

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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ORIGINAL

THE STATE,

RESPONDENT

RECEIVED

V.

JAN 26 2017

QUARTIS NAQUAN HEMINGWAY

SC Court of Appeals

APPELLANT

APPELLATE CASE NO. 2015-001201

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Appeal from Horry County

Honorable Michael G. Nettles, Circuit Court Judge

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Opinion No. 2017-UP-017

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PETITION FOR REHEARING

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The Court of Appeals affirmed the above named appellant's conviction and sentence on January 11, 2017. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, Appellant submits the following:

Appellant Hemingway raised one issue on appeal: the trial court erred by failing to suppress the out of court identification of Appellant using a photo lineup because it was tainted by

Mario Aldan's view and his wife's<sup>1</sup> view of the Appellant on Facebook, and the identification process was suggestive due to the police investigation on Facebook of Appellant Hemingway which Officer Larry Williams admitted was one of the reasons Appellant was included in the photo line-up which was prejudicial and unconstitutional.

This Court affirmed Appellant's convictions based on State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012), that 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 discretion. This court also cited State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004), which stated that an identification procedure arranged by police that "is unnecessarily suggestive and conducive to irreparable mistaken identification" may deprive a criminal defendant of due process of law.

Respectfully, this Court misapprehended this issue.

In Neil v. Biggers, 409 U.S. 188 (1972), the United States Supreme Court named a two prong process to determine if an out-of-court identification was admissible: (1) if the identification process was unduly suggestive and (2) if the identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Neil v. Biggers, *id.*; State v. Lewis, 354 S.C. 222, 580 S.E.2d 149 (2004); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000); State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (2003).

An in-court identification of an accused is inadmissible if an out-of-court identification was so unduly suggestive that it created a very substantial likelihood of irreparable misidentification. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). Neil v. Biggers cites five factors to determine reliability: (1) opportunity of witness to view criminal at time of crime (2) witness' degree of attention (3) accuracy of witness's prior description of criminal (4) level of certainty by

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<sup>1</sup> Alejandrina Morales-Gonzales testified that she and Mario were not married. Supp. R. 4, ll. 12 – 24. Mario Aldan referred to Alejandrina as his wife throughout the trial. R. 42, ll. 11 – 21.

witness at time of confrontation (5) length of time between crime and confrontation. Neil v. Biggers, supra.

In State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007), the South Carolina Supreme Court held that 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. The Court also held that in determining the admissibility of an out-of-court identification, a court must ascertain whether the identification process was unduly suggestive; and even if the identification procedure was suggestive, it need not be excluded so long as, under all the circumstances, the identification was reliable notwithstanding the suggestiveness. Id.

In State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004), the Supreme Court held that the central question in determining the admissibility of an out-of-court identification is whether under the totality of the circumstances, the identification was reliable even though the confrontation procedure was suggestive.

Explaining that the reason to exclude identifications when the police have engaged in unnecessarily suggestive confrontations is to deter the police from using these less reliable procedures, this Court held that the Biggers, supra, analysis is inapplicable when the identification source is non-governmental as the goal of police deterrence would not be achieved. State v. Tisdale, 338 S.C. 607, 612, 527 S.E.2d 389, 392 (Ct. App. 2000).

Nevertheless, this Court recognized that a defendant's due process rights may be violated "where the mind of a witness is so clouded by suggestions from nongovernment sources that a conviction based principally on the testimony of that witness violates due process." Id. at 613, 527 S.E.2d at 392 (quoting United States v. Peele, 574 F.2d 489, 491 (9<sup>th</sup> Cir. 1978)).

Applying the factors from Neil v. Biggers, *supra*, to Hemingway's case shows that the identification procedure was not reliable under the totality of the circumstances. Mario had only a brief opportunity to view the suspect initially when the suspect met him at his truck in front of the trailer at the incident location. It was only a few moments before the suspect pulled a gun on Mario and had him lie down on the ground face down during the entire episode. The wife was also made to lie face down on the ground for the entire time. The wife only saw the suspect briefly in the beginning because she remained in the truck until a masked man came to get her.

Concerning the degree of attention Mario and his wife paid to the suspect, they were terrified by their own admission. They thought they were going to die. The suspect fired a shot into the ground near their heads. In addition, there were two other masked men whose actions Mario needed to try to observe. Mario and his wife were so terrified that they did not notify the police for four days.

Mario's accuracy of the description of the suspect consisted mainly that the suspect was built like Mario and was a black male. The two victims provided no other specific identification factors. R. 26, ll. 8 – 24. They only provided the photo from Facebook and the name.

Mario's and his wife's level of certainty in viewing the photo line-up was skewed because they were certain the person in the photo line-up matched the Facebook photo although they said it was the man who robbed them. This was unreliable because Mario and his wife had the Facebook photo for almost a month before they were shown the photo line-up. This tainted their identification of Appellant because they could not be sure if they were identifying the person from the Facebook page or the robber.

Mario reached the Facebook page of Quartis Hemingway by a telephone number provided by Mario. When the officer checked with the phone company, the phone company did

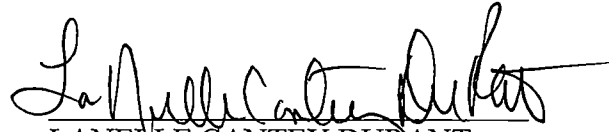
not provide the name of the person who owned the phone. The phone number appeared on Hemingway's Facebook page. It was possible that he was using someone else's phone number on Facebook. Or someone Mario reached the Facebook page of Quartis Hemingway by a telephone number provided by Mario. When the officer checked with the phone company, the phone company did not provide the name of the person who owned the phone. The phone number appeared on Hemingway's Facebook page. It was possible that he was using someone else's phone number on Facebook. Or someone else may have used Hemingway's phone to call Mario. This was an extremely unreliable source to be the basis of the identification. Although the location of the same number from Facebook was found through the cell phone tower locations to be in the vicinity of the robbery at the time of the incident, this did not prove that Appellant was using that phone on that day.

The state was wrong in arguing that there was no law enforcement involvement in the Facebook procedure. Officer Williams admitted that he performed his own Facebook investigation using the phone number provided by the victims. In addition, he completed a form sent by SLED to provide information on the suspect. It was only reasonable that Officer Williams used information from Facebook as the victims did not provide specific descriptive information. Officer Williams admitted that this information was one of the reasons Appellant Hemingway's photo was used in the photo line-up. Then SLED used the DMV photos.

There was a substantial likelihood of irreparable misidentification by the victims and police relying on Facebook. The cases that this Court relied on for their decision to affirm did not involve Facebook nor other social media. This Court did not address the real issue.

WHEREFORE, we respectfully request this Court to reconsider its ruling, and remand Hemingway's case for a new trial.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Laneille Canthey Durant", written in black ink.

LANEILLE CANTEY DURANT

Appellate Defender

This 26th day of January, 2017.

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Quartis Naquan Hemingway, #364195, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 26th day of January, 2017.



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 26th day  
of January, 2017.

Heaven Henderson (L.S)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.