

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Letitia H. Verdin, Circuit Court Judge

THE STATE,

V.

PATRICK DEAN LOWRANCE,

APPELLANT

APPELLATE CASE NO. 2013-000320

FINAL BRIEF OF APPELLANT

David S. Jones
Private Appointed Counsel (pro-bono)

Law Office of David S. Jones
111 Executive Point Blvd., Ste. D
Columbia, SC 29210
803-250-6345

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

RECEIVED
APR 01 2016
RESPONDENT
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

<u>Jefferson v. State</u> , 206 Ga.App. 544, 425 S.E.2d 915 (1992).....	7
<u>Neil v. Biggers</u> , 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).....	7, 8, 9
<u>State v. Moore</u> , 343 S.C. 282, 540 S.E.2d 445 (2000).	3, 7, 11
<u>Stovall v. Denno</u> , 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967).	7

STATEMENT OF ISSUE ON APPEAL

Was Officer Cruell's single-photo identification of Mr. Lowrance after being given his name as a suspect so unduly suggestive and unreliable that allowing Officer Cruell to identify Mr. Lowrance to the jury violated Mr. Lowrance's right to due process of law under Neil v. Biggers and State v. Moore?

STANDARD OF REVIEW

"In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or . . . prejudicial legal error. However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law." State v. Moore, 343 S.C. 282 at 288, 540 S.E.2d 445 (2000) (internal citations omitted).

STATEMENT OF THE CASE

Patrick Dean Lowrance was indicted on five charges on March 20, 2012. (R. pp. 1-8). The charges included possession of a stolen motor vehicle, failure to stop for blue lights, two counts of attempted murder (of Taci Cobb and Charles Lane), and possession of a weapon during the commission of a crime. (R. pp. 1-8). Mr. Lowrance was first tried on all five charges on October 8-11, 2012. Prior to the commencement of that trial, Judge John conducted evidentiary hearings, including a hearing pursuant Neil v. Biggers as to whether Officer Cruell would be permitted to identify Mr. Lowrance to the jury as the man she saw walking through the hotel lobby shortly before the shooting. (R. pp. 10-11). Judge John ruled that the identification would be allowed, and Officer Cruell did identify Mr. Lowrance to the jury. (R. pp. 22-23, 37). That jury convicted Mr. Lowrance on the charge of possession of a stolen motor vehicle, and did not reach an agreement on the remaining charges. (R. p. 123). Mr. Lowrance was sentenced to "three years, suspended, placed on probation for one year", and given credit for time served. (R. p. 123).

Mr. Lowrance was retried on the remaining four charges on January 7-10, 2013. Judge Letitia Verdin adopted Judge John's pretrial evidentiary rulings as *res judicata*, and noted at the conclusion of the trial that all previous motions were preserved. (R. p. 126). Officer Cruell identified Mr. Lowrance to the jury at this trial also. (R. p. 160). That jury convicted Mr. Lowrance on all four remaining charges. (R. p. 607). Mr. Lowrance was sentenced to twenty-eight years for each murder charge, and five years for the weapons charge, all running concurrently; and three years for the failure to stop charge. (R. p. 624). Mr. Lowrance was given credit for time served. He now appeals those convictions.

STATEMENT OF FACTS

On October 28, 2011, Officer Brittany Cruell, of Greenville City Police, was conducting a routine patrol through the parking lot of the Comfort Inn located on Laurens Road in Greenville, SC when she discovered that a Chevy Tahoe in the parking lot bore a license plate registered to another vehicle. (R. p. 30). Officer Cruell entered the lobby of the hotel with Officer Charles Lane and asked the staff about the vehicle. (R. p. 30). While she was speaking with the staff, a man walked through the lobby. 10/8/12 Tr. p. 79, line 25. Officer Cruell described "just briefly" seeing an "older" black male wearing a grey shirt with "longer hair." (R. pp. 13-16). Officer Lane did not observe this man. Shortly after this man passed through the lobby, the Chevy Tahoe left the parking lot, and Officer Cruell pursued it. (R. pp. 31-32). Once on the interstate, Officer Cruell put on her flashing blue lights. (R. p. 33). Instead of stopping, the driver of the Tahoe exited the road and increased speed to the point where Officer Cruell ceased pursuit. (R. p. 35).

Officer Taci Cobb later located the same Tahoe in the parking lot of a nearby apartment building, announced it on the radio, and Officer Lane responded to her call. (R. p. 35). Officers Cobb then entered the breezeway of the apartment building, where she was fired upon from the top of the stairs with a 9mm handgun. (R. p. 45). Officer Cobb returned fire. (R. p. 46). Officer Lane came to assist Officer Cobb, and also was fired upon. Neither of the officers was actually hit by any of the shots fired. Moreover, neither of the officers was able to clearly see the shooter. (R. p. 49). Officer Cobb testified that the stairwell was dark, and the most that she was able to determine from the muzzle flashes was that shooter was a black male. (R. pp. 46-55). This shooter apparently left the building without being apprehended.

A subsequent investigation located personal items belonging to Patrick Dean Lowrance at the hotel and in a duffel bag at the apartment building. (R. pp. 58-64). Mr. Lowrance later

surrendered to the police without incident when he was located at a friend's house on the evening of the day of the shooting. (R. pp. 65-68). It is not clear from the transcript how the police located Mr. Lowrance. Mr. Lowrance had suffered a gunshot wound in his shoulder, and a 9mm handgun was located in the bedroom of the house where Mr. Lowrance was found. (R. pp. 69-72). Officers later determined that the Chevy Tahoe had been stolen. Forensic tests found Mr. Lowrance's fingerprints on the Chevy Tahoe, and on items inside. (R. pp. 73-76). Tests also found his DNA on the exterior of the handgun used in the shooting, but not on the magazine containing bullets stored inside the grip of the handgun. (R. pp. 77-84).

The day after the shooting, Officer Cruell was given Mr. Lowrance's name as a suspect in the shooting. (R. p. 18). Without any other instruction, and apparently without any other officers present, Officer Cruell used a computer to view a mug shot of Mr. Lowrance. (R. p. 19). No lineup was conducted and no other photographs were viewed. (R. pp. 21-22). Based on viewing this single photograph, Officer Cruell testified that she identified Mr. Lowrance as the black male whom she briefly observed walking through the hotel lobby the day before. (R. pp. 20-22).

Mr. Lowrance testified at both trials in his own defense. He described for the jury how he had recently associated with new friends following his marital separation, one of whom was known to Mr. Lowrance by his street name, "Meat;" apparently a shortened version of "Lametrius." (R. p. 480). Mr. Lowrance testified that he had ridden in the Chevy Tahoe, believing that Lametrius owned the vehicle. (R. pp. 487-488). Mr. Lowrance testified that he had been staying at the hotel and had a party the night before with several friends, including Lametrius. (R. p. 485). Mr. Lowrance testified that he had been smoking marijuana during that party. (R. p. 486). Mr. Lowrance's testimony also described how it was Lametrius who walked through the lobby to the vehicle which he appeared to own, drove it from the hotel, and fled from the blue lights. (R. pp.

488-491. Mr. Lowrance testified that he was in the car with Lametrius and another man at the time, but that Lametrius drove. (R. pp. 488-491). Mr. Lowrance testified also that he was at the scene of the crime when Lametrius shot at the officers. (R. pp. 494-496). Mr. Lowrance was shot in the exchange, fled the building, and lay in the woods behind the apartment building. (R. pp. 496-497. Mr. Lowrance described how he lost consciousness for several hours after Lametrius walked by him, and placed the handgun with Mr. Lowrance. (R. p. 498-499). Mr. Lowrance regained consciousness later in the evening, contacted a friend, and was taken to the house where he later surrendered to police. (R. pp. 500-503).

ARGUMENT

The Court below committed prejudicial error and deprived Mr. Lowrance of due process of law by finding that Officer Cruell's identification of Mr. Lowrance was sufficiently reliable to be presented to the jury, pursuant to Neil v. Biggers. Under Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), if an identification of a suspect is found to be suggestive, that identification should be kept from the jury unless it is sufficiently reliable under the totality of the circumstances. As our state's Supreme Court explained in State v. Moore, Biggers sets out a two-pronged approach where the court first considers "whether the identification process was unduly suggestive"; and if so, the court then considers "whether the . . . identification was nevertheless so reliable that no substantial likelihood of misidentification existed." State v. Moore, 343 S.C. 282 at 287, 540 S.E.2d 445 (2000). This is a mixed question of fact and law for the trial judge, who should not allow a suggestive identification to reach the jury unless the judge finds it to be sufficiently reliable. Id. at 288, 289, 540 S.E.2d at 447.

An identification of a suspect by a witness who is presented one option, absent a line-up, is almost certainly unduly suggestive. As stated by our Supreme Court, "[s]ingle person show-ups are

particularly disfavored in the law." State v. Moore, 343 S.C. at 287, 540 S.E.2d at 448. Other courts have described single person show-ups as "inherently suggestive," Jefferson v. State, 206 Ga.App. 544, 425 S.E.2d 915, 918 (1992), and "widely condemned," Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967).

Reliability is determined by a totality of the circumstances test, where the court considers "the opportunity of the witness to view the criminal at the time of the crime, the witness's degree or attention, the accuracy of the witness's 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." Neil v. Biggers, 409 U.S. at 199, 93 S.Ct. at 382.

In this case, although the court below did mention factors relating to both prongs, the court did not explicitly rule on the two separate prongs, and instead simply found that the in-court identification would be allowed. That decision constitutes reversible error, because Officer Cruell's identification was both unduly suggestive and unreliable, and Mr. Lowrance was prejudiced by her identification to the jury.

Officer Cruell's single-photograph identification of Mr. Lowrance as the man she saw in the hotel was unduly suggestive. Officer Cruell only identified Mr. Lowrance from a single mug shot, of a person who does not match the description in her police report, the day after the crime was committed after being told that he was in custody related to the shooting and the possession of the stolen vehicle. (R. pp. 20-22). She personally sought out this photograph only after being given Mr. Lowrance's name, and located Mr. Lowrance's photograph by searching for it by name - no other possibilities were considered, offered, or provided. There was no line-up of other possible suspects. (R. pp. 21-22). No other officers were present to oversee the process; nor were there any other controls over the suggestiveness of the identification. (R. pp. 21-22). Officer Cruell simply

was given a name, found a photograph, and concluded that Mr. Lowrance was the man she briefly observed walking past her the day before while she was speaking with someone else.

In addition to being unduly suggestive, Officer Cruell's single-photograph identification was unreliable. Officer Cruell only observed the man whom she later identified as Mr. Lowrance as he was walking through the hotel lobby. (R. p. 13). Officer Cruell testified that she paid attention "just briefly" at most, but also testified that she first testified that while she conversed with hotel staff, she "[got] a glimpse of him" for "five minutes," but later said that she was only able to observe this man for "maybe about a minute." By her own testimony officer Cruell "didn't pay a lot of attention to him." (R. p. 145). The behavior displayed by that man at the time of his exit was not criminal in nature and was so mundane that officer Cruell "barely noticed him" and her partner didn't notice him at all. (R. p. 145). The description by Officer Cruell of that unknown man correctly describes Mr. Lowrance in only one characteristic - his race. Officer Cruell never had "the opportunity . . . to view the criminal at the time of the crime" nor any reason to pay attention to someone leaving a hotel lobby in the morning. Neil v. Biggers, 409 U.S. at 199, 93 S.Ct. at 382. Therefore, Officer Cruell did not have a good opportunity to view the man walking past her, and her identification is unreliable.

As to the accuracy and certainty of her description, Officer Cruell's report stated that she had observed a man that might have had "longer" hair, and maybe pulled his hair back "in a ponytail," but agreed with defense counsel that Mr. Lowrance did not have long hair when she identified him as the man she saw. (R. pp. 145-169.) Furthermore, Mr. Lowrance admits that he had been smoking marijuana before he left the hotel, but Officer Cruell makes no mention of smelling it when the man walked by her. (R. p. 486). Officer Cruell surely has been trained on the smell of marijuana, and would likely have taken the opportunity to question someone who smelled like they had recently

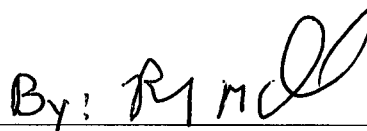
been smoking it. Taken together with the suggestiveness of Officer Cruell's identification, the court below should have concluded that the process was so suggestive and open to mistake that Officer Cruell's identification of Mr. Lowrance as the man walking through the lobby should have been kept from the jury.

The Court's erroneous decision to allow Officer Cruell's identification prejudiced Mr. Lowrance because the identification directly contradicted Mr. Lowrance's defense that he did not possess the stolen vehicle, that he was not the driver who failed to stop for the blue lights, and that he did not shoot at the police officers. Mr. Lowrance's testimony described for the jury how he had recently associated with new friends following his marital separation, one of whom was known to Mr. Lowrance by his street name, "Meat;" apparently a shortened version of "Lametrius." (R. p. 480). Mr. Lowrance testified that he believed that Lametrius owned the vehicle that turned out to be stolen. (R. pp. 487-488). Mr. Lowrance's testimony also described how it was Lametrius who walked through the lobby to the vehicle which he appeared to own, drove it from the hotel and fled from the blue lights, and shot at the officers. (R. pp. 488-496). Although Mr. Lowrance's DNA was found on the pistol, he described for the jury how he received it from Lametrius only after the shooting and while he was laying in the ground and bleeding. (R. pp. 498-499). Officer Cruell was the only witness who identified Mr. Lowrance as the man who walked through the hotel lobby. Without her identification of Mr. Lowrance to the jury as the man who walked through the lobby, the jury likely would have given more weight to Mr. Lowrance's testimony concerning the presence of another driver and shooter. Therefore, Mr. Lowrance was prejudiced by the erroneous admission of Officer Cruell's identification, and his convictions should be reversed and remanded for a new trial.

CONCLUSION

Because Officer Cruell's prejudicial identification of Mr. Lowrance was unduly suggestive and unreliable pursuant to State v. Moore and other authority cited above, Mr. Lowrance respectfully asks this Court to reverse his conviction and remand for a new trial, with a ruling that the identification is inadmissible as a matter of law.

Respectfully submitted,

By: 

David S. Jones
Private Appointed Counsel (pro-bono)

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 1st day of April, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APR 01 2016

SC Court of Appeals

Appeal from Greenville County
Letitia H. Verdin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PATRICK DEAN LOWRANCE,

APPELLANT

APPELLATE CASE NO. 2013-000320

CERTIFICATE OF SERVICE

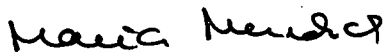
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Record on Appeal in the above referenced case has been served upon Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of April, 2016.



ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of April, 2016.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.