

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

On Writ of Certiorari to Orangeburg County  
The Honorable Diane S. Goodstein, Post-Conviction Relief Judge  
The Honorable James C. Williams, Jr., Trial Court Judge

Appellate Case No. 2015-001438

**RECEIVED**

FEB 10 2016

**SC SUPREME COURT**

Antionelle LaTroy Owens,

Respondent,

v.

State of South Carolina,

Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

Christopher S. Leonard  
Joshua Snow Kendrick  
KENDRICK & LEONARD, P.C.  
P.O. Box 886  
Columbia, SC 29202  
(803) 667-3186

Attorneys for the Respondent

Other Counsel of Record:

Megan Harrigan Jameson  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3727

Attorney for the Petitioner

TABLE OF CONTENTS

Restatement of Issues..... 4

Statement of the Case .....5

Statement of the Facts ..... 6

Arguments.....7

    I.    THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO FIND DEFENSE  
          COUNSEL’S FAILURE IN OBJECTING TO THE REFUSAL OF A *NEIL v.*  
          *BIGGERS* HEARING FELL BELOW REASONABLE STANDARDS UNDER  
          PROFESSIONAL NORMS AND RESULTED IN PREJUDICE TO OWENS.

    II.   THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO FIND DEFENSE  
          COUNSEL FAILED TO ADEQUATELY PREPARE FOR EXPERT  
          TESTIMONY.

Conclusion ..... 12

RESTATEMENT OF ISSUES

- I. THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO FIND DEFENSE COUNSEL'S FAILURE IN OBJECTING TO THE REFUSAL OF A *NEIL v. BIGGERS* HEARING FELL BELOW REASONABLE STANDARDS UNDER PROFESSIONAL NORMS AND RESULTED IN PREJUDICE TO OWENS.
- II. THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO FIND DEFENSE COUNSEL FAILED TO ADEQUATELY PREPARE FOR EXPERT TESTIMONY.

## STATEMENT OF THE CASE

Antionelle Owens was arrested and charged with Assault and Battery with Intent to Kill and Attempted Burglary- First Degree. Two attorneys with the Orangeburg County Public Defender's Office represented Owens at trial. Initially, one of the defense attorneys requested a *Neil v. Biggers* hearing but when contested by the State and challenged by the trial judge, the request was withdrawn without objection. Despite representations by the State, an in-court identification was elicited without objection from the defense.

During the trial, a trace evidence forensic expert from SLED testified there was an inconclusive gunshot residue (GSR) result from one of Owen's hands. The expert gave direct testimony indicating the most likely cause of the result was Owens being in close proximity to a fired gun. Defense counsel failed to put forth any possible alternative to the expert's opinion on cross-examination.

## STATEMENT OF THE FACTS

In the morning hours of June 5, 2006, Antionelle Owens was apprehended by the police. He was handcuffed and placed in a patrol vehicle and driven to the home of Irene Shannon. He was then brought out of the vehicle and told to stand in front of an ambulance where a woman who was lying on a spine board told police he was the man who shot her. This identification occurred while Owens was handcuffed and surrounded by several police officers. Afterwards, one of the officers swabbed four areas of Owens' hands for a gun-shot residue test.

At the beginning of his trial, one of Owens' defense attorneys informed the court a *Neil v. Biggers* identification. The prosecution told the court the hearing was not necessary since Shannon would only be describing the assailant's physical build, clothing and facial area that could be seen through the ski mask. The trial court questioned the need for the hearing and defense counsel withdrew the request for the hearing.

Despite the representations by the State, Shannon identified Owens as the man who shot her that morning. Defense counsel made no objection or request for a mistrial.

Prosecutors also called SLED Agent John Roberts to testify to the result of the GSR test. Roberts testified that while three of the four tests came back with negative results, the fourth result was inconclusive. He further testified that while not a positive result, the most likely source of the single lead particle was Owens being in proximity to gunfire. During cross-examination defense counsel was unable to prompt any other possible sources of the particle.

The jury convicted Owens as indicted.

## ARGUMENT

### I. THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO FIND DEFENSE COUNSEL'S FAILURE IN OBJECTING TO THE REFUSAL OF A *NEIL v. BIGGERS* HEARING FELL BELOW REASONABLE STANDARDS UNDER PROFESSIONAL NORMS AND RESULTED IN PREJUDICE TO OWENS.

The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. *United States v. Wade*, 388 U.S. 218, 228 (1967). There is inherent danger in this evidence as “eye witness identification of strangers is proverbially untrustworthy.” *Id.* This risk is elevated to grave when combined with suggestive police tactics in obtaining the identification. It naturally becomes the responsibility of the defense attorney to ferret out problems with identifications, bring them to the court’s attention and prevent their admissibility when required. Failure to raise and preserve these issues falls below the reasonable standards of professional norm for the the defense attorney and serves as a significant basis for an allegation of ineffective assistance of counsel. *Cherry v. State*, 300 S.C. 115, 117 (1989).

The PCR court ruled the defense attorneys in Mr. Owens’ trial were required to request an *in camera* hearing to determine the admissibility of the identification, commonly referred to as *Neil v. Biggers* hearing, which was the heart of this case and the failure to preserve that request and subsequent testimony amounted to ineffective assistance of counsel. In granting Owens’ application for post-conviction relief, the PCR court applied *Strickland’s* two-prong test determining not only was there deficient performance by the trial counsel but also there was a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.

The State argues trial counsel was not ineffective because the witness’ testimony did not amount to an identification requiring a *Neil v. Biggers* hearing. In reviewing the testimony, the PCR court noted the victim described the assailant as “tall and he was slender, and I knew from the mask on his head that he had a lot of hair. This part of is (sic) face was like a big part where I could see his lips and I could see his eyes.” Additionally, she testified “he had big lips and I know

this part – like a big part protrusion, meaning, but I could really see is (sic) physical feature without even pulling the mask of his face.” Finally, the witness specifically identified Owens by name from the stand. “...when I left out of my house Mr. Owens came from around another vehicle.”

There is no doubt that an *in camera* hearing to determine if this testimony was tainted by an unduly suggestive police tactic is required by the Constitution, case law and the South Carolina Rules of Evidence. “Where identification is concerned, the general rule is that a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation.” *State v. Cheatham*, 349 S.C. 101, 116-17 (Ct. App. 2002).

Clearly, the testimony by the witness is an identification of Owens. This case is peculiar in that the State argued since the witness would only be describing the assailant’s physical build and clothing, and not his face, it was not an identification. This is in stark contrast to the testimony of the witness who said the police asked her only one question when they performed the show-up identification while she was in the back of the ambulance “if he was the one.” (App. 89).

A *Neil v. Biggers* hearing was required in this case. Especially since the identification was the result of a single person show-up. “Single person show-ups are particularly disfavored in the law. *Stovall v. Denno*, 388 U.S. 293 (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also *State v. Johnson*, 311 S.C. 132, 134 (Ct.App.1993) (single person show-ups are particularly disfavored in the law).

While the State misrepresented the facts to the court and the trial judge erred in not requiring the hearing, the real deficient performance was on the defense counsel, who withdrew his request for a hearing when challenged by the State and did not object to the trial court’s determination that the hearing was unnecessary despite overwhelming case law and court rules.

“When the State offers witnesses whose testimony tends to identify the appellants as the persons who committed the crime charged in the indictment and they interpose timely objections challenging that the in court identification by the witness is tainted by an illegal line-up, the trial judge should conduct a hearing in the absence of the jury and the competency of the evidence should be evaluated. In such a hearing, the testimony should be taken and all factual questions determined including those involving the appellant's constitutional rights pertinent to the admissibility of the proffered evidence. *State v. Cheatham*, 349 S.C. 101, 113-14 (Ct. App. 2002). See also *State v. Simmons*, 308 S.C. 80, 83 (1992) (refusal by the court to hold an *in camera* hearing challenging a potential illegal identification is error that warrants reversal).

The testimony identifying Owens as the assailant procured under the suggestive tactic of a single person show-up identification is the exact circumstance when a *Neil v. Biggers* hearing is required. “The purpose of an in camera hearing when the State offers identification witnesses is for the trial court to decide ‘whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification.’” *State v. Ramsey*, 345 S.C. 607, 613 (2001).

During the PCR hearing, one of the defense attorneys admitted 1) the “victim ID was a big issue in this case.” 2) “this was the kind of ID that a *Neil v. Biggers* hearing addresses before the trial starts” 3) it was critical for the defense attorney to preserve the record for appeal and 4) that had the hearing occurred the first prong of the test would probably have been satisfied under case law. (App. 352-53). When the other defense attorney was questioned why he withdrew the request for the hearing, he stated “it was pretty obvious the Judge was not going to give a *Neil v. Biggers* hearing...” (App. 323). Finally, the defense attorney stated he did not think he could have gotten by the first prong of the *Neil v. Biggers* test and when questioned if that was based on the law or the judge, he replied “I would have to go with I don’t think Judge Williams would have granted it.” (App. 324).

Failure to insist a constitutionally required *in camera* evidentiary hearing due to belief the trial judge would deny the request is not a valid reasonable trial strategy, especially in light of case law holding the court must give the defendant the hearing. Failing to object to the court's determination compounds the deficiency since the failure precludes appellate review.

In its Petition for Certiorari, the State then argues since trial counsel cross-examined the witness on the reliability of her identification, that trial counsel was not ineffective. This argument is without merit. "Only after a determination as to the reliability of a witness' identification has been made by the trial court may the witness testify before the jury." *State v. Patterson*, 337 S.C. 215 (Ct. App. 1999). Further, the PCR court cited *Rodriguez v. Young*, 906 F.2d 1153, 1160 (7th Cir. 1990) "we think it is obvious that in a case like this one -- with no murder weapon in evidence and only one witness naming the defendant as the murderer -- even the most withering cross examination could not substitute for suppression."

Additionally, the State maintains Owens suffered no prejudice from the ineffective assistance of counsel in that the identification would have been admitted had trial counsel gotten the *Neil v. Biggers* hearing. This argument ignores the PCR's court's finding there was a reasonable possibility to the contrary. On review, "this Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." *Dempsey v. State*, 363 S.C. 365, 368 (2005). The PCR court was mindful of the standards for admitting the identification and reviewed the applicable factors considering admission per *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

The PCR court noted there were several facts questioning the reliability of the identification. (1) The short period of time of the encounter, (2) the fact the victim was focused on her keys and facing the door away from the suspect during this brief time, (3) lack of previous description of facial features and (4) the ski mask (5) the identification features noted only after the show up was done and (6) and the inconsistent testimony of the witness being on a spine board during the identification.

Further, the PCR court held that while some of the *Brathwaite* factors were satisfied, those were outweighed by the others suggesting the unreliability of the identification. In reviewing this decision, the great deference given to the PCR court means its decision will be upheld where there “any evidence of probative value in the record.” *Speaks v. State*, 377 S.C. 396, 399 (2008). The PCR court cited several pieces of probative evidence supporting the court’s decision there was a reasonable probability the identification would have been excluded. The PCR court’s findings of fact well support this conclusion and should be upheld on review.

The defense attorneys were ineffective in withdrawing their request for a *Neil v. Biggers* hearing and in failing to object to the admission of identification testimony throughout the trial. This testimony was at the heart of this case, where there was no forensic evidence to support a conviction, no weapon found or confession given. Without this evidence there is nothing more than a man in similar generic clothing found close to the incident location. Further, had defense counsel insisted upon the identification hearing, the PCR court found there is a reasonable probability the testimony would have been excluded. The findings of the PCR court support upholding this conclusion as there is some evidence in the record to support the granting of Owens’ application for a new trial.

### III. THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO FIND DEFENSE COUNSEL FAILED TO ADEQUATELY PREPARE FOR EXPERT TESTIMONY

At trial, the prosecution introduced testimony of SLED expert, John Roberts, to explain the results of the gun-shot residue test conducted on Owens after the arrest. Despite three of the test coming back negative and the final one deemed inconclusive, the expert testified that the only reasonable theory for the round lead particle was Owens being near a recently fired gun. When

questioned about other possibilities, the expert testified the only other options were smelting lead and handling cheap, Chinese Christmas lights.

On cross-examination, defense counsel was able to confirm that the particle alone could not be classified as gun-shot residue, however there was no questioning about contamination leading to the result. During the evidentiary hearing, defense counsel testified they knew the prosecution was planning on introducing the test results. (App. 315). Counsel also stated they did not consult with and expert to discuss the results or their possible implications. (App. 316). In fact, one of the defense attorneys informed the court that because of Owens' trial the Orangeburg County Public Defender's Office created a policy change. "Policy now in the office is that we're always going to have an expert double-check those results... so as a result of this we have changed policy a little bit because we felt like we were not prepared for that." (App. 349). Finally, when the same SLED expert testified at the PCR evidentiary hearing, he confirmed that had he been questioned about contamination it was "not something that I could rule out just out of hand." (App. 302).

The PCR judge noted the similarities between Owens trial and the case *Ard v. Catoe*, 372 S.C. 318 (2007). The PCR order quoted *Ard*:

[T]hat trial counsel's failure to adequately evaluate and challenge the State's gunshot residue testimony was deficient performance that resulted in prejudice to respondent. As to deficiency, the PCR court concluded trial counsel failed to: (1) "aggressively re-examine" the gunshot residue reports; (2) "read the documents, evaluate them, and pursue the necessary next steps, such as consulting an appropriate," i.e., "an independent expert;" and (3) "investigate the possibility of retesting the samples." As to prejudice, the PCR court found that the "extent to which the jurors credited Powell's testimony ... was critical to the outcome of the case." Moreover, the PCR court noted that "[d]efense counsel's failure to refute gunshot residue evidence transformed an arguable case into a clear case.... Because of the solicitor's critical reliance on the absence of gunshot residue evidence, there is little question that the tenor of the jury deliberations would have been different, but for counsel's mistakes." Finally, the PCR court stated it was not "confident that a jury, adequately informed, would have convicted [respondent] of murder."

The State argues the PCR court's written order was in conflict with the oral ruling made during the evidentiary hearing. While the PCR court did suggest this ground for relief was to be denied, it clear from the written order PCR court did find the defense counsel provided ineffective assistance of counsel and without this deficiency there would have been a reasonable probability of a different outcome at trial.

Following the evidentiary hearing, the PCR court asked both attorneys to prepared proposed orders to consider. The PCR specifically instructed Owens to include the failure to prepare for expert testimony ground in the proposed order. (App. 369). After granting Owens' PCR application on both grounds, the State made a motion to reconsider based on the PCR judge's oral statements at the evidentiary hearing. The PCR judge denied the motion. It is well settled law that "a judge is not bound by the prior oral ruling and may issue a written order which is in conflict with the oral ruling." *First Union Nat'l Bank v. Hitman, Inc.*, 308 S.C. 421, 421-22 (1992).

Based on the defense counsels' admitted unpreparedness to cross the SLED expert and the clear prejudice from the defense theory of misidentification, the lack of an alternative theory for the GSR testimony gave the jury no choice but discredit the defense.

#### CONCLUSION

The PCR court correctly granted Owens' application for post-conviction relief and ordered a new trial. This decision was based on probative evidence that defense counsels' performance fell below the reasonable standard of professional norms in failing to insist on an *in camera* identification hearing and failing to object to the identification testimony. Further, the ineffective assistance of counsel was shown in failing to adequately prepare and investigate the gun-shot residue evidence to show the single particle could have been the result of police contamination. Had the identification testimony been excluded and the GSR testimony weakened, all the jury would have been left with is a defendant who was in close proximity to the incident location and there is a real possibility the outcome would have been different. The order of the PCR court laid

out sufficient findings of fact and conclusions of law to uphold the granting of the post-conviction application. For the previous reasons and under the standard of review this Court should deny the State's request for certiorari.

Respectfully submitted,



---

Christopher S. Leonard  
KENDRICK & LEONARD, P.C.  
P.O. Box 886  
Columbia, SC 29202  
(803) 667-3186

ATTORNEY FOR THE RESPONDENT

February 16, 2016  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

On Writ of Certiorari to Orangeburg County  
The Honorable Diane S. Goodstein, Post-Conviction Relief Judge  
The Honorable James C. Williams, Jr., Trial Court Judge

Appellate Case No. 2015-001438

Antionelle LaTroy Owens,

Respondent,

v.

State of South Carolina,

Petitioner.

**RECEIVED**

FEB 16 2016

**SC SUPREME COURT**

PROOF OF SERVICE

I certify that I have served the attached *Return to Petition for a Writ of Certiorari* and *Motion for Leave to File Return Out of Time* on the State of South Carolina by U.S. Mail, on February 16, 2016 addressed to the State's attorney of record, Megan Harrigan Jameson, South Carolina Attorney General's Office, PO Box 11549, Columbia, South Carolina 29201.



Christopher S. Leonard  
Joshua Snow Kendrick  
KENDRICK & LEONARD, P.C.  
P.O. Box 886  
Columbia, SC 29202  
(803) 667-3186

February 16, 2016