

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to York County
Alison Renee Lee, Circuit Court Judge

DONALD ALTMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000413

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
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INDEX

INDEXi

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

Trial counsel erred in failing to enter a contemporaneous objection to the eyewitness’ testimony regarding her identification of petitioner as the perpetrator after police showed her a single photograph of petitioner because this was the equivalent of an unduly suggestive show-up identification, which ultimately yielded a misidentification in the case, particularly since petitioner’s defense was that he was never at the crime scene on the day in question and more importantly, that he had a twin brother who looked like him and another brother who looked more like him than the twin brother. 4

CONCLUSION 10

ISSUE PRESENTED

Trial counsel erred in failing to enter a contemporaneous objection to the eyewitness' testimony regarding her identification of petitioner as the perpetrator after police showed her a single photograph of petitioner because this was the equivalent of an unduly suggestive show-up identification, which ultimately yielded a misidentification in the case, particularly since petitioner's defense was that he was never at the crime scene on the day in question, and more importantly, that he had a twin brother who looked like him and another brother who looked more like him than the twin brother.

STATEMENT

Petitioner Donald Ray Altman was convicted per jury trial of shoplifting, possession of an altered license plate, and four counts of possession of stolen goods during the July 2011 term of the York County General Sessions Court before Judge John C. Hayes, III, and received an aggregate term of imprisonment for twenty years. Petitioner was represented at trial by Erik Delaney and Assistant Solicitor E.B. Springs appeared on behalf of the state. App. 1 – 158. Petitioner appealed, but after briefing his convictions and sentences were affirmed. App. 161 – 199. Dayne C. Phillips, Esquire, represented petitioner on direct appeal. See State v. Altman, Unpublished Opinion No. 2013-UP-336 (S.C. Ct. App. August 7, 2013). App. 201-202.

On August 22, 2013, petitioner filed a PCR application with the York County Office of the Clerk of Court. App. 203 – 214. The respondent filed a return dated December 3, 2013, requesting that a hearing be held in the case. App. 215 – 220. A PCR hearing was convened on November 19, 2014, at the York County Courthouse before Judge Alison Renee Lee. App. 221 – 175. Petitioner was present at the hearing and represented by Leah B. Moody, and Assistant Attorney General J. Rutledge Johnson appeared on behalf of the state.

On January 12, 2016, Judge Lee issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of trial counsel in the case.

Petitioner appealed Judge Lee's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to enter a contemporaneous objection to the eyewitness' testimony regarding her identification of petitioner as the perpetrator after police showed her a single photograph of petitioner because this was the equivalent of an unduly suggestive show-up identification, which ultimately yielded a misidentification in the case, particularly since petitioner's defense was that he was never at the crime scene on the day in question and more importantly, that he had a twin brother who looked like him and another brother who looked more like him than the twin brother.

The state's case in chief consisted of the testimony of two police officers and an eyewitness, who was a store manager that made the shoplifting call to the police. The remaining witnesses were representatives from the following stores: CVS, Lowes, Big Lots, and Walmart. Those store representatives testified only with respect to identifying the merchandise submitted as items found in the suspect's vehicle as goods that were not scanned and purchased from their respective stores.¹

Family Dollar Store Manager Michelle Williams, whose store was located on Heckle Boulevard in Rock Hill, South Carolina, testified that on May 10, 2010, she saw a white male with a tan hat come into the store, conceal beef jerky in his pocket, and then exit the store without purchasing the goods. Williams stated that she followed the male outside and reported the event to police and went on to describe the vehicle the perpetrator drove (white Ford Taurus) and gave police a tag number for the vehicle. App. 77, l. 17 – p.81, l. 4.

¹ CVS employee Mary Ann Gomulinski at App. 86, l. 14 – p. 88, l. 23. Lowes employee Jonothan Garrett at App. 89, l. 6 – p. 90, l. 18. Big Lots employee Jane Adams at App. 91, l. 6 – p. 92, l. 21. Walmart store employee Amy Stevens at App. 93, l. 10 – p. 94, l. 24.

Police Officer Daniel Popov responded to the shoplifting call on that date, and located a vehicle matching the description given by Ms. Williams on Heckle Boulevard, and further noticed that the driver was a white male wearing a beige cap. Officer Popov testified that he followed the vehicle to a BP station where the driver exited and disappeared. App 39, l. 13 – p. 44, l.8.

Police Officer Ryan Thomas was dispatched to the crime scene as well on the day in question. Thomas ran a check on the tag number submitted by Williams and found that it was registered to petitioner.² Officer Thomas searched the vehicle driven by the perpetrator and found items from CVS (goody's powder), Big Lots (flashlights), Lowes (wire cutters and pliers), and Wal Mart (razors and lighters). App. 51, l. 11 – p. 70, l. 10.

During cross-examination, store manager Williams testified about her positive identification of petitioner as the perpetrator via a picture of petitioner shown to her 24 hours after the incident in question as follows

A. No, they did. He actually brought a photo to me the next morning.

Q. The police showed you a photo lineup the next morning?

A. A photo picture of him.

Q. Just one picture?

A. One picture.

Q. It's just the police brought you one picture of Mr. Altman. A. Correct?

A. Yes, un huh.

² Officer Popov subsequently checked a DMV picture of petitioner looking for a match of petitioner and the vehicle/tag. App.48, l. 24 – p. 49, l. 4.

A. No he didn't. He asked me was that the person. And I told him yes.

App. 84, l. 4 – p. 85, l. 5.

Note that at no time during this colloquy at trial did trial counsel object to the mention of a photograph. Note further that at no time was this photograph or picture of petitioner introduced into evidence at trial.

Petitioner testified at trial and explained that he was not driving the white Ford Taurus on May 10, 2010, and that he did not enter the Family Dollar Store in question on May 10, 2010, and that “it could have been [his] twin brother, [his] other brother...who both look just like him.” App. 103, lines 12 -25.

When the state rested it's case, defense counsel objected to the testimony identifying petitioner as the perpetrator as follows:

Mr. Delaney: Your Honor, at this point, we would make our – The State has rested and we would make our motion for a directed verdict in this case. I would argue to Your Honor the testimony that we've heard regarding the identification of Mr. Altman, I would argue that, that identification came from Ms. Williams who takes the stand. And I would argue to this court that the suggestiveness that took part as far as her being showed a single photograph of Mr. Altman a day after this alleged incident it would be overly suggestive to obtain her identification of Mr. Altman in this case. And without her testimony, without that identification, the State doesn't have any identification. And I would like to ask, Your Honor, to direct a verdict in favor of the Defense in this case. App. 96, l. 9-22

The Court: Well, I find that it could -- a single photo is suggestive, but that would not affect the reliability in this case because the witness has observed the individual in the past. And therefore that even though the showing of the one photograph as suggested on its face that that does not affect in this case to reliability of the identification of Mr. Altman as the individual who was involved in

the act. And I will certainly charge the jury regarding eyewitness identification. App. 97, lines 13-21.

Counsel renewed the motion at the close of the case. App. 153, l. 24 – p. 154, l. 4.

On appeal, appellate counsel raised the following issue on appeal:

Did the trial court err in refusing to suppress the out-of-court identification of Appellant where the testimony of the State's key witness revealed that the State failed to disclose under *Brady v. Maryland* an inherently suggestive single person photographic "lineup," which denied Appellant his due process right to require the trial court to conduct an *in camera* hearing prior to the witness's testimony pursuant to *Neil v. Biggers*?

The Court of Appeals ruled as follows:

Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."): *State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); *State v. Garris*, 394 S.C. 336, 348, 714 S.E.2d 888, 894-95 (Ct.App.2011) (finding a defendant's objection to testimony about a photographic lineup was not preserved for appellate review when the defendant did not contemporaneously object and waited until after the State rested its case).

During the PCR hearing held in the case, petitioner testified that counsel "failed to object to the identification concerning the photograph identifying [him] when there was no such photograph [offered into evidence]" and that counsel "failed to do any pre-trial identification hearing before the trial took place and also he failed to preserve the issue for the Court of Appeals' review." App. 226, l. 16 – p. 227, l.4

Trial counsel testified at the PCR hearing and explained that there was no photographic line-up that existed in the case, and thus no reason for a Biggers³ hearing, but that he raised the photograph issue at “different points throughout the trial.” App. 254, lines 17 – p. 255, l. 3. However, counsel admitted he “never objected or put anything on the record as a formal objection preserving the record regarding that” App. 255, lines 6-10.

The PCR judge ruled that trial counsel was not ineffective as follows:

Delaney did not provide ineffective assistance of counsel in the instant matter. At the time of discovery, Delaney was not provided with any evidence indication that a photograph was presented to Williams to identify Applicant. See Transcript of Record at 98:24-25 to 99:1-7. Delaney, thus, would not have been alerted to request a Biggers hearing, that he was not aware of any photograph being presented to Williams. Officer Thomas, moreover, testified, during trial, that he did not perform a photo line-up in this case. Transcript of Record at 75:2-4. Furthermore, concerning Delaney’s failure to simultaneously object to Williams’ testimony concerning the alleged photograph, Delaney cross examined Williams on the suggestiveness of being presented a single photo of Applicant. Transcript of Record 84:6-25. Delaney also made a directed verdict motion that focused specifically on the alleged suggestiveness of the single-photo identification procedure once he was aware of Williams’ testimony which contradicted Officer Thomas’ testimony.

However, assuming, arguendo, that Delaney was deficient in not requesting a Biggers hearing and by failing to timely object to William’s testimony, Applicant would not be able to satisfy the second prong of the ineffective assistance of counsel analysis. Applicant cannot show that, “but for” Delaney’s alleged unprofessional conduct, the trial result would have been different. Williams’ testimony regarding being shown a photograph of Applicant was only part of her testimony.

³ Neil v. Biggers, 409 U.S. 188 (1972).

The fact that the store manager had seen petitioner previously in her store did not make the in-court and out-of-court identifications reliable in the case. In State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012), the Court held that due process would require a Biggers hearing to determine that reliability of an eyewitness' out-of-court identification regardless of how the eyewitness knew the defendant. A defendant is deprived of due process if an identification is made by an unduly suggestive procedure, and in such a situation a hearing must be conducted on the issue of reliability in order to determine if the same should be admitted to avoid a substantial likelihood of a misidentification in the case. Neil v. Biggers, *supra*; State v. Moore, 343 S.C. 282, 546 S.E.2d 445 (2000). Since the instant case involved the equivalent of a show-up identification, and note that our courts have held that one on one show-ups have been criticized and deemed inherently suggestive, disfavored and condemned, then an identification can only be admitted if under the totality of the circumstances the show-up identification was reliable notwithstanding the suggestive procedure based on the factors to be analyzed per Neil v. Biggers⁴. See Stovall v. Denno, 388 U.S. 293 (1967), State v. Moore *supra*

Clearly, counsel should have objected contemporaneously when the picture show-up identification testimony surfaced in the case at bar. As a rule, a contemporaneous objection is required to preserve an error for appeal. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994). Furthermore, under Liverman, a hearing was required regardless of whether Williams had prior

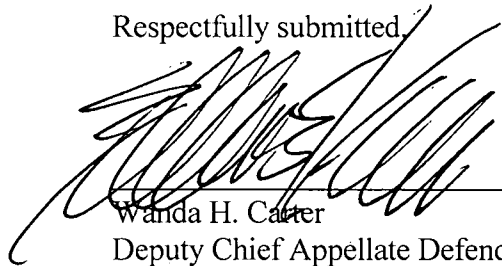
⁴ The factors to be considered in evaluation under the totality of the circumstances as to whether an identification is admissible is whether includes 1.) the opportunity of the witness to view the criminal at the time of the crime; 2.) the witness' degree of attention; 3.) the accuracy of the witness' prior description of the crime; 4.) the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and confrontation.

contact with petitioner. Counsel's error prejudiced petitioner's case because the state's case hinged primarily on the store manager's eyewitness' identification testimony and the reliability of said identification of petitioner via the picture of the perpetrator, i.e petitioner, shown to her 24 hours after the incident. Also, since petitioner in effect pled alibi and defended himself on the basis of a mistaken identify defense where his twin brother and another brother who looked like his twin could have committed the crime for which he was charged and convicted, then the erroneous admission of an unchallenged identification in this case could not have been harmless error considering petitioner's defense and the fact that the case hinged on this one identification. Clearly, a hearing on the identification in this instance should have been held. Counsel's error with respect to this omission in reference to this identification matter at trial constituted deficient representation of petitioner at trial in violation of the Sixth Amendment; and a reasonable likelihood existed that the outcome of the trial and/or the appeal (had the issue been preserved for appellate review) might have ended differently but for counsel's error as outlined above. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing in the above raised issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line. The signature is fluid and cursive.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of October, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Alison Renee Lee, Circuit Court Judge

DONALD ALTMAN,

PETITIONER,

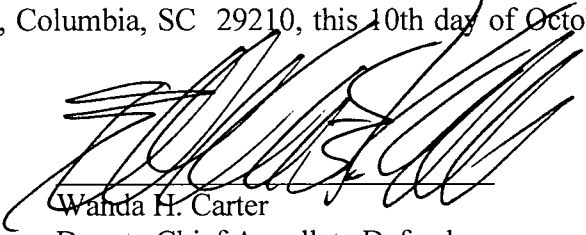
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STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

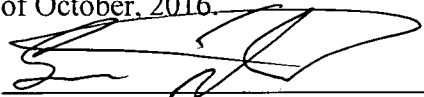
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Justin Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Donald Altman, #261468, at Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 10th day of October, 2016.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day
of October, 2016.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.