. The State called Ford as a witness. (R. p. 29, line 21). Ford testified that on the morning of the shooting he was at Gowans' house and there was a knock on the door. (R. p. 32, lines 6-10). According to Ford, Gownas opened the door and Dukes came inside the house. (R. p. 32, lines 9-10). According to Ford, there was a brief conversation and then Dukes pulled out a gun and shot Gowans. (R. p. 32, lines 12- p. 33, lines 1-18). Ford testified that he had seen Dukes on two prior occasions. (R. p. 30, lines 7-13). Ford described the shooter as having a funny accent and a big smile. (R. p. 34, lines 3-8). After the shooting, Ford called his father, Rasheed Muhammad. (R. p. 38, lines 17 – p. 39, p. 40, lines 1-2).

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

Muhammad came to the house and met the police. Ford did not wait for the police and fled the scene when his dad arrived. (R. p. 40, lines 4-19). Later, at trial, Muhammad admitted that on the morning of the shooting, he did not tell police that his son had been at the house and he admitted that he lied about how he came to be at the house on the morning of the shooting. (R. pp. 85 – 90).

Later that evening the police contacted Muhammad about speaking with his son, Cornelius Ford. (R. p. 44, lines 6-10). Muhammad and Ford went to the police substation and met with a detective. (R. p. 44, lines 9-12). Ford testified, "When I went to get a interview I was giving – telling them what happened, and while I was talking – while I was talking to them they said they was going to get some pictures, like a photo book or whatever, but I seen like some pictures on the table, and when I seen the pictures on the table I pointed him out, because I knew that's who it was." (R. p. 34, lines 24 – p. 35, lines 1-5). Ford testified that the detective opened up his file to take notes and Ford saw three or four pictures inside the detective's file. (R. p. 35, lines 12 – p. 36, 37, line 1).

After the testimony, Dukes again objected to the fact that Detective Addision was not available to testify about the identification procedure used in this particular case. (R. p. 50, lines 13-20; p. 50, lines 25 – p. 51, lines 1 – p. 52 lines 1-10). The judge found, "I do not find it is necessary for the Court to hear the testimony of the detective who is unavailable. I mean, there is no argument, Mr. Fox, that that detective is unavailable. He is in the service of his country in Afghanistan. It's not possible for him to be at the trial. I mean, that's clear, correct?" (R. p. 52, lines 12-18). Defense counsel agreed that the detective was unavailable. (R. p. 52 line 19). The judge then found, "All right, so with that circumstance, the Court does not find it obviously, number one, within the court's power to have him here. Secondly, I find it is not necessary for the court to make the determination on your motion to suppress the identification to have the testimony of the

officer in this particular case." (R. p. 52, lines 20-25). The judge erred. The detective's testimony was necessary in order for the State, as the proponent of the identification testimony to establish the procedure used by the police in obtaining an identification of Petitioner. The pre-trial hearing in regard to identification testimony did not meet the requirements of due process.

In State v. Liverman, 727 S.E.2d 422 (2012), the South Carolina Supreme Court overruled State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973) creating a bright line rule excusing a Neil v. Biggers hearing where the eye witness knows the accused. In Liverman the defense requested a Neil v. Biggers hearing and the State objected, based on McLeod, because the witnesses knew the accused. The judge required the State to proffer the testimony of the witness. The judge first found the identification testimony admissible pursuant to Mcleod. The judge then made a secondary finding that, under the totality of the circumstances, the identification testimony was admissible. The identification in Liverman involved an individual show up identification. In discussing the evidence presented in regard to the identification testimony the Court wrote, "While the trial court required the State to submit evidence that has many of the traditional features of a Neil v. Biggers hearing (and the trial court made concomitant Neil v. Biggers findings), we decline to hold that the pretrial hearing fully comported with due process requirements." State v. Liverman, 727 S.E.2d at 427. The Court in Liverman then found that any error in the insufficient Neil v. Biggers hearing was harmless.

The identification hearing in the present case which included the testimony of the eye-witness and his father was the equivalent of the proffered testimony of the eye witness in Liverman. The police who conducted the identification procedures in both Liverman and the present case failed to testify at the pre-trial hearings. As the South Carolina Supreme Court declined to find that the pre-trial hearing in Liverman comported with due process requirements,

this Court should find that the identification hearing in the present case failed to comport with due process requirements. Unlike Liverman, the error was not harmless, as discussed below in issue two.

Due process requires the State, as the proponent of the identification testimony, to initially establish what identification procedure was used by law enforcement. Due to the unavailability of the officer in the present case, the State was unable to establish what identification procedure was used. The testimony that was presented at the Neil v. Biggers[2] hearing was contradictory and failed to establish if the eye-witness identified Dukes by accidentally viewing photos inside the officer's case file or if the officer showed the eye-witness several photographs one at a time and the eye-witness selected the photograph of Dukes. Importantly, the photographs viewed by the eye-witness were not introduced in evidence. Dukes did not have the opportunity to cross examine the officer. The unavailability of the officer and the photographs make this case analogous to a case where a photo line-up has been lost prior to trial. See United States v. Honer, 225 F.3d 549 (5th Cir. 2000) (When government fails to preserve photographic array used in pre-trial line-up, there shall exist presumption that array is impermissibly suggestive, even if record discloses no evidence of bad faith on part of government); Grady v. Commonwealth, 325 S.W.3d 333 (Kentucky, 2010) (Pre-trial lineup materials lost before defendant had an opportunity to scrutinize their content would be presumed to be unduly suggestive.). Based on the State's inability to establish details in regard to how the identification was made and Dukes' inability to cross examine the officer, the identification procedure should be presumed impermissibly suggestive.

[2] 409 U.S. 188, 93 S.Ct. 375 (1972).

The Court of Appeals found that the "trial court afforded Dukes all that due process required in this particular situation." The Court of Appeals wrote:

> The trial court gave Dukes notice of the hearing and the opportunity to be present. The court also gave him the opportunity to cross-examine the State's witnesses, offer his own evidence, and argue his position. Dukes argued the specific reasons Addison's testimony was essential, but the trial court determined otherwise, specifically stating, "I find it is not necessary for the court to make the determination on your motion to suppress the identification to have the testimony of the officer in this particular case." Thus, the trial court was able to determine from the testimony of the State's witnesses that nothing the police did was suggestive. Finally, this appeal is Dukes' opportunity for judicial review. We find the hearing did not violate Dukes' due process rights.

State v. Dukes, 404 S.C. 553, 559, 745 S.E.2d 137, 140 (Ct.App. 2013).

The opinion fails to address the fact that Dukes was unable to cross examine the law enforcement officer who conducted the identification procedure about the manner in which the photographs were presented to the eye witness. The State's failure to establish the procedure used to obtain the identification precluded Dukes from demonstrating that the identification procedure was impermissibly suggestive and deprived Dukes of due process of law. Requiring Dukes to prove that the identification procedure was impermissibly suggestive without the presence of the officer or the photographs to determine what procedure was used is the equivalent of requiring a defendant to prove prejudice from a photo line-up without requiring the State to produce the photo line up.

The Court of Appeals distinguished the present case from Liverman based on the fact that the identification procedure in Liverman involved an unduly suggestive show up identification. This Court of Appeals wrote:

> Liverman arose, therefore, under the second prong of Biggers—reliability. We decide this appeal under the first prong—suggestiveness. Under Perry and Liverman, judicial inquiry into reliability is required *every* time the police orchestrate a suggestive identification procedure. Under Perry and

> cases like Sanders, however, judicial inquiry into reliability is never required unless (1) the police (2) orchestrated an identification procedure (3) that was impermissibly suggestive. Perry and Sanders remove this case from the ambit of Liverman because the trial court here found there was no impermissibly suggestive police conduct.

State v. Dukes, 404 S.C. 553, 560, 745 S.E.2d 137, 140 - 141 (Ct.App. 2013).

In Perry v. New Hampshire, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012), the United States Supreme Court held that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. There is no question that the identification procedure in the present case was arranged by law enforcement. The problem in the present case is the State's failure to initially establish the procedure used by law enforcement to obtain the identification. It is this precise failure on the part of the State that deprived Dukes of due process of law and precluded Dukes from meeting his burden to show that the identification procedure was unduly suggestive. The identification procedure should be presumed suggestive under the unique circumstances of this case. See United States v. Honer; Grady v. Commonwealth.

The Court of Appeals' decision in regard to the sufficiency of the hearing hinges on the trial court's finding that the identification procedure was not suggestive. The trial judge stated:

> It does not appear, even taking into consideration the report of the investigator, that there was any corrupting effect, that there was any intentional act, that there was any deliberate act, that there was any act by the police of a suggestive manner. The witness had already identified the Defendant prior to the – looking at the photographs. The seeing of the photographs was either done accidentally through the looking at a file or in a process that the Court finds was not suggestive in – in any manner, and therefore, based upon all that, the motion to suppress the identification is denied.

(R. p. 54, line 16 – p. 55, line 1).

The State, however, failed to establish what procedure was used to obtain the identification. As this Court noted, "In this case, the trial court was not able to determine exactly what [the officer] Addison did. However, the court was able to determine that either Ford saw the photographs accidentally or Addison showed them to him one at a time. The court then determined that neither of those alternatives involved suggestive police conduct." State v. Dukes, 404 S.C. 553, 560, 745 S.E.2d 137, 141 (Ct.App. 2013).

Finding that the eye witness either accidentally saw the photos or the officer showed the eye witness the photos, without more information about the manner in which either alternative was accomplished, fails to support the finding that the identification procedure was not unduly suggestive. First, even if inadvertent, allowing the witness to view a photograph of the defendant contained in the case file of the officer investigating the shooting is an unduly suggestive identification procedure. Second, the evidence is insufficient to find that the procedure was not unduly suggestive when the State failed to present testimony from the officer or even copies of the photos shown.

The line-up procedure should be presumed unduly suggestive where, as here, the identification hearing failed to meet the requirements of due process because the State failed to establish the procedure used in obtaining the identification of Petitioner. Addressing the substantive issue[3] of the suggestive nature of the identification procedure, the Court of Appeals wrote:

[3] The Court of Appeals cites to various federal and state cases holding the burden of proving that the identification procedure used was impermissibly suggestive rests with the defendant. Petitioner does not suggest that the burden of disproving suggestiveness rests with the State. The State, however, must establish an evidentiary predicate before the evidence can be challenged as suggestive. The State failed to establish the evidentiary predicate in this case and the procedure must be presumed to be impermissibly suggestive. The Court of Appeals' reliance on State v. Ford Motor Co. 208 S.C. 379, 390-391, 38 S.E.2d 242, 247 (1946) is misplaced.

> Not withstanding the existence of contradictory evidence, the trial court had the responsibility to determine whether the identification procedure was suggestive. We find evidence to support the trial court's decision, and thus the court did not abuse its discretion in ruling the procedure was not impermissibly suggestive. See Liverman, 398 S.C. at 138, 727 S.E.2d at 425 (stating "the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion").

State v. Dukes, 404 S.C. 553, 563, 745 S.E.2d 137, 142 (Ct.App. 2013).

The contradictory evidence from the identification hearing and the State's failure to establish how the identification was made through the police officer or through the photographs used was insufficient to allow the trial court to make a finding as to suggestiveness. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). The trial court's finding that the identification procedure was not suggestive constitutes an abuse of discretion as the finding lacks evidentiary support. The identification hearing did not comport with the requirements of due process and should be presumed impermissibly suggestive. The trial court should have considered the second prong of Neil v. Biggers and found that the identification was not so reliable that no substantial likelihood of misidentification existed, as discussed below in issue two.

2. The Court of Appeals erred in failing to address the issue in regard to the reliability of the in court identification testimony when the out of court identification procedure used created a substantial likelihood of irreparable misidentification.

The Court of Appeals did not address the reliability prong of Neil v. Biggers writing, "Because we affirm the court's ruling that the identification procedure was not impermissibly suggestive, we need not consider the trial court's determination of the second prong of Biggers.

See Sanders, 708 F.3d at 984." State v. Dukes, 404 S.C. 553, 563, 745 S.E.2d 137, 142 (Ct.App. 2013). As discussed in issue one, the identification procedure used in the present case should have been presumed impermissibly suggestive. Once the identification procedure was deemed impermissibly suggestive, the trial court should have considered the reliability prong of Neil v. Biggers and found the identification was not so reliable that no substantial likelihood of misidentification existed.

In State v. Liverman, 727 S.E.2d 422, 426 (2012) the South Carolina Supreme Court wrote:

> In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S.Ct. 375. 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. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

Considering the five Neil v. Biggers factors in the present case, the out-of-court identification, resulting from the presumed unduly suggestive identification procedure, created a substantial likelihood of irreparable misidentification. Ford testified that he was in the hallway when the gun was pulled. (R. p. 32, lines 12 – 21). Ford testified, "Yes. I stood up when I seen him pull the gun out, and then he pointed the gun at me, and the victim - - -" (R. p. 33, lines 2-3). While Ford was certain of his identification, the only description given by Ford was that the shooter had a funny accent and a big smile or big mouth. (R. p. 34, lines 3-8). Ford identified Dukes four to five hours after the shooting and after Ford fled the scene. (R. p. 34, lines 13-17).

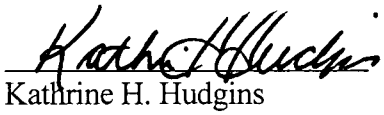
Ford testified that he had seen Dukes briefly on two prior occasions but there is no evidence that he knew Dukes. (R. pp. 30 – 31).

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. Stovall v. Denno 388 U.S. 293, 87 .Ct. 1967, 18 L.Ed.2d 1199 (1967). 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, 97 S.Ct. 2243, 53 L.Ed.2d 14 (1977) (citing Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)); State v. Stewart, 275 S.C. 477, 272 S.E.2d 628 (1980). Based on the totality of the circumstances, the out of court identification procedure was not so reliable that no substantial likelihood of misidentification existed. Both the out of court identification and the in court identification should have been suppressed.

CONCLUSION

Based on the above arguments, this court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully submitted,



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This 23rd day of October, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Steven H. John, Circuit Court Judge

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THE STATE,

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HENRY JERMAINE DUKES,

APPELLANT

APPELLATE CASE NO. 2013 -001798

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Henry Jermaine Dukes 347234 Lieber Correctional Institution PO Box 205 Ridgeville, SC 29472 and the S.C. Court of Appeals this 23nd day of October, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of October, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

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October 23, 2013

William Edgar Salter, III, Esquire
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Re: The State v. Henry Jermaine Dukes

Dear Ed:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KHH/khh

Enclosures

cc: Court of Appeals