

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS RECEIVED

MAY 19 2015

Appeal from Newberry County

Donald B. Hocker, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CARLOS DEMONT REEDER

APPELLANT

APPELLATE CASE NO. 2014-000990

ANDERS BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
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

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STATEMENT OF ISSUE ON APPEAL

Did the trial court's admission of the witness's photo lineup identification of Appellant deprive him of due process where the officer did not specifically advise the witness that the shooter might not be in the lineup?

STATEMENT OF THE CASE

On August 23, 2013, the Newberry County Grand Jury indicted Appellant Carlos Demont Reeder on two counts of attempted murder. R. 548-551. On April 21, 2014, Appellant proceeded to trial before The Honorable Donald B. Hocker and a jury. Charles V. Verner represented Appellant and C. Dale Scott represented the State. R. 1. At the conclusion of trial, the jury found Appellant guilty of the two lesser-included offenses of first degree assault and battery. R. 517, line 16—R. 518, line 2. Judge Hocker sentenced Appellant to consecutive sentences of ten years' incarceration. R. 546, lines 3-10.

ARGUMENT

THE TRIAL JUDGE ERRED IN HOLDING THE PHOTO LINEUP WAS NOT UNNECESSARILY SUGGESTIVE WHEN THE OFFICER DID NOT SPECIFICALLY ADVISE THE WITNESS THAT THE SHOOTER MIGHT NOT BE IN THE LINEUP.

STATEMENT OF FACTS

The State alleged that on October 6, 2012, Appellant fired a number of shots from a firearm into a group of people at a cookout in the yard of a home close to downtown Newberry. R. 163, line 19—R. 165, line 10. Prior to trial, the court held a hearing pursuant to *Neil v. Biggers*, 409 U.S. 188 (1992), to determine the admissibility of an identification of Appellant given to police by a person at the cookout. R. 37, line 1—R. 141, line 6. The State called Officer Ryan Matthews who worked for the City of Newberry and who responded to the location after a report of shots fired. R. 37, line 12—R. 38, line 7. He testified that a woman who showed up after the shooting gave Appellant's name and showed him a picture of Appellant on her cell phone.¹ R. 51, line 22—R. 55, line 21. Another police officer then called a local agent with the South Carolina Law Enforcement Division ("SLED") and asked her to make a photo lineup with Appellant. R. 53, lines 19-23.

The State also called Vickie Davis, who testified that she attended the cookout and witnessed the shooting. She had never seen or met Appellant until she allegedly saw him arrive at the cookout. R. 99, line 16—R. 101, line 16. She described how the SLED agent approached her at the scene and gave her a six-pack lineup and "told [her] to pick the one that was the shooter or who [she thought] was the shooter or [who looked] familiar." R.

¹ The woman later testified that She lived in the area, and a friend who witnessed the shooting called her and mentioned Appellant's nickname. R. 64, line 12—R. 65, line 15.

110, lines 17-22. The agent never told her that the shooter might not be in the lineup. R. 121, lines 23-25.

Counsel for Appellant moved to exclude Davis's identification through the photo lineup on grounds that the SLED officer never specifically told her that the shooter might not be in the lineup. R. 146, line 2—R. 148, line 1. The trial judge denied the motion after concluding that the lineup was not unduly suggestive by failing to include a specific admonition that the shooter might not be in the lineup. R. 149, lines 10-25. Later during trial, the State offered the six-pack photo lineup into evidence. Counsel for Appellant renewed the objection, and the trial judge overruled. R. 383, lines 15-25.

DISCUSSION

The trial judge erred in holding the photo lineup was not unnecessarily suggestive when the officer did not specifically advise the witness that the shooter might not be in the lineup. An identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification violates an individual's right to due process of law. *Stovall v. Denno*, 388 U.S. 293 (1967); *State v. Moore*, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). In *Neil v. Biggers*, 409 U.S. 188 (1992), the United States Supreme Court created a two-prong inquiry to determine the admissibility of out-of-court identifications. First, the trial court must ascertain whether the identification process was unduly suggestive. Next, the trial court must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.* at 198.

Our courts have found some identification procedures patently suggestive. For example, in *State v. Traylor*, 360 S.C. 74, 600 S.E.2d 523 (2004), our Supreme Court held a line-up procedure wherein three victims were in the same room, sitting within feet of each

other, while observing photographic line-ups was blatantly unacceptable. *Id.* at 81-82, 600 S.E.2d at 527.

If a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, the in-court identification is not admissible. *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Moore*, 343 S.C. at 286, 540 S.E.2d at 447. The central issue is whether the identification was reliable even though the confrontation procedure was suggestive under the totality of the circumstances. *Id.* The following factors should be considered when evaluating the totality of the circumstances: (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. *Id.* at 199; *see also State v. Stewart*, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

Rationally, a photo lineup in which an officer does not specifically advise the witness that the perpetrator might not be pictured is unnecessarily suggestive. Put differently, no need exists not to give such an admonition that would reduce suggestiveness. Advising that the perpetrator might not be in the lineup does not place an unmanageable burden on law enforcement. Further, it does not prejudice law enforcement's investigation or prosecution: if the witness can confidently match the photo to her recollection, the admonition does not discourage the witness from doing so. If the witness cannot confidently match the photo, the admonition can prevent an uncertain identification. On the other hand, an officer's failure to so advise a witness can impliedly suggest that the officer is not merely investigating by looking for a description of the perpetrator when the officer does

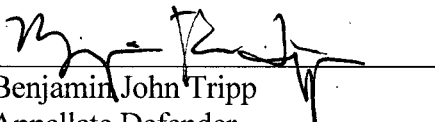
not otherwise have one. It may suggest that the officer knows and has included the perpetrator in the lineup and is simply looking for a witness who can provide admissible identification testimony in prosecuting the perpetrator. In these circumstances, an otherwise uncertain witness could assume her best estimation among the pictures must be the actual perpetrator because the perpetrator is definitely in the lineup.

In this case, the SLED officer told Davis “to pick the one that was the shooter or who [she thought] was the shooter or [who looked] familiar.” The agent never told her that the shooter might not be in the lineup. Based on the unnecessary suggestion that the shooter was definitely in the lineup, the procedure violated Appellant’s due process rights, and the trial judge erred in admitting the lineup into evidence.

CONCLUSION

For the foregoing reasons, Appellant requests that this Court reverse the decision of the trial court and remand for a new trial.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of May, 2015.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Carlos D. Reeder states:

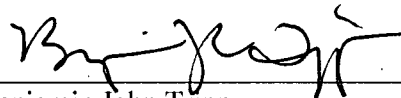
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Donald B. Hocker, which was held on April 24, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Carlos D. Reeder.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of May, 2015.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Transcript of April 21, 2014.

I certify that this designation contains no matter which is irrelevant to this appeal.

May 19th, 2015



Benjamin John Tripp
Appellate Defender

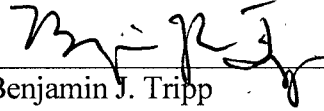
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Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

May 19, 2015



Benjamin J. Tripp
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
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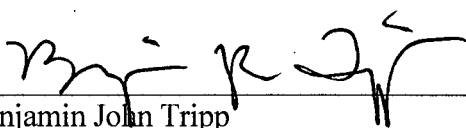
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Carlos D. Reeder, #338583 at Perry Correctional Institution, * this 19th day of May, 2015.



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me

this 19th day of May, 2015.

A handwritten signature in cursive script, appearing to be the initials 'U M'.

(L.S.)

Notary Public for South Carolina

My Commission Expires: May 12, 2025 .