

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAR 19 2015

SC Court of Appeals

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge
2011-GS-42-5626

Appellate Case No. 2012-213672

THE STATE,

RESPONDENT,

v.

KEITH LETMON,

APPELLANT

RESPONDENT'S PETITION FOR REHEARING

The Respondent, above named, hereby makes a Petition for Rehearing pursuant to SCACR Rule 221. Respondent submits that the Court misapprehended the facts in concluding: "the identification process was unduly suggestive, as Investigator Porter administered an initial lineup in which Letmon's photograph and five others were presented together, and Letmon's photograph was highlighted as compared to the other photographs shown to the witnesses."

State v. Keith Letmon, Unpublished Opinion No. 2015-UP-117 (S.C. Ct.App. March 4, 2015),

p. 2.

1. First, the mere fact that the record reveals that Investigator Porter initially presented the photographs in a single array of six photographs, before Investigator Nelson presented the same six (6) photographs in an individual one at a time presentation

when the identification of Petitioner was made does not present a process that was “unduly suggestive.” Rather it reveals two identifications with the similar results. The fact of a confirmatory second photographic lineup with the same photographs of six (6) individuals does not create an “unduly suggestive process” nor undermine the first array presentation which had the same results as the one at a time lineup.

2. Second, the Court concluded that the Letmon’s photograph was “highlighted” as compared to other photographs shown to Anthony Copeland, Crystal Ross and Brittney Robinson.

a. At no time does the record support that either Investigator Nelson or Investigator Porter highlighted or pointed out the Appellant’s photograph to any witness shown the array or one at a time presentation of the individual photographs. ROA 8-9.

b. The record reflects that although Letmon’s photograph had a glare on his face, the photograph was not suggestive due to the difference. Exhibit 1, 1074055. Other photographs of the similar looking individuals within the lineup had slighter glare – 1648448 and 1649403. The mere fact that Petitioner’s photograph had a greater glare than the other five photographs does not demand a conclusion that it is *unduly* suggestive, The fact that the lineup array was not unduly suggestive is supported by this record because one of the witnesses, Brittney Robinson, was unable pick out the Appellant from her lineup presentation, although she was able to identify him in court. ROA p. 26-27, 93, 95-96.

c. The fact that Investigator Nelson did a one at a time presentation to the

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witnesses which had similar results dissipates the effect of the glare in

Investigator Porter's array showing due to the other similarities in the pictures.

3. As argued before, courts have found that lighting differences in lineup photographs does not mandate a conclusion of being unduly suggestive. See, e.g., State v. Phillips, 202 Ariz. 427, 433–34, SI 20, 46 P.3d 1048, 1054–55 (2002) (“[A] photographic lineup may contain differences in lighting between the defendant's photograph and other photographs.” (citation omitted)), supplemented by 205 Ariz. 145, 67 P.3d 1228 (2003); see also State v. Gonzales, 181 Ariz. 502, 509, 892 P.2d 838, 845 (1995) (finding that an “almost imperceptible” difference in lighting did not render a lineup impermissibly suggestive); State v. Hopkins, 774 So.2d 1178, 34,119 (La.App. 2 Cir.,2000) (Photographic identification was not suggestive; although defendant's photograph was the only photo that did not have glare, glare was not so significant as to draw one's attention to particular photograph); United States v. Marchand, 564 F.2d 983, 995 (2d Cir.1977) (differences in sizes of pictures and fact that defendant's photograph “was somewhat marred by glare” did not render photo array impermissibly suggestive); United States v. Burdeau, 168 F.3d 352, 357 (9th Cir.1999) (stating that “insubstantial differences between the defendant's photograph and others do not in themselves create an impermissible suggestion ...” where defendant's picture was placed in the center and was darker than the rest); United States v. McComb, 249 Fed. Appx. 429, 440 (6th Cir. Oct.3, 2007) (“A darker hue or different colored background does not ‘in [itself] create an impermissible suggestion that the defendant is the offender.’ “ (alteration in original) (citations omitted)); United States v. Mathis, 264 F.3d 321, 333 (3d Cir.2001) (holding that “slightly

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darker” background of defendant's picture “did not significantly contribute to the array's unnecessary suggestiveness”); United States v. Bautista, 23 F.3d 726, 731 (2d Cir.1994) (“While it is true that the photograph of [the defendant] is slightly brighter and slightly more close-up than the others, we find that these differences did not render the array suggestive.”).

4. However, Respondent agrees with the Court of Appeals conclusion that under the second prong of the test for identification in State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) there was no substantial likelihood of irreparable misidentification under the totality of the circumstances.
5. The Court failed to give proper deference to the trial court’s conclusion that “based upon the evidence, I find that there **is no unduly suggestive procedure used** and that the procedure that was used is not in any way conducive towards an irreparable misidentification of the defendant by a witness picking out a photograph.” Supp. ROA. p. 1 (Tr.p. 48, l. 8-16) (emphasis added). The decision to admit eyewitness identifications is within the trial judge's discretion and will not be disturbed on appeal absent an abuse of that discretion or the commission of prejudicial legal error. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). This was not an abuse of discretion by the trial judge’s conclusion.

CONCLUSION

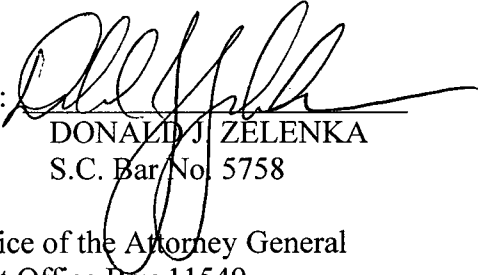
For all the foregoing reasons, Respondent State, submits that the petition for rehearing should be granted and the limited finding that the identification process was unduly suggestive vacated and corrected to conclude that the process was not unduly suggestive and the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

March 19, 2015
Columbia, South Carolina.

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CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Respondent's Petition for Rehearing in the foregoing action by depositing copies in the InterAgency Mail to Robert M. Dudek, Chief Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 19th day of March, 2015.


DONALD J. ZELENKA
Senior Assistant Deputy Attorney General



ALAN WILSON
ATTORNEY GENERAL

March 19, 2015

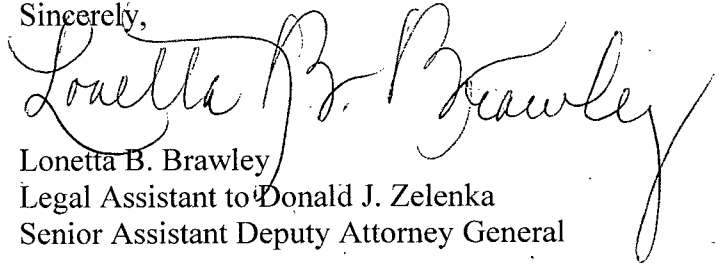
Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Keith Letmon
Appellate Case No. 2012-213672

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the **Respondent's Petition for Rehearing** in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,



Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosures

cc: Robert M. Dudek, Esquire
Barry J. Barnette, Solicitor
Trisha Allen, Victim Assistance

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