

ORIGINAL

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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NOV 12 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DWAYNE EDDIE STARKS,

APPELLANT

Appeal from Abbeville County

Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 5276

PETITION FOR REHEARING

On October 29, 2014, this Court affirmed Appellant's conviction and sentence for armed robbery and possession of a weapon during commission of a crime, *State v. Starks*, Op. No. 2014-5276 (S.C. Ct. App. Oct. 29, 2014). The sole issue raised by Appellant in his appeal was whether the trial judge erred in admitting a "show up" identification after a pretrial *Neil v. Biggers* hearing. In affirming the trial court's decision to admit the identification, this Court reviewed the trial court's procedure for admitting the identification. This Court found that while the trial court clearly erred in ruling that a show up identification is not unduly suggestive, nonetheless the trial court reviewed all elements of the identification in conformity with *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375

(1972) and that additionally, the identification was technically an independent, confirmatory identification. This Court questioned whether *Biggers* applied to this case. Pursuant to Rule 221(a), SCACR, Appellant files this petition for rehearing because this Court overlooked or misapprehended the issue presented for appeal.

Pursuant to the requirements of *Biggers*, the trial court must use threshold test to determine whether an identification was unduly suggestive. If the identification was unduly suggestive, as this Court found, then the trial court must review the *Biggers* elements to determine if the statement should still be admissible. Those elements 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; and (5) the length of time between the crime and the confrontation. *State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012) at 138; 727 S.E.2d at 426. *See also State v. Stewart*, 275 S.C. 447, at 450, 272 S.E.2d 628, 629 (1980). The evidence presented during the pretrial hearing, and during the trial, indicated some confusion of the nature of the identification, and whether it was an independent identification or a *Biggers* analysis from the identification at the time of commission of the underlying crime. The record shows that in addition to the trial court's erroneous ruling that stand-up identifications are not inherently suggestive, that only some of the *Biggers* elements were reviewed by the trial court. The trial court's analysis and ruling follows:

THE COURT: All right. I appreciate that, but I find that there's nothing unduly suggestive in the way he show-up was done, given the short period of time, as I understand it, really less than an hour or so involved from when the time the robbery occurred or thereabouts, an hour or so and him being presented to her in the backseat of a patrol car for a few brief seconds with the light on. I don't think that was unduly suggestive, particularly since she identified him, as I understand it from out the outset, as being the person that robbed her. She recognized him at the time in the store, told the police that's who

that was; and then presented with him and she confirmed, that's him. So I don't see where it was unduly suggestive under all the circumstances and I think it is a reliable identification based on her prior knowledge of Mr. Starks and identifying him that night. So I don't think it's that it is an impermissible show-up identification and I'll allow it to be presented to the jury here in court.....

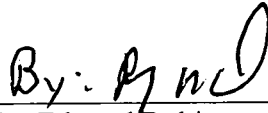
(R. 100, lines 10- R.101 line 3). Respectfully, Appellant does not believe these statements in the trial court's ruling constitute a summary of the *Biggers* factors. The witness was unable to see the face of her assailant, so prong 1 could not be satisfied under a strict reading of the elements, and this element was not expressly addressed by the trial court. The witness' degree of attention was not noted in the trial court's ruling. The accuracy of the prior description was not directly addressed in the trial court's ruling. The only element the trial court appears to review clearly is the element of the short duration between the crime and confrontation. (R. 100, lines 10-16). While the trial court may have stated grounds for an independent identification, it did not enumerate the *Biggers* factors. The trial court erred in admitting the identification which was both suggestive, and nevertheless admitting the identification while failing to enumerate the factors in making that ruling. At the conclusion of the pre-trial hearing, Appellant argued the show up identification was inadmissible because it was both highly suggestive and unreliable under the totality of the circumstances (R.100 lines 7-9). Nevertheless, the trial court denied the motion to suppress and allowed the introduction of the identification.

This Court held that the trial court may have admitted an independent identification which may not have required a *Biggers* analysis. However, the record begins and ends with this identification being couched as a *Biggers* hearing, and both the State's and Appellant's arguments were directed to a *Biggers* analysis. Because the trial court undertook a *Biggers* analysis that led to the admission of the identification in evidence, any legal error in that analysis should be subject to

review and reversal. This Court properly determined that the trial court erred in stating stand up identifications are not suggestive. Appellant does not suggest that there was no basis for the trial court to consider an independent confirmatory identification. Instead, the issue is that a *Biggers* hearing that was conducted was defective and there was no express ruling on an independent, confirmatory identification. If this case falls into the exception to a “full” *Biggers* hearing created by *State v. Liverman* where there is merely a confirmatory identification, then there would have been no need for the confusing proceeding conducted by the trial court. While this Court's analysis of the *Neil v. Biggers* factors corrects the trial court as to the first prong of the test, it affirms the trial court's ruling on the basis of inferences rather than a strict reading of the record from the hearing.

This Court overlooked or misapprehended the issue presented because the opinion concerned whether the witness' identification was still admissible as an independent identification rather than a *Biggers* identification requiring review of a *Biggers* analysis and each element therein, and even though this Court held that the identification was inherently suggestive. Therefore, Appellant respectfully requests this Court rehear the matter pursuant to Rule 221(a), SCACR, and issue a new opinion granting Appellant a new trial, or in the alternative, a remand to the trial judge to determine if all of the *Biggers* factors were met in order to allow admission of a suggestive identification.

Respectfully submitted,

By: 

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This 12th day of November, 2014.

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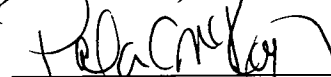
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CERTIFICATE OF SERVICE  
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The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Christina Catoe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Dwayne Eddie Starks, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 12<sup>th</sup> day of November, 2014.



\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

SWORN TO BEFORE ME this 12th day  
of November, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022