

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CLAYTON L. MASSEY,

APPELLANT

APPELLATE CASE NO. 2013-000657

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in admitting a confidential informant's out of court identification and subsequent in court identification of Appellant as the individual he purchased crack cocaine from since the photographic lineup compiled by law enforcement was unduly suggestive and the identification was so unreliable that a substantial likelihood of misidentification existed?

STATEMENT OF THE CASE

A York County Grand Jury indicted Appellant at the January 19, 2012 term of General Sessions for distribution of crack cocaine. R. * His case was called to trial on March 20, 2013 before the Honorable John C. Hayes, and a jury. Assistant Solicitors Teasa Weaver and Ryan Newkirk appeared on behalf of the prosecution and Ashley Anderson and Amy Sikora represented Appellant. Tr. 1.

At the conclusion of the trial on March 21, 2013, the jury found Appellant guilty. Tr. 160, ll. 11-19. Judge Hayes sentenced Appellant to fifteen years imprisonment. Tr. 165, ll. 19-21.

This appeal follows.

ARGUMENT

The court erred in admitting a confidential informant's out of court identification and subsequent in court identification of Appellant as the individual he purchased crack cocaine from since the photographic lineup compiled by law enforcement was unduly suggestive and the identification was so unreliable that a substantial likelihood of misidentification existed.

Background Facts

Appellant was arrested for distribution of crack cocaine after he allegedly sold a quantity of crack to a confidential police informant on September 16, 2011. The informant, Ronald Birch, had agreed to work with law enforcement after he was arrested for possession of crack cocaine in August 2011. Tr. 68, ll. 15-25. Birch hoped that his assistance with law enforcement would result in his pending charge being dismissed. Tr. 90, l. 16 – 92, l. 6. He assisted in a total of five or six cases. Tr. 34, ll. 12-15.

On September 16, 2011, Birch met with Detective Joshua Welch at the Rock Hill Police Department. Birch made a phone call to a “black male,” from whom he had purchased crack cocaine on approximately ten prior occasions. This call was recorded. Birch asked for a “forty,” which was approximately two small rock pieces of crack worth about forty dollars. Birch was to call the black male again when he arrived at the agreed upon meeting location. Tr. 70, l. 7 – 73, l. 11.

Before departing, law enforcement searched both Birch and his vehicle and put audio and video recording devices in various places in his car and on his person. Detective Welch also gave Birch the forty dollars he needed to purchase the crack. Tr. 73, l. 18 – 75, l. 17. Upon arriving at the approximate meeting location, Birch called the black male again

and the male told Birch to meet him at the Valero, a nearby store. Tr. 76, l. 19 – 77, l. 6. Upon arriving at the Valero, the black male got into the front passenger seat of Birch's car, removed the crack from his mouth, and handed it to Birch. Birch in turn handed the male the forty dollars. Tr. 78, ll. 11-24. After the exchange, Birch travelled back to the Rock Hill Police Department where he gave Detective Welch the crack and was searched again. Tr. 79, l. 6 – 80, l. 8.

Appellant's identity as the "black male" was not determined by law enforcement until several days after the purchase. Tr. 109, l. 20 – 110, l. 4. After Appellant was identified by law enforcement, he was also identified by Birch in a photographic lineup eleven days after the transaction as the man he purchased crack cocaine from. Tr. 81, l. 15 – 84, l. 25. However, Appellant was not arrested until October 21, 2011 because Detective Welch did not want to jeopardize Birch's identity as a confidential informant since he was still using Birch in several other investigations. Tr. 112, l. 12 – 113, l. 1.

The chemist for the York County Sheriff's Office, Cynthia Mitchum, testified the substance allegedly sold by Appellant was 0.31 grams of crack cocaine. Tr. 121, l. 25 – 129, l. 12.

Neil v. Biggers Hearing

Prior to the start of trial, defense counsel requested a Neil v. Biggers¹ hearing to determine the admissibility of the out of court identification of Appellant by Ronald Birch, the confidential informant, involving a photographic lineup.

Birch testified that he met with Detective Josh Welch of the Rock Hill Police Department in August or September 2011 to discuss working as a confidential informant.

¹ 409 U.S. 188 (1972)

Tr. 10, ll. 13-16. On September 16, 2011, Birch set up a controlled buy with an individual from whom he had purchased crack cocaine from approximately ten times. The only description of the individual that Birch was able to provide to Detective Welch before the purchase was a “black male.” He failed to describe any other characteristics of the man. Birch did not know the individual’s name or address. Tr. 10, l. 17 – 11, l. 14. He simply had a phone number for the man that he used to contact the individual when he wished to purchase crack. Tr. 18, ll. 2-14.

On September 16, 2011, Birch actually purchased crack cocaine from the male. It was the same man he had dealt with on the prior occasions. Birch had audio and video recording devices in his car and on his person and worked closely with Detective Welch during the transaction. Tr. 12, ll. 3-11.

Birch testified that each of his previous ten encounters with the black male and the encounter on September 16, 2011 lasted approximately five seconds. Tr. 11, ll. 15-18. Birch acknowledged that during each encounter he was concentrating on the transaction, specifically the exchange of money for crack, which often caused him to look down rather than at the person’s face. Thus, Birch admitted he was not focused on the person for the entire five second period. Tr. 16, l. 21 – 17, l. 20. Despite this, Birch testified that he was able to get a good look at the person’s face during each meeting. Tr. 11, ll. 19-21.

On September 27, 2011, eleven days after the controlled buy, Birch came to the Rock Hill Police Department to view a photographic lineup. After observing the photographic lineup, Birch identified the man he purchased crack cocaine from, circled his picture, and initialed it. Tr. 12, l. 15 – 13, l. 19; Tr. 18, l. 15 – 19, l. 11; See R *. The lineup is on file with this Court. Birch was not wearing his glasses when he viewed the

photographic lineup. Birch testified that he only needs his glasses to read text. Tr. 18, l. 22 - 10, l. 3. After viewing the photographic lineup, Birch signed a form indicating that he “freely and voluntarily without threats or promises viewed a photographic lineup” and selected the “responsible party.” Tr. 14, l. 21 – 15, l. 13; See R *.

Detective Welch confirmed that he met with Ronald Birch in August or September 2011 to discuss Birch working as a confidential informant. Tr. 21, l. 23 – 22, l. 1. Birch told Detective Welch that he knew a person who sold crack cocaine. Birch described the individual as a “black male,” but he did not know the man’s name or address. All Birch knew was a phone number for the man. On September 16, 2011, Birch set up a crack cocaine purchase. The transaction was audio and video recorded. Tr. 22, l. 2 – 23, l. 23.

Detective Welch was not able to ascertain the identity of the black male that day. During his investigation, Detective Welch showed a video of the transaction to other members of the Rock Hill Police Department and an officer from the Street Crimes Unit identified the black male as Appellant. Tr. 24, l. 6 – 25, l. 2. This officer never testified. Based on this identification, Welch compiled a photographic lineup and showed it to Birch on September 27, 2011. Birch identified Appellant as the man who sold him crack cocaine. R *. Detective Welch testified that he did not suggest to Birch who he should select in the photographic lineup nor did he threaten Birch or make him any promises. Birch signed a form indicating that he “freely and voluntarily” identified the “responsible party” in the photographic lineup. Tr. 25, l. 3 – 29, l. 17; See R *.

Defense counsel argued that Birch’s identification of Appellant was not reliable under the circumstances. She identified several factors the court should consider: (1) the encounters lasted approximately five seconds; (2) Birch was not always focused on the

person, specifically his face; (3) Birch never provided a name, nickname, or address for the individual; (4) Birch provided no description beyond an unknown black male; (5) eleven days had passed between the controlled purchase and the identification by Birch; and (6) Birch did not wear his glasses when he viewed the lineup despite testifying that he needed them for reading and despite the fact that he used his glasses on the stand while viewing the court exhibits. Tr. 36, l. 13 – 37, l. 15.

The court found by clear and convincing evidence that the lineup was not unduly suggestive and that the identification procedure utilized by law enforcement did not create a substantial likelihood of irreparable misidentification. The court also held that Birch's identification of Appellant was reliable and thus that both the identification and photographic lineup were admissible. Tr. 37, l. 16 – 38, l. 3.

Defense counsel made a contemporaneous objection to the identification and admission of the photographic lineup before the jury. See Tr. 83, ll. 23-24. Both Detective Welch's and Birch's testimony in front of the jury was consistent with their testimony during the pretrial hearing. Birch also identified Appellant in court as the man who sold him crack cocaine. Tr. 84, ll. 15-25.

Discussion

The court erred in ruling that the informant's identification of Appellant and the photographic lineup were admissible since the photographic lineup was suggestive and the identification was so unreliable that a substantial likelihood of misidentification existed. 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. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). 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.

In Neil v. Biggers, 409 U.S. 188 (1972), the United States Supreme Court created a two-prong inquiry to determine the admissibility of out-of-court identifications. First, the trial court must ascertain whether the identification process was unduly suggestive. Next, the trial court must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id. at 198. The central issue is whether the identification was reliable even though the confrontation procedure was suggestive under the totality of the circumstances. Id. The following factors should be considered when evaluating the totality of the circumstances: (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; and (5) the length of time between the crime and the confrontation. Id. at 199; see also State v. Stewart, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

The six person photographic lineup compiled by Detective Welch and presented to the informant, Ronald Birch, was unduly suggestive because the other black males used in the lineup had different facial shapes than Appellant and were obviously of smaller stature than Appellant. This easily singled out Appellant from the other members of the photographic lineup and resulted in the lineup being highly suggestive. The photographic lineup is on file with this Court.

Not only was the identification process unduly suggestive, but Birch's identification of Appellant was also highly unreliable. Birch testified that his encounters with the

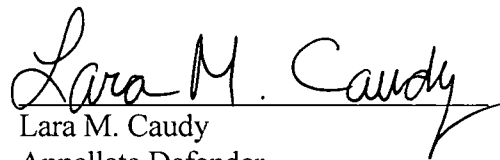
individual lasted only five seconds and that he was focused on the exchange and thus did not concentrate on the individual's face. Birch provided no prior description of the individual before viewing the photographic lineup besides the extremely general description of a "black male." Birch gave no description of the man's approximate age, height, or weight. He did not describe any facial features, hair length, tattoos, birth marks, or other identifying characteristics. Additionally, eleven days had passed between the recorded drug transaction and the identification of Appellant by Birch. Birch was also not wearing his glasses when he viewed the photographic lineup despite the fact that trial counsel noted on the record that he wore them in court when viewing the exhibits.

Based on the totality of the circumstances and the above factors, Birch's identification was so unreliable that a substantial likelihood of misidentification existed. Appellant was prejudiced by the admission of the unduly suggestive lineup and Birch's unreliable in-court and out-of-court identifications because Birch was a key witness and his identification of Appellant as the man who sold him crack cocaine was fundamental to the state's case.

CONCLUSION

By reason of the foregoing argument, Appellant's conviction should be reversed and this case remanded to the York County Court of General Sessions for a new trial.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of November, 2013.

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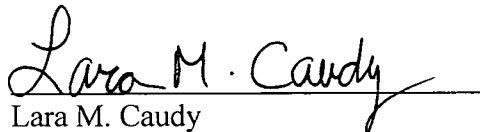
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Cover page of trial transcript dated March 20-21, 2013;
- (3) Tr. 9-38;
- (4) Tr. 59-66;
- (5) Tr. 68-130;
- (6) Tr. 136-158;
- (7) Tr. 160-166;
- (8) Court's Exhibit No. 2/State's Exhibit No. 5 (photographic lineup form);
- (9) Copy of Court's Exhibit No. 1/State's Exhibit No. 4 (photographic lineup) to be included in record on appeal for Respondent's convenience;
- (10) Court's Exhibit No. 1/State's Exhibit No. 4 (original photographic lineup) which will be transported and on file with the Clerk of the Court of Appeals.

I certify that this designation contains no matter which is irrelevant to this appeal.

November 4th, 2013



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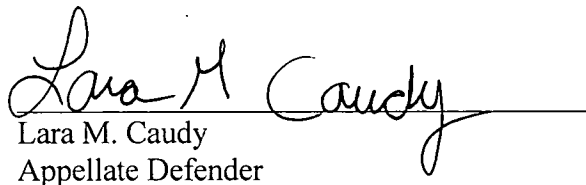
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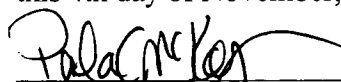
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of November, 2013.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of November, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.