

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

RECEIVED

AUG 13 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KEITH LETMON,

APPELLANT

APPELLATE CASE NO. 2012-213672

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 2

STATEMENT OF ISSUES ON APPEAL..... 3

STATEMENT OF THE CASE 4

ARGUMENT

The court erred by allowing the in-court identifications of appellant where the photographic array impermissibly highlighted appellant’s photograph and the patently suggestive line-ups presented a legally unacceptable likelihood of misidentification under Neil v. Biggers..... 5

Relevant Facts..... 5

Discussion..... 10

CONCLUSION..... 13

TABLE OF AUTHORITIES

Cases

Foster v. California, 394 U.S. 440 (1969)..... 10

Neil v. Biggers, 409 U.S. 188 (1972)..... 3, 5, 10, 12

Simmons v. United States, 390 U.S. 377 (1968) 10

State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000)..... 10, 11

State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct.App. 1999)..... 11

State v. Rogers, 262 S.C. 373, 210 S.E.2d 604 (1974)..... 11

State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000)..... 11

State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004) 11

State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007) 10

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing the in-court identifications of appellant where the photographic array impermissibly highlighted appellant's photograph and the patently suggestive line-ups presented a legally unacceptable likelihood of misidentification under Neil v. Biggers?

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg Grand Jury for the offense of murder. R. p. 317. His case was called for trial on December 10, 2012 before the Honorable J. Derham Cole, and a jury. Matthew Shealy represented appellant. Derrick Balsa was the solicitor. R. p. 1.

On December 12, 2012 the jury found appellant guilty of murder. R. p. 307, ll. 7-9. Judge Cole sentenced appellant to life imprisonment. R. p. 309, ll. 20-24.

This appeal follows.

ARGUMENT

The court erred by allowing the in-court identifications of appellant where the photographic array impermissibly highlighted appellant's photograph and the patently suggestive line-ups presented a legally unacceptable likelihood of misidentification under *Neil v. Biggers*.

Introduction

The shooting in this case occurred on July 25, 2011 at about 5:00 in the morning while people sat outside Anthony Copeland's duplex and continued drinking. R. p. 3, ll. 22-24. Prior to trial a *Neil v. Biggers*, 409 US 188 (1972), identification hearing was held. R. p. 2, l. 10 - 3, l. 6.

As will be seen *infra* two eyewitnesses, Anthony Copeland and Crystal Ross, identified appellant from a photo array which highlighted -- indeed spotlighted -- appellant's face. Appellant submitted at trial this led to a very substantial likelihood of irreparable misidentification. The third eyewitness, Brittany Robinson, was unable to identify anyone from the line-up. R. p. 314 (line-up reports).

At trial, Investigator Russell Porter admitted that a fourth potential eyewitness, James Worthy, was "very intoxicated and basically refused to -- refused to come, be transported to city hall." R. p. 167, ll. 14-19.

Relevant facts

Porter was the lead investigator in the murder that occurred on July 25, 2011 on Norris Street in Spartanburg. R. p. 3, l. 16 - 4, l. 2. Eyewitnesses Anthony Copeland, Crystal Ross, and Brittany Robinson were brought to city hall to be interviewed by Porter after the

shooting R. p. 4, ll. 6-15. The eyewitnesses only knew the alleged shooter by the name of "Slow." R. p. 13, ll. 20-25.

Porter testified he knew two people who went by the nickname of "Slow." One lived on the north side and the other was on the south side of town. R. p. 5, ll. 1-5. Porter identified state's exhibit #1 the photo array he put together. R. p. 5, ll. 18-22. He identified appellant as number five in the photo array. See State's Exhibit #1 on file with this Court. R. p. 5, l. 23 - 6, l. 1.

The record shows that Copeland, Ross, and Robinson looked at the line-ups one after another although Porter said they were shown the line-ups separately. Porter at first claimed he had an "independent administrator" show them the lineups. Porter then said he personally showed the lineups to Ross, Copeland and Robinson. R. p. 6, ll. 2-14. Porter said that Investigator Nelson performed a separate identification procedure with each of the three eyewitnesses. It is difficult to ascertain what utility that second identification procedure could have after the first line-up with appellant's highlighted photograph in it had been shown. R. p. 6, l. 20 - 8, l. 7.

Copeland and Ross identified appellant from the photo array as the shooter, but Robinson was not able to make an identification. R. p. 8, ll. 8-22. The supplemental eyewitness lineup report showed that Crystal Ross made an identification at 7:25 a.m. R. p. 315. Brittany Robinson was unable to make an identification at 7:36 a.m. R. p. 316. Anthony Copeland identified appellant at 7:49 a.m. as photograph #5 in the photographic array. R. p. 314. It is apparent from the photo arrays on file with this Court that appellant's photograph was very much highlighted, and it immediately attracts the attention of the viewer.

Investigator Louis Nelson testified he met with Anthony Copeland around 7:00 a.m., followed by Brittany Robinson, and concluding with Crystal Ross. R. p. 22, l. 5 - 23, l. 5. Nelson said that Copeland was the most decisive person in selecting appellant's photograph. R. p. 26, ll. 2-7. Again, Robinson was not able to identify anyone. Robinson told Porter: "I cannot identify him." R. p. 316 (eyewitness supplemental support). R. p. 26, ll. 2-25.

After the testimony of Porter and Nelson at the in camera hearing, defense counsel Shealy argued the identification procedure was suggestive: "Mr. Letmon's picture basically has it spotlighted compared to the others." Defense counsel argued this was an improper lineup, and he also argued the state had failed to follow its own identification procedure. R. p. 39, l. 1 - 40, l. 17.

The solicitor stated: "I believe the standard is whether there's any suggestiveness in the lineups to render a misidentification of the subject in question." The solicitor asserted: "We don't feel there is any suggestiveness." He said that the witnesses knew the man involved as "Slow," and the officers were trying to put a photograph the witnesses could identify with the name. R. p. 40, l. 19; Supp. R. p. 1, ll. 1-5.

The judge denied the motion, ruling: "I find there is no unduly suggestive procedure used and that the procedure that was used is not in any conducive towards an irreparable misidentification of the defendant by the witness picking out a photograph." R. p. 40, l. 8; Supp. R. p. 1, l. 18.

Trial evidence

Anthony Copeland was living in a duplex off Highland Avenue in Spartanburg. The decedent, Cedric Moss, came around his neighborhood "all the time." R. p. 48, l. 19 -

49, l. 2. Copeland lived by himself but Crystal Ross, Brittany Robinson and “my cousin Jessie” were all present in his front yard at the time the decedent was shot. R. p. 49, ll. 6-25. Copeland testified that at about 5:00 a.m. they were drinking and “having a good time out there.” R. p. 50, ll. 5-25. Copeland estimated they started partying together around 11:00 the prior night and the drinking continued. R. p. 50, l. 25 - 51, l. 14.

Copeland said he knew the decedent “off and on.” Copeland maintained that the night before the early morning shooting was the first time appellant had ever been to his duplex. Copeland said he did not invite appellant to drink with them but “I just let him stay.” R. p. 52, ll. 1-17.

Copeland said at some point appellant left in a car with his brother-in-law, Antonio Bogan. R. p. 53, ll. 8-25. Bogan was driving the car.

Copeland maintained the car drove back by the duplex “when he pulled up, he pulled up by my mailbox. He got by my tree and he just let a couple of shots off.” R. p. 54, ll. 6-11; R. p. 55, ll. 2-5. Copeland said he was five to ten feet away from the shooter at the time. R. p. 55, ll. 4-12.

Copeland admitted to drinking two to three bottles of vodka that evening but he claimed he was not intoxicated. R. p. 57, l. 22 - 58, l. 6. When Copeland went to make an in-court identification of appellant defense counsel repeated his objection. R. p. 64, l. 13 - 65, l. 3.

The state next called Brittany Robinson as a witness. Robinson told the solicitor, as seen above, that she had been unable to identify the shooter. She now claimed: “I was in shock.” R. p. 93, ll. 14-19; R. p. 96, ll. 9-13. Robinson maintained at trial that appellant drove up in a car near Copeland’s front car and walked toward the decedent saying:

“N_____s don’t fight no more. They shoot.” R. p. 91, l. 19 - 92, l. 21. Robinson testified that appellant then started shooting. R. p. 92, ll. 20-24. Robinson testified that despite her inability to identify appellant as the shooter after the shooting that she was now sure – at the time of his trial – that he was the shooter. R. p. 100, l. 22 – 101, l. 8.

Crystal Ross also described the shooting to the jury. When she went to make an in-court identification, defense counsel renewed his previous objection. R. p. 105, l. 10 – 107, l. 18.

Jessie Worthy was incarcerated at the time of the trial. He admitted he was drunk when he arrived at Copeland’s house at about 1:30 or 2:00 in the morning. R. p. 132, ll. 1-19. Worthy testified: “I was so full of alcohol.” His testimony was extremely strange, and he claimed when he saw appellant that early morning: “I passed out for a second or two and then when I – woke I seen a streak of fire.” R. p. 127, ll. 4-21.

Worthy testified: “I guess he did whatever he did or whatever he supposed to did, or whatever y’all saying he did. I don’t know. I was – like I say he came in the yard . . . I seen fire . . .that’s all I remember seeing . . .seeing the car pull off going down the street.” Worthy admitted at one point that he did not see what actually occurred. He did remember, he claimed, seeing the decedent laying in the yard. R. p. 129, l. 1 - 130, l. 2. Worthy at another point maintained that he did remember seeing appellant get out of the car just before the decedent was shot. R. p. 131, ll. 5-9.

Worthy admitted he had been drinking heavily and smoking marijuana. R. p. 133, l. 4 - 134, l. 1. Worthy acknowledged he was in prison for trafficking crack cocaine at the time of appellant’s trial but he denied he hoped to get some consideration for his testimony R. p. 140, l. 21 - 142, l. 6.

Discussion

The photographic lineups are on file with this Court. It is clear that appellant's photograph stands out from the others because, as trial counsel argued, his photograph was "spotlighted." The red herring that Investigator Porter located a photograph of appellant based on his nickname of "Slow" does not add anything to the analysis of this issue. The police **very often** are including the known suspect's photograph in the photographic line-up based on a nickname or other such information that leads them to believe they may know of the suspect.

The question still remains: Was the known suspect's photograph placed in the line-up in a highly suggestive manner? Here it clearly was.

"The United States Supreme Court has developed a two-pronged inquiry to determine the admissibility of an out-of-court identification." State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000). In Neil v. Biggers, 400 U.S. 188, 198-99 (1972), the Court held that a trial court must first determine whether the identification process was unduly suggestive. Second, the Court must decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. See, also, Foster v. California, 394 U.S. 440, 442 (1969); Simmons v. United States, 390 U.S. 377, 390 (1968).

The inquiry must focus on whether, under the totality of the circumstances, there was a substantial likelihood of the irreparable misidentification. See, State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007). An in-court identification of an accused is inadmissible if it resulted from a suggestive out-of-court identification procedure which creates a substantial likelihood of irreparable misidentification. State v. Tisdale, 338 S.C.

607, 611, 527 S.E.2d 389, 392 (Ct. App. 2000). Reliability is the “linchpin” of the determination of whether a witness’s identification is admissible. State v. Patterson, 337 S.C. 215, 229, 522 S.E.2d 845, 852 (Ct.App. 1999). If the identification procedure is suggestive, as here, the state bears the burden of proving the in-court identification was based on an independent source by clear and convincing evidence. See State v. Rogers, 262 S.C. 373, 377, 210 S.E.2d 604, 606 (1974). In some cases, an identification is so unreliable as to be constitutionally inadmissible as a matter of law. State v. Moore, 343 S.C. 282, 290, 540 S.E.2d 445, 449 (2000).

The photographic array in this case was patently suggestive because it highlighted appellant’s face while the other five photographs in the lineup were dark. This case is distinguishable from State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004) where the Supreme Court found the line-up procedure was suggestive, but nonetheless affirmed the conviction because it concluded the facts did not rise to the level of a “substantial likelihood of irreparable misidentification.”

The three victims in Traylor viewed the assailant from anywhere from ten minutes down to one minute. Conversely, Anthony Copeland and Crystal Ross only saw the assailant as they identified as “Slow” very briefly. Copeland admitted he had consumed two or three bottles of vodka at the time. Ross acknowledged she told police she did not see the assailant’s “face good.” She then claimed that she closed her eyes when shown a photograph of appellant and she “said a prayer.” She claimed: “When I opened by eyes I pointed right at the picture.” R. p. 120, l. 17 - 122, l. 7.

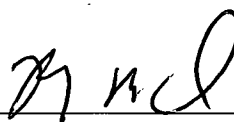
This is a highly unusual case. Appellant’s photograph in the lineup was patently suggestive. There can be no serious contention that it was not. There is no evidence in

this record that the taint of the unduly suggestive lineup was removed by any “independent source.” Further, the jury could easily have dismissed the “identification” of Worthy given his incomprehensible testimony, and the fact even Investigator Porter thought he was so intoxicated he could not be of any assistance. Further, Robinson admitted she could not identify appellant after the shooting, and her trial identification must have appeared highly suspect to the jury. The in-court identifications of appellant by Copeland and Ross were tainted by the gross suggestibility of the photographic lineup, and appellant’s photograph being spotlighted and they should not have been allowed under Neil v. Biggers, *supra*. Appellant should be granted a new trial.

CONCLUSION

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

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

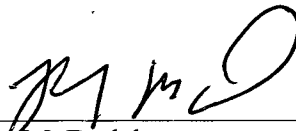
ATTORNEY FOR APPELLANT

This 13th day of August, 2014

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 13, 2014.



Robert M. Dudek
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED

AUG 13 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

RECEIVED

AUG 13 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

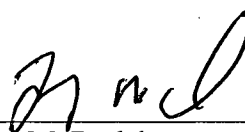
KEITH LETMON,

APPELLANT

APPELLATE CASE NO. 2012-213672

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of August, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of August, 2014.

Rhonda Demise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021