STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case Tracking No. 2014-001556

The State, Respondent,

vs.

Shawn Lee Wyatt, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court correctly found based on the totality of the circumstances the identification made by both Officers Schnettler and Lippe were reliable and did not err in denying Appellant's motion to suppress their identifications.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court correctly found based on the totality of the circumstances the identification made by both Officers Schnettler and Lippe were reliable and did not err in denying Appellant's motion to suppress their identifications.

Appellant contends the trial court erred in denying his motion to suppress the identifications made by two Correctional Officers who observed Appellant and then identified him during a single person show-up identification procedure. The officers each had ample time to view Appellant during the crime or during his departure from the scene, provided a reasonably accurate description of Appellant and his clothing, made the identification a short time after initially viewing Appellant, and were one hundred percent confident in their identification.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of identification evidence falls within the trial judge's discretion and will not be disturbed on appeal without an abuse of discretion or an error of law. State v. Govan, 372 S.C. 552, 556, 643 S.E.2d 92, 94 (Ct. App. 2007). A trial judge should only exclude the identification evidence if there is "'a **very substantial** likelihood of irreparable misidentification.'" Perry v. New Hampshire, ___ U.S. ___, 132 S. Ct. 716, 720 (2012) (emphasis added and citation omitted); see also, State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003) ("Suggestiveness alone does not mandate the exclusion of evidence."). Significantly, the exclusion of evidence is a "drastic sanction" and should be "limited to

identification testimony which is **manifestly suspect**." Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983)(emphasis added).

A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

The South Carolina Supreme Court explained:

> The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Manson v. Brathwaite, supra. First, "[a] court must first determine whether the identification process was unduly suggestive.... [It] next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." Curtis v. Commonwealth, 11 Va.App. 28, 396 S.E.2d 386, 388 (1990) (citing Neil v. Biggers, 409 U.S. at 198, 93 S.Ct. 375).

State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000). The Court further stated:

> Although one-on-one show-ups have been sharply criticized, and are inherently suggestive, the identification need not be excluded as long as under all the circumstances the identification was reliable notwithstanding any suggestive procedure. [The] inquiry, therefore, must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification.

Id. at 287, 540 S.E.2d at 448 (quoting Jefferson v. State, 206 Ga.App. 544, 425 S.E.2d 915, 918 (1992)).

If a show-up is conducted, the show-up may be proper where it occurs: (1) shortly after the alleged crime; (2) near the scene of the crime; (3) while the witness' memory is still fresh; (4) when the suspect has not had time to alter his looks or dispose of evidence; and (5) when it may expedite the release of innocent suspects and enable the police to determine whether they need to continue searching. Brown, 356 S.C. at 503-504, 589 S.E.2d at 785. The use of a show-up is less objectionable the closer the show-up is in time and proximity to the scene of the crime. Brown, 356 S.C. at 504, 589 S.E.2d at 785. Furthermore, a show-up may even be proper when the police refer to the individual as a suspect and he is handcuffed and in the presence of law enforcement officers. Id.

Assuming the single-person show-up identification procedure was unduly suggestive,[1] the Court must determine "whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." Biggers, 409 U.S. at 199. The United States Supreme Court enounced:

> As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 200. "[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." Perry, 132 S. Ct. at 720.

[1] The State conceded at the hearing the show-up procedure was inherently suggestive. (T.61; 66; R. 49; 54). The State did not concede it was unduly suggestive but did argue exclusively regarding the indicia of reliability regarding the officers' identifications.

In State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000), this Court considered whether identification evidence obtained from a show-up identification procedure conducted at a police station was properly admitted during trial. In that case, a neighbor of the victim witnessed a man later identified as Mansfield attempting to break into the victim's home in the middle of the afternoon. Id. at 69-70, 538 S.E.2d at 259. During the attempted break-in, the neighbor looked right at Mansfield's face and attempted to speak with him before Mansfield quickly exited the area. Id. at 70, 538 S.E.2d at 259. Thereafter, the neighbor contacted the authorities and correctly described Mansfield's height, race, skin tone, and shirt but incorrectly indicated that Mansfield was wearing white shorts and tennis shoes and had his hair in plaits. Id. A short time later, Mansfield was apprehended while wearing grey sweat pants pulled up to his knees and boots and with his hair in an afro. Id. at 70-71, 538 S.E.2d at 259. Following his apprehension, Mansfield was transported to a police station, and the neighbor identified him as the attempted burglar. Id. at 71, 538 S.E.2d at 259.

On appeal, this Court affirmed Mansfield's conviction after finding the neighbor's identification of Mansfield to be reliable under totality of the circumstances. Id. at 79-80, 538 S.E.2d at 263-264. In reaching its conclusion, this Court relied upon the following circumstances supporting the reliability of the identification: (1) the neighbor's attention was heightened; (2) the neighbor had a good opportunity to view the attempted burglar in good lighting; (3) the neighbor expressed certainty in his identification of Mansfield; (4) the neighbor's description "description on the whole was accurate" even though there were slight discrepancies in the description of Mansfield's hair and clothing; and (5) the show-up was conducted less than an hour after the crime. Id.

The trial court conducted a hearing in which both officers testified. Officer Lippe testified she was headed into work at the Kershaw Correctional Institution (KCI) in the early morning on July 12, 2013. (T.17; R. 5). As she headed down Highway 601, she passed an individual walking on the opposite side of the road toward her. She observed the individual and described him as a "medium build, light skinned black gentleman in a black colored shirt with looked to be charcoaled colored shorts." (T.18-19; R. 6-7). She also indicated he had a "nice neat haircut." (T.20; R.8). Officer Lippe indicated she saw him roughly a half a mile from the driveway to KCI.

A sheriff's deputy brought Appellant back to KCI to be identified by Officer Lippe. The gentleman stepped out of the sheriff's department vehicle and was identified by Officer Lippe. (T.24-25; R. 12-13). She identified him about an hour after seeing him on Highway 601 and was "100 percent sure" of her identification. (T.27; R.15).

Officer Schnettler also testified at the pre-trial hearing. He indicated he was working in an observation tower at KCI in the morning hours of July 12, 2013. (T.31; R. 19). He testified he saw a man run from the treeline up to the fence of the prison and throw several packages over the fence and then run back to the trees. (T.34; R. 22). He indicated the area is well lit from the prison's perimeter lighting as well as cluster lights above the prison. He testified he saw a "light complected [sic] man run from the treeline in a pair of jean shorts, long jean shorts and dark shirt." (T.34; R. 22). He indicated at the time of the incident he believed the individual to be a white male. (T.35; R. 23). He viewed him from about 80 yards away for approximately 30 seconds. (T.35-37; R. 23-25).

Officer Schnettler exited the tower and met a sheriff's deputy on the side of the road to make an identification of Appellant. He then viewed the man in the back of the sheriff's department vehicle and he looked like the man. Officer Schnettler asked that the man get out of the car to see him standing and indicated it was the man he saw throwing contraband into the prison. (T.39; R. 27). Officer Schnettler noted how light the skin on Appellant's legs was as well as the clothing Appellant wore. (T.39; R. 27). He indicated he was "100 percent" certain the man in the sheriff's car was the man he saw throw packages over the fence. The viewing took place less than a half hour after he originally witnessed Appellant throw packages over the fence. (T.40; R. 28).

The show-up procedure in this case was not unduly suggestive. The show-up occurred a short time after the incident and shortly after Appellant was viewed by both officers. The identification took place at or very near the site of the incident, and precluded any opportunity for Appellant to have altered his appearance. The close proximity and time to the incident allowed the officers' memories to remain fresh and allowed the sheriff's department to quickly determine whether Appellant was the individual throwing contraband into KCI or whether they needed to continue a search for another individual. See Brown, 356 S.C. at 503-504, 589 S.E.2d at 785.

Even assuming the show-up procedure was unduly suggestive, the trial court properly admitted the out-of-court and in-court identifications of Appellant by Officers Lippe and Schnettler. The trial court conducted a thorough analysis of whether the identifications were reliable not withstanding the show-up procedure used. (T.66-68; R. 54-56).[2] Specifically, the court found 1) both officers had opportunity to view Appellant

[2] It should also be noted the trial court thoroughly charged the jury regarding its role in assessing and using the identifications. (T.236-238; R. 204-206).

at or near the scene of the crime; 2) while Officer Schnettler mistakenly believed the individual to be a white male, the court took judicial notice Appellant was an African-American males "of a lighter skin complexion," and the remaining descriptions offered by both officers were accurate; 3) both officers were paying close attention at the time they viewed Appellant; 4) both officers were "100 percent certain" Appellant was the individual seen previously; and 5) the show-up occurred a short time after the crime and the viewing by the officers. (T.66-68; R. 54-56).

The trial court explicitly considered all factors provided by Biggers and found, based on a totality of the circumstances, "the show-up identification procedures used in this arrest did not create a substantial likelihood of irreparable misrepresentation" and the identification by the officers was "reliable." (T.68; R. 56). The trial court's decision is amply supported by the testimony of the officers and the evidence presented during the pre-trial hearing, and, therefore, the court properly admitted the identification.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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July 17, 2015

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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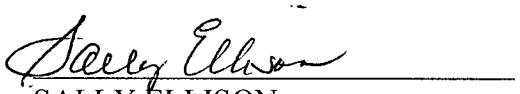
PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 17th day of July, 2015.



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RE: State v. Shawn Lee Wyatt
Appellate Case Tracking No. 2014-001556

Dear Mr. Strom:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and 9 copies enclosed)
Victim Services