STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Abbeville County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 5276 (S.C. Ct. App. filed 12/12/2014)

THE STATE,

RESPONDENT,

V.

DWAYNE EDDIE STARKS,

PETITIONER

APPELLATE CASE NO. 2015-000013

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 December 12, 2014.

QUESTIONS PRESENTED

Whether the trial court erred in admitting a witness's identification when the witness admitted she initially identified petitioner by voice, when the show-up identification was performed with petitioner in handcuffs seated in the back of a moving patrol car, at night, lasting only for a few seconds, when the witness admitted she could only see petitioner's face at the show-up, and without the opportunity for voice identification, when the trial court failed to enumerate all *Neil v. Biggers* findings in its ruling, and when the trial court instead admits an identification without an express ruling on the record citing *State v. Liverman* or the applicable alternate legal standard for the admission of the identification.

STATEMENT OF FACTS

Procedural history

The Abbeville County grand jury indicted petitioner on one count of armed robbery and one count of possession of a firearm or knife during the commission of a crime. (Record on Appeal p. 6, lines 2-11). On April 1, 2013, petitioner proceeded to trial before a jury and the Honorable Thomas L. Hughston, Jr. Patricia Bolen and Janna Nelson represented petitioner and David Stumbo and Yates Brown represented the State. (R. p. 1).

At the conclusion of the trial on April 3, 2013, the jury found petitioner guilty of armed robbery and possession of a firearm in the commission of a crime. (R. p. 333, lines 20-25). For the armed robbery charge, Judge Hughston sentenced petitioner to twenty-five years imprisonment. For the weapons charge, the Judge sentenced petitioner to five years concurrent with credit for time served in jail prior to trial. (R. p. 345, lines 6-12).

Petitioner appealed his convictions to the South Carolina Court of Appeals. Oral arguments were requested and, the case was argued on October 8, 2014. The Court of Appeals affirmed petitioner's conviction in *State v. Starks*, __ S.C.__ 765 S.E. 2d. 148, Opinion No. 5276 (Ct. App. 2014), with Judge Thomas concurring in result only. App. 1-3. Petitioner sought rehearing. App. 4. Rehearing was denied on December 12, 2014.

This petition for a writ of certiorari follows.

ARGUMENT

The trial court erred in admitting a witness's identification when the witness admitted she initially identified petitioner by voice, when the show-up identification was performed with petitioner in handcuffs seated in the back of a moving patrol car, at night, lasting only for a few seconds, when the witness admitted she could only see petitioner's face at the show-up, and without the opportunity for voice identification, when the trial court failed to enumerate all *Neil v. Biggers* findings in its ruling, and when the trial court instead admits an identification without an express ruling on the record citing *State v. Liverman* or the applicable alternate legal standard for the admission of the identification.

Relevant trial facts

Late on the evening of February 27, 2012, the Shell gas station on Highway 72, near Abbeville, S.C., was robbed by a hooded assailant in a ski mask. (R. p. 116, line 20-p. 120, line 18). The cashier on duty that night, Nakelia Williams, gave the robber the contents of her cash register. (R. p. 119, lines 20-22). The assailant then left the store. Ms. Williams stated she "believed" petitioner as the robber on the basis of "body build" and a voice identification. (R. p. 88, lines 13-22). Ms. Williams indicated she had prior interaction with petitioner at her store, and "he always comes in the store." (R. p. 87, lines 11-14). However, Ms. Williams was unable to see the face of the robber as it was obscured by a ski mask and hood. (R. p. 84, line 15- p. 85, line 19). Ms. Williams called Abbeville 911 and reported both the robbery and that she believed Appellant was the robber. On the call, she did not state to a certainty that petitioner was the assailant. (R. p. 153)

(911 Call, State Ex. 24); (R. p. 137, lines 17-21). Williams never saw the robber's face. (R. p. 138, lines 13-15).

Corporal Thomason of the Abbeville Police Department heard the 911 dispatch operator's report of the robbery and responded within a few minutes of hearing the initial report to a neighborhood near the crime scene. According to his own testimony this was on the basis that Corporal Thomason said he had previous familiarity with Appellant in the community (R. p. 158, lines 2-10). Upon entering a trailer park neighborhood in his car, Corporal Thomason came upon petitioner, wearing a red shirt, khaki slacks, and white shoes. (R. p. 158, line 24-p. 159, line 2). Corporal Thomason performed a *Terry*[1] frisk on petitioner, found cash in his pocket, and placed him in the back of his patrol car. (R. p 159, line 22-p. 162, line 4). While petitioner was detained, Thomason and Officer McAllister, who had also responded to the 911 call, searched the vicinity where he was detained and found rolls of coins, a ski mask, and other items on the ground. (R. p. 176, lines 10-25). After this discovery, Officer McAllister returned to the patrol car containing petitioner and read him his Miranda rights. (R. p. 188, lines 18-24).

Officer McAllister and another officer, Lieutenant Wilkie, left the scene of petitioner's arrest and returned to the Shell station, where they met with Ms. Williams and asked her if she could identify the person who robbed the store. (R. p. 67, lines 9-14, 21-23, 24-p. 68, line 3). When Ms. Williams agreed to comply despite a stated reluctance to closely examine their detainee, Corporal Thomason brought the patrol car into the parking lot of the Shell station, turned on the interior lights of the car, and then drove on. According to testimony, the car stopped only a few seconds during the identification process. (R. p. 68, lines 13-20; p. 179, line 25-p. 180, line 3). By Investigator Wilkie's account, the alleged identification lasted seconds. (R. p. 68, lines 22-25).

Appellant's attire did not match the initial description given by Ms. Williams to 911. (R. p. 174, lines 8-15). At no point was Ms. Williams given the opportunity to examine a voice identification of petitioner, the basis on which she had previously identified him. (R. p. 91, lines 2-11). Petitioner was handcuffed, alone, in the back of a patrol car. (R. p. 69, lines 10-14; R. p. 70, lines 10-15).

At the hearing in this case, Appellant's trial counsel moved for a *Neil v. Biggers*[2] hearing, seeking to exclude Ms. Williams' momentary visual identification. (R. p. 68, line 22-p. 70, line 17). During cross-examination by petitioner's counsel, Investigator Wilkie described the cursory nature of the show-up from the back of the patrol car:

> Q. Just a couple of questions, Investigator Wilkie. You said it was less than a minute. It was really just a couple of seconds according to that video. Right?
>
> A. Yes, ma'am.
>
> Q. In fact, Sergeant Thomason didn't even really stop his car.
>
> A. Correct.
>
> Q. It was very close to midnight, so it's fair to say it was dark out?
>
> ...
>
> Q. Okay. And my client was in the back of the police car. Correct?
>
> A. Yes, ma'am.
>
> Q. And he was wearing handcuffs?
>
> A. They were on him at the time. Yes, ma'am.

---

[1] Terry v. Ohio, 392 U.S. 1 (1968).
[2] 409 U.S. 188 (1992).

Q. And he was obviously brought to the victim by the police. Correct?

A. Yes, ma'am.

Q. Okay. And he was not wearing what she reported the robber was wearing. Right?

A. No, ma'am.

Q. He was wearing a red shirt, I believe?

A. A red shirt. Yes, ma'am.

Q. His face was unobstructed?

A. Yes, ma'am.

Q. And he was wearing beige pants?

A. Yes, ma'am. He was.

...

Q. And prior to Sergeant Thomason coming up, did you tell her anything about who was coming up?

A. I asked her if she felt comfortable viewing him or seeing him so that she could identify him and she said that was fine.

Q. And there wasn't anyone else in the car, right? Other than the officer and my client?

A. That's correct.

Q. And you didn't bring anyone else up there at any other time to the victim to view. Correct?

A. No, ma'am.

Q. And you didn't do a lineup?

A. No, ma'am.

Id. Furthermore, at the *Biggers* hearing, Ms. Williams admitted during cross-examination by petitioner's counsel that she could not really see petitioner during the show-up, identification of his clothing that night did not match that of Investigator Wilkie, and she herself was unsure of what the robber was wearing:

> Q. The person in the store was wearing a mask? Okay. And when you saw him in the back of the police car, was he handcuffed?
>
> A. Yes.
>
> THE COURT: Could you see?
>
> A. I couldn't really. I could see his head and him just sitting in the car and they shined the light and I seen his face.
>
> Q. Okay. So, he was sitting in the car.
>
> A. Yes, ma'am.
>
> Q. They didn't take him out? They didn't take him out of the car?
>
> A. No, they didn't take him out.
>
> Q. Okay. And what was ---
>
> A. Because I asked them not to, because they asked me first could they bring him back up there and I could fully identify him. I told them that I didn't want to, as far as him coming in the store. But they said, well, I'll leave him in the car and have him seated and they will shine the light and ---
>
> Q. And he was wearing a red shirt in the car. Right?
>
> A. No, ma'am.
>
> Q. What was he wearing?
>
> A. He had that, a green jacket on, if I'm not mistaken.

Q. In the car?

A. Yes, ma'am, I think so. I really just couldn't tell. I seen his face.

Q. In the car?

A. Yes, ma'am.

Q. So, you didn't really notice what he was wearing in the car?

A. No.

(R. p. 90, line 12-p. 91, line 23). Despite some contradictory testimony of the witnesses, the witness' own admission that she could not see, and the brief and cursory nature of the show-up outside the police station, the trial court ruled that the identification was admissible over petitioner's objection, and most importantly, without reviewing all of the *Neil v. Biggers* factors. (R. p. 100, line 10-p. 101, line 4). After the arguments of counsel, the trial court ruled as follows:

> THE COURT: All right. I appreciate that, but I find that there's nothing unduly suggestive in the way the 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).

Pursuant to *Biggers*, a trial court determines if a stand-up identification is inherently suggestive. Even where it is, the Court must consider: (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. 138, 727 S.E.2d 426 (2012). *See also State v. Stewart*, 275 S.C. 447, at 450, 272 S.E.2d 628, 629 (1980). A reading of the trial court's ruling in this case (R. at 100) demonstrates absence of review of all five *Biggers* factors. 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 and following 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.

Opinion of Court of Appeals and Petition for Rehearing

The Court of Appeals correctly held that the police stand up identification was inherently suggestive and that the trial court erred. App. 2. However, the Court of Appeals' opinion did not reverse the trial court's ruling, and the Court of Appeals stated that "the trial court considered all the *Biggers* factors and discussed its findings as to those factors on the record. The trial court placed particular emphasis on the fact that Williams knew Starks before the crime. App. 2-3. The Order also stated "we question whether *Biggers* applies to the facts of this case." The Court stated. "... the reliability of (the witness') testimony that Starks committed the crime depended only upon the

accuracy of her recognition of Starks' voice and body build during the crime sequence, and did not depend upon any likelihood of misidentification the police created when she viewed Starks' face during the show-up procedure" App. 2. The Court of Appeals' basis for its opinion seemed to rely heavily on the theory that the witness' identification would, or should have been, an independent identification based on prior knowledge of the accused, and specifically, that such an identification "cures" any procedural defects with a *Biggers* hearing at the trial court. App. 3.

Petitioner moved for rehearing on the basis that the Court of Appeals misapprehended the issue before it. Specifically, petitioner identified that the Court of Appeals' opinion holding that all five *Biggers* factors were reviewed was in error based on the trial transcript, and that it was error to hold any issues with a *Biggers* hearing could be resolved in favor of the conclusion that *Liverman* and its progeny allowed the identification to be admissible regardless of how the identification was couched at the pretrial hearing.

On rehearing petitioner argued:

> 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.

App. 6. Furthermore, in attempting to address the conflation of *Liverman* and *Biggers*, Petitioner argued:

> 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.
>
> App. 6-7.

Discussion

Petitioner believes this case presents significant constitutional issues and an opportunity to resolve ambiguity and conflict in the holdings of this State's appellate courts regarding pretrial identification procedures at criminal trials pursuant to Rule 242 (1)(3) &(4), SCACR. The issues presented for the Court's review are, concisely, whether a trial court should have to establish a clear

basis for its ruling on admitting a witness identification during pretrial hearings required by *Neil v. Biggers* and furthermore, whether during the course of a *Biggers* hearing, the trial court should rule on all five factors of that test. Additionally, where the trial court is confronted with facts tending to show an independent, confirmatory identification admissible pursuant to *Liverman,* as opposed to *Biggers*, Petitioner urges that the trial court must make a ruling as to which legal basis it is admitting the identification. In the case before the Court, the trial court apparently applied independent, confirmatory identification factors during a *Biggers* hearing, and Petitioner argues the trial court was allowed to merge the pretrial procedures and factors in *Biggers* and *Liverman* to allow an identification in evidence, even though the pretrial proceeding was clearly a *Biggers* hearing. Petitioner's counsel is unable to glean from the trial record that there was a ruling that there was an independent *Liverman* identification or an incomplete *Biggers* hearing. To the extent there was an incomplete *Biggers* hearing, the ruling of the trial court was fatally flawed in failing to review all *Biggers* factors when making the ruling.

In 1972, the United States Supreme Court ruled in *Neil v. Biggers* that a criminal defendant had a right to a pretrial review of the admissibility of a "show up" or "stand up" identification conducted by police actors. The Supreme Court formulated a two-prong test, first to determine the suggestiveness of an identification, and secondly where an identification was suggestive, to determine it was nonetheless so reliable as to be admitted into evidence using a five-component analysis. *Biggers* at 198-200.

In *McLeod v. State*, 260 S.C. 445, 196 S.E. 2d 645 (1973), the South Carolina Supreme Court held that an identification that was merely confirmatory, and not the result of police action, was not subject to pretrial admissibility determinations. *Liverman* at 426. Subsequently, in *State v.*

Liverman, this Court responded to *Perry v. New Hampshire*[3] by holding independent, confirmatory identifications not conducted by a state actor were admissible without a "full" pretrial *Biggers* hearing due to other procedural safeguards available to a criminal defendant, but this Court overruled *McLeod* to the extent that *McLeod* created a bright-line rule denying a *Biggers* hearing to a criminal defendant where the witness purportedly knew the accused independently of the charged offense. *Liverman* at 423, 426. In a very fact-specific ruling, this Court noted the care with which the *Liverman* trial judge had made independent rulings for the admission of an identification into evidence *Id.* at 424-5.

With the holding in the *Liverman* case, the analysis of necessity of a "full" *Neil v. Biggers* pretrial analysis is modified. *Id.* at 423-4. However, in the case at hand, the record in the trial court and the subsequent holding of the Court of Appeals do not resolve with certainty whether under the facts presented and in similar pretrial hearings, a trial court must make an express ruling and determination as to whether the questioned identification is admissible pursuant to *Biggers* and *Liverman*, or either. Petitioner believes that some express legal basis for admission in the aftermath of the *Liverman* opinion is necessary in pretrial hearings. Petitioner respectfully suggests that in his case, the identification admitted was a conflation of the *Biggers* and *Liverman* standards, and this conflation or ambiguity must be resolved in a manner to do Petitioner substantial justice and to resolve a gap in the applicability of the common law to this essential pretrial process.

In its opinion, the Court of Appeals stated that it was not sure that *Biggers* applied to the facts of Petitioner's case, and that *Liverman* might better apply to the case instead. However, the Court of Appeals' order also stated that all of the factors of a *Biggers* test were conducted, when in fact a strict reading of the record shows that all elements of *Biggers* were not reviewed

[3] 132 U.S. 716 (2012).

expressly by the trial court. The ruling of the trial court was made during the conduct of what started as a *Biggers* hearing. Moreover, the manner in which the hearing was conducted and the factors considered by the Court of Appeals show that an independent identification hearing and a *Biggers* hearing were in fact conflated, with the result was that all *Biggers* factors were not applied, and there was no citation to *Liverman* as the independent basis for admitting the identification. Given that the Court of Appeals' opinion suggests *Liverman* applies rather than *Biggers*, and considering that *Biggers*' five-prong test is not addressed fully in the trial court's ruling, petitioner seeks to resolve these inherent conflicts.

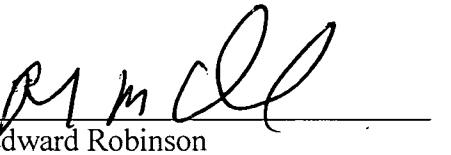
Respectfully, the Court of Appeals' opinion corrected the trial court's error of stating that stand-up identifications are not unduly suggestive, but then concluded that all factors of the *Biggers* test did not have to be ruled on to avoid an abuse of discretion by the trial court, and that *Liverman* might apply instead. Petitioner suggests a *Biggers* hearing should require a ruling by the trial court on each element if a *Biggers* hearing is in fact being conducted, and clarify procedures for making a ruling where the trial court is confronted with facts similar to this case if the trial court or State intends to admit a confirmatory eyewitness identification allowed by *Liverman* instead of having to apply *Biggers.* Petitioner notes that the Court of Appeals' Order found the identification in question to be reliable under a *Liverman* analysis, but did not state that any error was harmless error, or that there were additional sustaining grounds for the admission. Initially, the trial court's initial decision apparently rested on *Biggers*, as no other case was cited as a basis for the trial court's decision, unlike the pretrial ruling in *Liverman.* Petitioner suggests that the trial court in this case and the Court of Appeals ruled in such a manner as to create a novel question of law, a conflict with the prior decision of the Supreme Court, and that substantial constitutional issues are involved. *See* Rule 242 (b)(1)(3)&(4).

The procedural defects at trial, and an apparent "open door" view by the Court of Appeals expressed in its opinion as to the applicability of *Biggers* as opposed to *Liverman* in the case at hand demonstrate significant Constitutional implications for criminal defendants. This case provides an important basis for the Court to clarify pretrial identification admission procedure. There was a fatal inconsistency in applying current law, including *Liverman*, in the context of a *Biggers* hearing with the truncated procedures used by the trial judge in this case. This Court can remove ambiguity regarding pretrial identification procedures where a trial court is confronted with the necessity of applying *Biggers* or *Liverman* and direct the trial courts to make express rulings on the basis for identification admissions. Because of the issues presented, this is a case involving substantial Constitutional issues including an inconsistency in the applicability of current law in the specific pretrial procedures identified in this case, and certiorari should be granted to allow this Court to resolve this important issue. *Id.*

CONCLUSION

By reason of the foregoing argument, a writ of certiorari to the Court of Appeals should be issued.

Respectfully submitted,

By: 

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This 22nd day of January, 2015

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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 Christina Bigelow, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 22nd day of January, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of January 2015

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023