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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

SC Court of Appeals

Appeal from Williamsburg County

George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROY DONELL MOORE,

APPELLANT

APPELLATE CASE NO. 2013-001137

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in admitting the complainant's out of court identification and subsequent in court identification of Appellant as the individual who entered his shed without his consent since the one man show up was unduly suggestive and the particulars of the complainant's identification were so unreliable that a substantial likelihood of misidentification existed?

STATEMENT OF THE CASE

A Florence County Grand Jury indicted Appellant at the July 26, 2012 term of General Sessions for third degree burglary. R. 238 – R. 239. His case was called to trial on May 16, 2013 before the Honorable George C. James, and a jury. Assistant Solicitors Kimberly Barr and Tyler Brown represented the state, and Amanda Shuler represented Appellant. R. 1.

At the conclusion of the trial, the jury found Appellant guilty. R. 224, ll. 6-11. Judge James sentenced Appellant to four years imprisonment. R. 236, ll. 1-14.

This appeal follows.

ARGUMENT

The court erred in admitting the complainant's out of court identification and subsequent in court identification of Appellant as the individual who entered his shed without his consent since the one man show up was unduly suggestive and the particulars of the complainant's identification were so unreliable that a substantial likelihood of misidentification existed.

Neil v. Biggers¹ Hearing

Officer Ron Dozier of the Kingtree Police Department testified that on June 4, 2012, he responded to a call regarding a burglary at the home of Bryan Kline. The 911 call came in at 1:23 pm and Dozier arrived at the residence at 1.25 pm. Once he arrived, Dozier said he spoke to Kline who told him that he heard a noise coming from his shed and eventually found an unidentified person in his shed without his permission. According to Dozier, Kline described the person as a black male, wearing a gray t-shirt and blue jeans, and riding a red bicycle. R. 8, ll. 21-24; R. 11, ll. 14-19. After receiving this description from Kline, Dozier communicated the description over his radio to other members of law enforcement at 1:29 pm. R. 11, ll. 12-19.

At 1:37 pm, Deputy Lloyd Hayes of the Florence County Sheriff's Office told Dozier that he had detained an individual that matched the description provided by Kline. R. 10, l. 19 – 11, l. 11. This individual was Appellant. Dozier drove to Hayes' location, picked up Appellant, and then drove Appellant back to Kline's residence. They arrived back at Kline's home at 1:40 pm. R. 11, l. 23 – 12, l. 4. Dozier testified that when Appellant was brought back to the scene Kline said, "Well, that's him, that's the guy right

¹ 409 U.S. 188 (1992)

there” Dozier claimed that Kline did not hesitate at all and did not seem to have any uncertainty about his identification. R. 12, ll. 9-20.

On cross-examination, Dozier testified that he received a description of the suspect from dispatch before he arrived at the scene and later from Kline. Dozier claimed that Kline was uncertain about the color of the bicycle the alleged burglar was riding when he fled from the residence. However, when Kline called 911 to report the alleged burglary, he described the bicycle as red. Dozier acknowledged that based on Kline’s call to 911, Kline was certain the bicycle was red. R. 13, l. 14 – 16, l. 6.

Dozier explained that about ten minutes before he received the call from dispatch about the alleged burglary, he had seen Appellant on Highway 52 near Cumbee Tire wearing the same clothing described by Kline, but riding a green bicycle. R. 8, ll. 8-20; R. 16, l. 7-16. According to Dozier, Cumbee Tire is “[n]ot even two or three minutes, not even a block” from Kline’s residence. R. 8, ll. 18-22.

Dozier further explained that when he took Appellant to Kline’s residence after Appellant was detained, Appellant was in handcuffs and in the back seat of a marked patrol vehicle. Dozier said that he asked Kline, “[I]s this the man?” to which Kline responded, “That’s him.” R. 16, ll. 17-25. Dozier admitted that he did not compile a photographic lineup. R. 17, ll. 1-2.

Kline testified that on June 4, 2012 he was in the process of moving. He explained that his shed has two separate parts and that he was cleaning out the front part and packing stuff up. While he was packing, he “heard something moving around in the back part [of the shed].” R. 19, ll. 8-25. Kline testified that he walked around to see what had caused the noise and saw a man coming out of his shed with a drill in his hand. Kline described the

man as a black male, approximately six feet two inches tall, wearing a gray t-shirt and blue jeans, *with a gold tooth*. Kline said that he asked the man what he was doing and the man told him that somebody said “he could have that stuff.” Kline testified that he told the individual that the “stuff” belonged to him and that the man could not have it. After the man put the drill back, Kline told him to sit on the ground while he called the police. According to Kline, the man then “got down on his knees [and] started crying saying don’t call the police.” When Kline left to get his phone, the man “took off” on a bicycle. R. 20, ll. 2-22.

Kline claimed that this exchange between him and the alleged burglar lasted about four to five minutes. R. 20, l. 23 – 21, l. 4. He further claimed that when he was confronting the alleged burglar, the two were standing face to face “within arm’s reach” of each other and Kline looked the man “right dead in his eye.” R. 23, ll. 2-23. Additionally, Kline testified that the amount of time that passed between when the man fled from his home and when Dozier brought Appellant to his residence was approximately twenty minutes. R. 21, ll. 9-15. According to Kline, when Dozier brought Appellant to his home, Kline “immediately recognize[d]” Appellant as the man who entered his shed. R. 21, ll. 16-23. Kline also identified Appellant in the courtroom as the man who entered his shed without his permission. R. 22, ll. 9-23.

On cross-examination, Kline admitted that he told the police that the alleged burglar fled on a red bicycle. However, Kline claimed that he was color blind, which is why he was mistaken about the color of the bicycle. Kline also acknowledged that he told the police the man had a gold tooth. R. 24, ll. 6-19.

He explained that when Officer Dozier brought Appellant to his residence, Appellant was sitting in the back seat of a police car and was handcuffed with his hands

behind his back. Kline claimed that he walked up to the window of the patrol vehicle and observed Appellant through the window. He said that he was close enough to the police car that he could have touched it, but that Appellant never got out of the car. Kline also admitted that he could not see how tall Appellant was since Appellant remained seated the entire time. R. 24, l. 20 – 25, l. 22. Furthermore, Kline explained that he is five feet and eleven inches tall and that the alleged burglar was taller than him. R. 26, ll. 2-6.

Appellant testified that he is five feet and eleven inches tall and that he does not have a gold tooth. He explained that on June 4, 2012, he went to town hall, then went to a friend's house to pick up his bicycle, and then was on his way home when he saw Officer Dozier near Cumbee Tire. Appellant said that he was wearing a red shirt and blue jeans that day and that his bicycle is green. R. 27, l. 23 – 28, l. 23.

Additionally, Appellant explained that when Officer Dozier brought him to Kline's house, Kline came out of his house and spoke with Dozier, but that Kline never approached the police vehicle. R. 30, l. 21 – 31, l. 4. Appellant said, "They was off way off in front of the vehicle." He maintained that Kline never came and looked inside the patrol car and that, while it was possible that Kline could have seen Appellant's face, there was no way Kline could have seen Appellant's clothing. He said that after Dozier finished talking to Kline, Dozier came back to the police car and told Appellant he was under arrest. R. 31, l. 5 – 33, l. 10.

When questioned by the court, Appellant explained that when Kline and Dozier were talking they were about twenty-five feet, or perhaps slightly closer, to the patrol car. He also said that the two were standing in front of the patrol car and that Appellant was sitting on the right side of the car behind the passenger seat. Appellant maintained that he

“was kind of laid up on the side, but [he] was able to see [Kline] clearly.” However, Appellant said that he was not sure whether Kline was able to see him. R. 34, l. 7 – 35, l. 23.

The court later had Kline and Appellant stand next to each other in the courtroom and noted that their height was “practically identical.” R. 36, l. 25 – 37, l. 5.

Arguments

Defense counsel argued that the identification should not be admitted because the identification procedure was inherently suggestive. Defense counsel further argued that in addition to the show up being extremely suggestive, the identification was not reliable because of the discrepancies between Kline’s description of the alleged burglar and Appellant’s characteristics, clothing, and bicycle. The man described by Kline had a gold tooth and was significantly taller than Appellant. Furthermore, Appellant was riding a green bicycle and Kline stated that the suspect fled on a red bicycle. R. 36, ll. 15-23; R. 37, ll. 7-18; R. 41, l. 22 – 42, l. 7.

In response, the state argued that “suggestiveness alone does not mandate the exclusion of evidence.” The solicitor went through the five factors that must be considered by the court in determining the reliability of the identification. She argued that Kline identified Appellant as the man who entered his shed within twenty minutes after the call was made to 911 and that “[t]here was no hesitation” by Kline when he identified Appellant. She also argued that Kline and the alleged burglar interacted for approximately four to five minutes, which provided Kline an adequate opportunity to view the suspect. Additionally, the solicitor noted that law enforcement detained Appellant “within a very very short distance from [Kline’s] home less than a mile I believe.” Lastly, she maintained that the

“testimony concerning the color of the bike . . . was properly explained by [Kline] when he said that he was color blind.” R. 39, l. 8 – 41, l. 20.

During arguments, the court asked the solicitor whether the clothing Appellant was wearing that day was collected and placed into evidence. The solicitor admitted that Appellant’s clothing was never collected, but was rather returned to him when he was released from jail after posting bond. R. 42, l. 17 – 43, l. 3.

The court stated, “The law is very clear that a show up as this was in and of itself [is] inherently suggestive.” R. 43, ll. 13-14; see also R. 39, ll. 3-7. The court ultimately held:

I’m going back to the factors. Mr. Kline said that he looked at him arm’s length away at the time of the crime and even had a conversation with him.

In my view, his opportunity to view him at the time of the crime was ample. Number two, the witness’ degree of attention at the time according to his testimony, I accept that he was paying very close attention to the person who was taking his drill. Skipping to number four, the level of certainty displayed by the witness at the time of the confrontation the evidence is that Mr. Kline from - - he said he was absolutely sure as did Officer Dozier, that it was him. And fifth, the length of time between the crime and the confrontation according to the evidence, according to Mr. Kline it was about 20 minutes later . . .

We go back to the accuracy of witness’ prior description when the two men stood in front of each other at least in my view, they’re exact height. Of course, Mr. Kline indicated right then that he had on boots today. I don’t know what Mr. Moore’s got on. But it seems to me that they are pretty much the same height if you shake everything out. Mr. Moore does not have a good tooth. Mr. Kline said on direct that he did and on cross he said he thinks he did. We have description of a black male with a gray shirt with blue jeans. According to Dozier, Mr. Dozier, that’s what [Appellant] had on when they brought him back, but I don’t know where the clothes are. Mr. Dozier, he said he did have on blue jeans, which obviously is not an unusual article of clothing. The

bicycle color red green. Mr. Kline said it was red, but he's color blind. Mr. Moore said it was green . . .

I'm not going to take judicial notice of what being color blind means, but perhaps Mr. Kline can explain that if he knows based on his own personal experiences with it. It's the accuracy of the prior description is substantially in question, but in weighing all five factors, I'm going to allow the identification to come in. All right.

R. 43, l. 4 – 47, l. 8.

Both Officer Dozier and Kline testified during the trial consistent with their pretrial testimony. Kline identified Appellant in the courtroom in front of the jury as the man who entered his shed. R. 128, ll. 8-24. Defense counsel made the proper contemporaneous objections to the identification in front of the jury. R. 125, ll. 9-13; R. 125, ll. 21-25; R. 126, ll. 11-12; R. 126, ll. 17-22; R. 128, ll. 5-6; R. 152, l. 24 – 153, l. 1.

Discussion

When law enforcement use an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification, an individual's right to due process of law is violated. Stovall v. Denno, 388 U.S. 293 (1967); State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). If a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, the in-court identification is not admissible. Manson v. Brathwaite, 432 U.S. 98 (1977); Moore, 343 S.C. at 286, 540 S.E.2d at 447.

In Neil v. Biggers, 409 U.S. 188, 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 demonstration by the witness; and (5) the length of time between the crime and the confrontation. Id. at 199; see also State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003).

Our Supreme Court held a show-up identification was unduly suggestive in Moore, supra. A witness observed two people exiting her neighbor's home when she knew the neighbor was away. She called the police and provided a general description of the men, primarily focused on their clothing. Id. at 285, 540 S.E.2d at 447. Ninety minutes later, officers took the witness to an area where two men were being detained. The witness positively identified the two men as the perpetrators. Her identification was based upon the clothing she observed. She admitted she had not really seen their faces earlier. Id. at 285-286, 540 S.E.2d at 447. The court explained that "[s]ingle person show-ups are particularly disfavored in the law" and that the procedure used in Moore was unduly suggestive Id. at 287, 540 S.E.2d at 448 (citing Stovall, 388 U.S. at 302 and State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct. App. 1993)). Additionally, the court found the identification unreliable as a matter of law. Moreover, the court found the only factor with any reliability was the amount of time between the crime and the confrontation, which was ninety minutes. The other factors clearly outweighed that one where the witness observed the two

perpetrators for a brief time at a significant distance, the degree of attention was not great, and the accuracy of her description was tenuous. Id. at 449, 540 S.E.2d at 290.

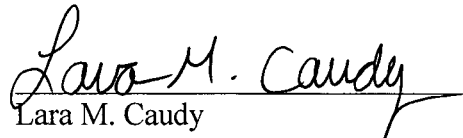
Here, there is no doubt that the show up procedure used by Officer Dozier was unduly suggestive. Additionally, the identification made by Kline was highly unreliable, which created a substantial likelihood of irreparable misidentification. While Kline testified that he viewed the alleged burglar for approximately four to five minutes and that he did not hesitate when he made the identification, the accuracy of his description is substantially in question. See R. 47, ll. 5-6. Kline claimed that the alleged burglar was six feet two inches tall and was taller than him. However, Appellant is only five feet eleven inches tall and the exact same height as Kline. Additionally, Kline said that the individual rode away from his house on a red bicycle, but Appellant was found riding a green bicycle. Furthermore, Kline stated that the man had a gold tooth, but Appellant does not have a gold tooth. R. 20, ll. 7-8; R. 24, ll. 17-19. Lastly, Appellant testified that he had facial hair and Kline never described any facial hair. R. 29, ll. 3-5.

Therefore, the court erred in admitting Kline's out of court identification and subsequent in court identification of Appellant as the individual who entered his shed without his consent since the show up procedure was unduly suggestive and the identification was so unreliable that a substantial likelihood of misidentification existed. See Biggers, 409 U.S. at 198.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of April, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Williamsburg County

George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROY DONELL MOORE,

APPELLANT

APPELLATE CASE NO. 2013-001137

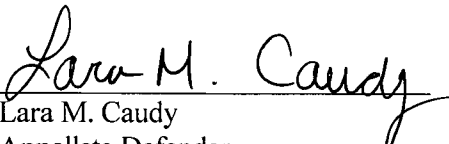
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Roy Donell Moore states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.
2. She has reviewed the record of Appellant's trial before Judge George C. James, Jr., which was held on May 16, 2013, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Roy Donell Moore.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of April, 2014.

STATE OF SOUTH CAROLINA

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Appeal from Williamsburg County

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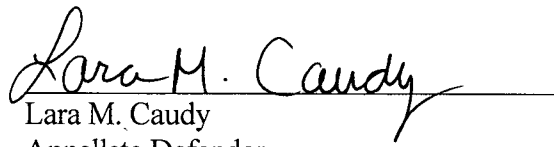
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Entire trial transcript dated May 16, 2013;
- (3) State's Exhibit No. 1 (CD of 911 Call).

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

April 28th, 2014


Lara M. Caudy
Appellate Defender

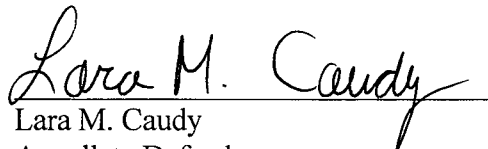
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 28, 2014


Lara M. Caudy
Appellate Defender

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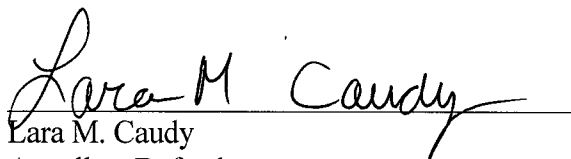
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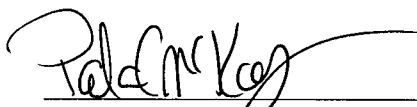
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Roy Donell Moore, #294950 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 28th day of April, 2014.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of April, 2014.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.