

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Clifton Newman, Circuit Court Judge

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S.C. Supreme Court

Opinion No. 5227 (S.C. Ct. App. filed 4/30/2014)

10-GS-40-0121, 0124

THE STATE,

RESPONDENT,

V.

FRANKIE LEE MCGEE,

PETITIONER

APPELLATE CASE NO. 2011-197606

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 6/19/2014.

QUESTION PRESENTED

Did the Court of Appeals err in refusing to find that the trial judge erred in admitting identification testimony based on a single photo line-up that was unduly suggestive and inherently unreliable?

STATEMENT OF THE CASE

In April of 2010, the Richland County Grand Jury indicted McGee for murder and burglary first degree, indictments #2010-GS-40-0121, 0124. On August 1, 2011, McGee proceeded to jury trial before the Honorable Clifton Newman. Attorneys Douglas S. Strickler, Elizabeth Fielding Pringle and Jennifer C. Davis represented McGee at trial. Attorneys Kathryn Luck Campbell, Dolly Justice Garfield and Nicole M. Simpson prosecuted the case. On August 10, 2011, the jury returned verdicts of guilty. Judge Newman sentenced McGee to life imprisonment for the murder and 30 years for the burglary. A timely notice of intent to appeal was filed on August 15, 2011, and the appeal perfected.

On September 10, 2013, a three judge panel of the Court of Appeals heard arguments in the case. On April 30, 2014, the Court of Appeal affirmed the sentence and conviction. The petition for rehearing was filed on May 15, 2014, and denied on June 19, 2014. This petition for writ of certiorari follows.

STATEMENT OF FACTS

On May 3, 2009, at 11:00 PM Temika Ashford drove to the home of Reverend Tryon Eichelberger in the Greenview community of Columbia, South Carolina. (R. p. 772, lines 16 – p. 773, lines 1-25). Reverend Eichelberger was an 87 year old former cab driver who held church services in the banquet hall behind the Blue Ribbon Cab Company. (R. p. 671, lines 6-12). Ms. Ashford met the Reverend a few years earlier when she had called for a cab. (R. p. 771, lines 6 – p. 772, lines 1-5). Ms. Ashford had a relationship with the Reverend and he would give her money to pay her bills. (R. p. 772, lines 6-15; R. p. 137, lines 22 – p. 138, lines 1-2).

Ms. Ashford testified that as she and the Reverend were sitting in the living room, they heard a noise in another part of the house. (R. p. 774, lines 14-25). The Reverend went to check on the noise. (R. p. 775, lines 13-25). According to Ms. Ashford, she then heard a commotion and hollering. (R. p. 776, lines 18-25). Ms. Ashford testified that she left the house, got in her car and drove away because she was scared. (R. p. 777, lines 4-25). When she could not reach the Reverend by phone, she returned to his house. (R. p. 778, lines 22 – p. 779 lines 1-2). According to Ms. Ashford, she saw a man standing on the Reverend's porch wearing white gloves and holding a pipe. (R. pp. 779-780). She described the man as husky with a big belly and receding hairline wearing a white shirt. (R. p. 779, lines 24 – p. 780, lines 1-2).

Ms. Ashford called 911 and then drove to Farrow Rd. According to Ms. Ashford, she was waiting on the police. (R. p. 782, lines 13-15). She testified that she saw the man again walking on Farrow Rd. (R. p. 782, lines 16-24). Once the police arrived, Ms. Ashford returned to the Reverend's house. (R. p. 783, lines 6-23).

Officer Chauncey Duckett of the Columbia Police Department was one of the first officers on the scene. Once inside the house, the officer found the Reverend on the kitchen floor bleeding

heavily. (R. p. 237, lines 13-22). The Reverend was unable to respond to the officer's questions. (R. p. 238, lines 11-13). EMS transported the Reverend to Richland Memorial Hospital. (R. pp. 300-303). Officer Duckett interviewed Ms. Ashford and she initially denied being inside the Reverend's house. (R. p. 239, lines 15-25). Ms. Ashford described the suspect she saw as wearing a white T-shirt and jeans. (R. p. 243, lines 7-9).

Based on Ms. Ashford's description, other officers began looking for the suspect. Officer Erskine Moody observed two individual walking in the Greenview area and one the individuals matched the description. (R. p. 732, lines 13 – p. 733 lines 1-21). The individual matching the description fled. (R. p 733, lines 23 –p. 734, lines 1-20). The suspect was apprehended and identified as David Williams. (R. p. 734, lines 21 -25).

The police took Ms. Ashford to see if she could identify David Williams. In a written statement to police, Ms. Ashford said that Williams was the man she saw on the Reverend's porch with gloves and a long object in his hand. (R. p. 829, lines 12 – p. 830, lines 1-4). She indicated, however, that he was wearing different clothes. (R. p. 830, lines 4-5). During the course of the investigation Ms. Ashford was shown six different photo line-ups but was never able to conclusively identify the suspect. (R. p. 832, lines 2-19). Ms. Ashford told police that two photos in State's Exhibit #123 resembled the suspect. (R. p. 795, lines 1-11). One of the photos in State's Exhibit #123 is a photo of Petitioner. (State's Exhibit # 123, R. p. 1224).

Officer Duckett continued to search the scene around the Reverend's house. Officer Duckett found a steel rod in Larry Harp, one of the Reverend's neighbor's yard. (R. p. 240, lines 8 – p. 241, lines 1-2). Officer Duckett also found a pair of white tube socks on a path about 25 – 30 yards from the steel rod. (R. p. 241, lines 11-20). Both the rod and the socks appeared to have blood on them. DNA analysis initially only determined that the blood on the rod and the socks belonged to the

Reverend. (R. pp. 539-546). Subsequent DNA testing, however, indicated that Petitioner's DNA was also present on the socks. (R. pp. 547-558).

The neighbor, Larry Harp, testified that on the day of the assault he saw appellant in the Reverend's yard once at 3:00 PM talking on the phone and again at about 5:00 PM with a plate and cup in his hand. (R. pp. 274-276; p. 290, lines 1-25). The neighbor testified that Petitioner was wearing an athletic jersey and denim shorts. (R. p. 292, lines 6-18).

In July of 2009, the Reverend died as the result of complications of a subdural hemorrhage due to blunt head impact. (R. p. 890, lines 18-23). In March of 2010, officers showed Michelle Perry, a dispatcher with the Blue Ribbon Cab Company, a single photo of Petitioner and asked her if she recognized him. (R. p. 671, lines 23 – p. 672, p. 673, lines 1-14). According to Perry, she recognized Petitioner because he came to one of the Reverend's church services at the Blue Ribbon Cab Company too early and then a few days later came for bible study. (R. p. 673, lines 19 – p. 674, 675, lines 1-23).

On May 2, 2009, the day before the assault, a truck was stolen from the Camden Steel and Metal Company in Camden, South Carolina. (R. pp. 845 – 847). Video surveillance captured the theft. (R. p. 847, lines 13 – p. 848, lines 1-21). Sandra Thomas, a City of Columbia Police Officer and the Petitioner's sister saw the video on the news and testified that she recognized her brother in the video. (R. pp. 902 – 904). According to the sister, she called crime stoppers. (R. p. 904, lines 8-18). The truck was found on May 3, 2009, next to Happy Daddy Towing Service, about a mile away from the Reverend's home. (R. pp. 646 - 652). There was no forensic evidence linking Petitioner to the truck and no evidence that a winch was missing from the truck.

On March 17, 2010, officers interrogated Petitioner while he was incarcerated on an unrelated offense at Wateree Correctional Institution. (R. p. 957, lines 22 – p. 958, lines 1-4). Petitioner denied assaulting the Reverend and explained that he had taken his socks off and left them at the store by a dumpster because of his athlete's foot condition. (R. p. 1028, lines 21 – p. 1029, 1030, lines 1-8; State's Exhibit #137).

ARGUMENT

The Court of Appeals erred in refusing to find that the trial judge erred in admitting identification testimony based on a single photo line-up that was unduly suggestive and inherently unreliable.

At trial Petitioner moved to suppress any in court identification made by Michelle Perry because of the unduly suggestive identification procedure and the resulting unreliability of the identification. (R. p. 928, lines 12 – 929, lines 1-14). The judge denied the motion to suppress. (R. p. 929, lines 15 – p. 930, lines 1-6). The judge erred.

On March 12, 2010, Investigator Sumter with the Columbia Police Department showed Michelle Perry, a dispatcher with the Blue Ribbon Cab Company, a single photo of Petitioner and asked her if she recognized him. (R. pp. 949-951). Perry testified at trial that she recognized the Petitioner because he came to one of the Reverend's church services at the Blue Ribbon Cab Company too early and then a few days later came for bible study. (R. p. 673, lines 19 – p. 674, 675, lines 1-23). At trial Perry identified Petitioner as the person she identified from the single photo shown to her by the police. (R. p. 938, lines 5-24).

“A criminal defendant may be deprived of due process of law by an identification procedure arranged by police 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). 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 140 (1977)

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34

L.Ed.2d 401 (1972). First, a court must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.*

In State v. Liverman, 398 S.C. 130, 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).

Single person show-ups are particularly disfavored in the law. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d. 1199 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law).

The single photo of appellant shown to Perry was unduly suggestive. Under the totality of the circumstances and a review of the Biggers factors, the identification was not so reliable such

that there was no substantial likelihood of misidentification. As argued by Petitioner, Perry had only two brief opportunities to view the appellant almost 14 months earlier. (R. p. 929, lines 4-14). Perry admitted that she knew why the investigator had come to see her and show her the photo of appellant. (R. p. 939, lines 7-13).

The Court of Appeals found that Petitioner's reliance on Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) and its progeny was misplaced because Perry was not an eyewitness to the crime. The Court of Appeals wrote, "However, Perry was not an eyewitness to the crime. Perry's testimony related to seeing McGee a year before the attack and was for the purpose of showing that McGee knew Eichelberger. Therefore, any reliance on cases concerning the admissibility of eyewitness identification is misplaced. Because McGee only challenged the admission of Perry's testimony as unduly suggestive and inherently unreliable, there is nothing for us to consider." (App. p. 5). The Court of Appeals erred.

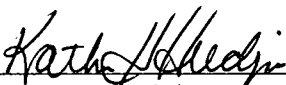
Petitioner's reliance on Neil v. Biggers in challenging Perry's identification is **not** misplaced. If challenged, identification testimony from any witness, not just an eyewitness to the crime, must be deemed reliable before admission at trial before a jury. The law does not limit a Neil v. Biggers identification hearing only to eyewitnesses to the crime. Trial courts in South Carolina commonly determine reliability and admissibility, pursuant to Neil v. Biggers, of identification testimony from witnesses who were not eyewitnesses to the crime. See State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987). Rule 104(c) SCRE provides, "Hearings on the admissibility of confessions or statements by an accused, and **pretrial identifications** of an accused shall in all cases be conducted out of the hearing of the jury." (emphasis added). The trial judge in the present case correctly held a hearing pursuant to Neil v. Biggers and found the identification reliable and

thus admissible. Appellant challenges the reliability/admissibility finding of the trial judge and asks this Court to review that finding pursuant to Neil v. Biggers.

CONCLUSION

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

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of July, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Clifton Newman, Circuit Court Judge

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THE STATE,

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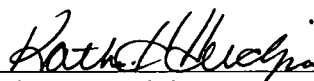
FRANKIE LEE MCGEE,

PETITIONER-

APPELLATE CASE NO. 2011-197606


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 Salley W. Elliott, Esquire, and the S.C. Court of Appeals this 18th day of July, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of July, 2014.



Notary Public for South Carolina
My Commission Expires: October 24, 2021