

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable Michael G. Nettles, Circuit Court Judge

Opinion No. 2017-UP-017 (S.C. Ct. App. Filed January 11, 2017)

14-GS-26-04212-04215

THE STATE,

RESPONDENT,

V.

QUARTIS NAQUAN HEMINGWAY

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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SC Court of Appeals

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 23, 2017.

QUESTION PRESENTED

Whether the Court of Appeals erred by affirming the trial court's failure 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 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.

STATEMENT OF THE CASE

On October 16, 2014, the Horry County Grand Jury indicted Quartis N. Hemingway on two counts of armed robbery (AR), and two counts of kidnapping. On May 27-29, 2015, Hemingway proceeded to trial before the Honorable Michael Nettles and a jury. Hemingway was represented by Buddy Long, and the state was represented by Austin Thomas. R. 1. The jury found Hemingway guilty of all charges as indicted. R. 152, ll. 11 – R. 153, ll. 12. Judge Nettles sentenced Hemingway to eighteen years on each count with all to run consecutive. R. 162, ll. 4 – R. 163, ll. 25. Hemingway's attorney filed a notice of appeal. The Court of Appeals affirmed Hemingway's conviction and sentence on January 11, 2017. State v. Hemingway, Op. No.2017-UP-017(Ct. App. filed January 11, 2017). App. 1-2. A petition for rehearing was denied on February 23, 2017. App. 9. This petition for a writ of certiorari to the Court of Appeals follows.

ARGUMENT

The Court of Appeals erred by affirming the trial court's failure 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 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.

Mario Aldan told the court that he bought junk cars with cash that he sold to the "junker." Mario's business card had his telephone number as contact information. R. 41, ll. 7 – 25; R. 64, ll. 1 – 25. On January 17, 2014, he received a phone call from someone wanting to sell Mario two junk cars. Mario agreed to pay the person \$500 for the two cars. They agreed to a meeting place which was in a rural area of Horry County near Loris. R. 64, ll. 1 – 25; R. 69 ll. 13 – 25.

When Mario and his wife arrived at the place, a man came from an apparently empty trailer, and told Mario to leave his car there and walk to the back area where the cars were. When they arrived at the back of the trailer, Mario did not see any cars. Then the man pulled out a revolver, grabbed Mario's neck, put the gun to Mario's head, and pushed him down. The man then tied Mario's arms with tape. Mario was lying face down. Two other men appeared wearing masks and carrying big guns. They searched Mario, but he told them his money was in the car. R. 42, ll. 17 – R. 43, ll. 12.; Supp R. 1, ll. 1 – 24.

One of the men then retrieved Mario's wife and wallet from Mario's car. The men threw Mario's wife down and tied her hands. They stuck guns in the backs of Mario and his wife, and kept demanding more money. The men threatened to kill them if they did not provide more money. The man who first met them who was not wearing a mask then fired a shot into the ground near them.

The men put a gun to their heads and threatened to kill them if they went to the police. After about forty-five minutes, the three men left. They had taken two cell phones, \$1600 in cash, and the wife's jewelry. R. 43, ll. 11 – R. 44, ll. 25; R. 48, ll. 8 – R. 49, ll. 25; R. 51, ll. 1 – R. 52, ll. 24.

Mario was too scared to call the police then so he called his T-mobile company and got the number that had called him for the meeting. He called that number, and a person answered. Mario then went to Facebook, with the help of his friend Dave Hatchell, and searched using that same number. The number was found on the Facebook page of Quartis Hemingway along with Hemingway's picture. Mario printed this information and picture as he believed this was the man who assaulted him. R. 45, ll. 22 - 46, ll. 24; R. 53, ll. 6 – R. 56, ll. 20.

When Mario finally called the police four days later, Officer Larry Williams responded to the call on January 21, 2014. Mario said he gave Officer Williams the Facebook picture and Appellant's full name and telephone number as seen on Facebook. R. 56, ll. 21 – R. 58, ll. 14.

Officer Larry Williams confirmed that he responded to the call from Mario on January 21, 2014 at Hatchell and Son's Scrapyard. He described Mario and his wife as being very scared still. They explained what had happened and provided him the name of a "possible suspect." R. 70, ll. 1 – R. 73, ll. 21.

Mario and his wife, Alejandrina Morales-Gonzales, explained to Officer Williams that they went on Facebook using the phone number that had called Mario to set up the meeting. They gave Officer Williams that phone number. Officer Williams took the phone number and entered it into Facebook using the Facebook search engine on that same day, January 21, 2014. According to Officer Williams, "multiple different entries popped up all of which led back to the suspect in this case." R. 75, ll. 15 – R. 76, ll. 25.

Officer Williams printed two screen shots from Facebook with that phone number and a picture of several young men. See State's Exhibits 6-7; R. 77, ll. 1 – R. 78, ll. 5. Officer Williams testified that Mario and his wife did not give him any documents when he met with them. They may have shown him the printout from Facebook with the suspect's photo but no message posts from Facebook. He said that the Facebook page had the name of Quartis Hemingway. R. 91, ll. 1 – 25.

According to Officer Williams, there were two messages posted on Appellant Hemingway's Facebook page that had the phone number. One said: "Someone text me, I'm mad—843-582-2043." The other post also had the same phone number which was the same number Mario provided at their January 21, 2014 meeting. R. 77, ll. 4 – R. 79, ll. 3.

Officer Williams then obtained arrest warrants and generated a photo lineup using the South Carolina Law Enforcement Division (SLED). He said he completed a standardized form and emailed it to SLED on January 24, 2014. He received that form back and entered "some very brief information on the photo lineup requests" with information about Appellant Hemingway. That was returned to SLED, and then returned to Officer Williams along with the photo line-up. The photo line-up had six photos "chosen solely on the variety of facial features." R. 79, ll. 9 – R. 81, ll. 24; R. 14, ll. 1 – R. 15, ll. 17. Officer Williams testified that SLED used Hemingway's DMV photo to generate matching photos for the other five photos. R. 26, ll. 8 – R. 27, ll. 23.

Officer Williams then took the photo line-up to Mario and his wife and showed them the six photos on February 18, 2014. He showed Mario the line-up first on the hood of the patrol car while Mario's wife stayed at their truck. Mario said that she could not see who he selected nor hear. Mario selected the suspect's photo immediately. He identified Hemingway in court as the man who held them at gunpoint. R. 58, ll. 15 –R. 61, ll. 22; R. 80, ll. 14 – 25.

Officer Williams said that when he showed the photo line-up to Mario and his wife separately, each one selected Hemingway's photo immediately. R. 80, ll. 14 – R. 85, ll. 25. In the pretrial hearing, Officer Williams testified that it was possible that Alejandrina, Mario's wife, heard what Mario said when he selected Hemingway. She could have heard Mario say that "he's the one" or "that's him." R. 22, ll. 1 – R. 24, ll. 6.

During pretrial motions, defense counsel moved to suppress the out-of-court identification of the photo line-ups because it was tainted by the victims' view of appellant on Facebook and then the police using that information in obtaining the photo line-up which was prejudicial. R. 11, ll. 15 – R. 12, ll. 2. The judge then asked the state:

What do you think about the allegation or position that Mr. Long takes that this is an un-Constitutional show-up, sort of, that taints the subsequent line-up?

R. 5, ll. 7 – R. 6, ll. 19; R. 11, ll. 1 – R. 13, ll. 4.

Later the judge told the state that he "would be happy to entertain any witnesses you have with regard to the constitutionality of the line-up and the ---what they entertain is an unconstitutional show-up." An in-court hearing was then held where Officer Larry Williams testified. R. 13, ll. 1 – 25.

Officer Williams testified that in generating a photo line-up, he completed a form sent to him by SLED. He put the basic information about the suspect on that form and returned it to SLED. SLED then used similar photos from DMV that matched the suspect and created the six person photo line-up. R. 14, ll. 1 – R. 15, ll. 17.

Officer Williams denied that Mario and his wife presented to him any Facebook photographs. He admitted that he did take the phone number Mario gave him, and Officer Williams entered that phone number into Facebook. He did that search of Facebook on January 21, 2014- the

same day he met with Mario and his wife the first time. He printed out the results of his search, but he denied showing those results to Mario. R. 19, ll. 1 – R. 21, ll. 4. Mario and his wife did not provide any specific descriptions of the suspect other than a black male. That is all Officer Williams had in his report of his interview with them. Supp. R. 2, ll. 8 – Supp. R. 3, ll. 21.

Officer Williams said that he thought that Mario and his wife had the Facebook photographs in their possession that they had printed on or before January 21, 2014. R. 24, ll. 4 – 24. He admitted that the Facebook information was one of the reasons the police included appellant in the photo line-up. He explained that it was not the only reason but was one of the reasons. Officer Williams stated:

We looked at the phone numbers and Facebook. We didn't just take the word of the victims. We also did our due diligence on the Facebook stuff as well.

R. 24, ll. 18 – R. 25, ll. 8.

When defense counsel asked him if that was the main reason, Officer Williams stated that it was a reason. R. 25, ll. 9 – 10.

Defense counsel argued to the court that the photo line-up was tainted by the Facebook photos. He argued that there were no specific identifications of the defendant such as height, weight or any other descriptive information except a black male provided by Mario and his wife. The only description came from the Facebook photos. Mario and his wife had seen the Facebook photos and then picked this same person from the photo line-up. Counsel asked that the “out-of-court identification be inadmissible.” R. 28, ll. 13 – R. 30, ll. 8; Supp. R. 2, ll. 9 – Supp. R. 3, ll. 21.

The state argued that law enforcement was “not involved in any way in that identification off of Facebook.” They were not present when the victims obtained the information from Facebook. The solicitor argued that there was nothing unduly suggestive on the part of law enforcement. The

solicitor said that SLED used the DMV photo of the suspect and used that to select similar people. R. 30, ll. 10 – R. 31, ll. 5.

The judge found nothing unconstitutional nor suggestive about the photo line-up. He ruled that it was a factual issue for the jury to decide: “are they, in fact, identifying this individual as being the same person that is on Facebook or whether this person is the one that committed the robbery and kidnapping.” The judge continued to state: “it is a legitimate point for the defense to make that what could be construed asa suggestive, almost show-up, might be ---might have tainted their ability to pick it out accurately.” R. 31, ll. 6 – R. 32, ll. 17.

When the photo line-ups shown to Mario and his wife were admitted as State’s Exhibits 1 and 2, defense counsel objected based on his pretrial motions. R. 82, ll. 1 – R. 85, ll. 19; R. 100, ll. 1 – 16.

Officer Williams had testified that he ran a search warrant on the phone number from Facebook in an effort to link Appellant Hemingway to Mario and his wife. He provided the results of that search to Detective Jonathan Martin who was the “cell phone person” for the division in the police department. R. 86, ll. 2 – R. 88, ll. 24; R. 102, ll. 1 – R. 103, ll. 9.

Detective Martin testified that he used a program called Cell Hawk using this program, he did an analysis of Appellant’s alleged phone number found on Facebook to determine the locations of the phone using the phone towers. The locations of the towers were provided by an FBI database. R. 103, ll. 10 – R. 106, ll. 20. His analysis showed a call from the Facebook number on Hemingway’s Facebook page to the cell phone of Mario on January 17, 2014. The closest tower to Appellant’s alleged phone number was the tower closest to Blue Moon Drive which was the incident location. R. 108, ll. 12 – R. 114, ll. 6.

Discussion

The Court of Appeals 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. The 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. The court cited State v. Dukes, 404 S.C. 553, 557-58. 745 S.E.2d 137, 139 (Ct. App. 2013), for the holding that if the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong. App. 1-2.

Respectfully, the Court of Appeals 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

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, the 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, the 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 (9th 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 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.

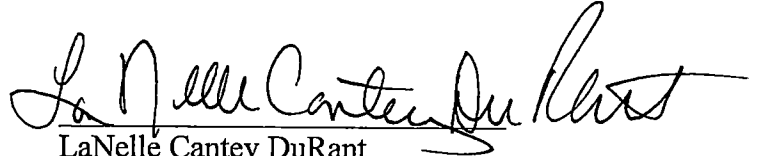
The Court of Appeals relied on State v. Liverman, *supra*, for their decision. However, Liverman is distinguished because that case involved a one person show-up who knew Liverman previously. It did not involve the use of social media as Facebook. The court also cited State v. Dukes, *supra*, but Dukes is also distinguished because again, that case did not involve the use of Facebook or any social media. The use in Dukes case was that the eyewitness saw a photo of Dukes in the officer's police file when the officer went to get the photo book for the eyewitness to view. The case of State v. Traylor, *supra*, cited by the Court of Appeals did not involve social media as the source of identification. There was a substantial likelihood of irreparable misidentification by the victims and police relying on Facebook.

The Court of Appeals did not address the crucial issue of the role of social media in criminal investigations and identifications.

CONCLUSION

Based on the above, certiorari should be granted; the Court of Appeals' decision should be reversed; the conviction and sentence should be reversed; and the case remanded for a new trial.

Respectfully Submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of March, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Honorable Michael G. Nettles, Circuit Court Judge

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THE STATE,

RESPONDENT,

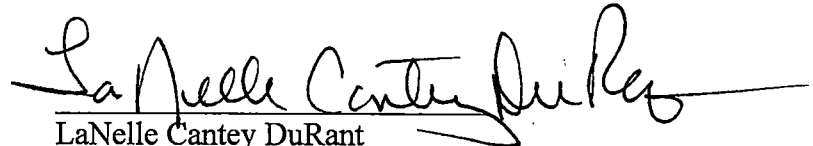
V.

QUARTIS NAQUAN HEMINGWAY

PETITIONER


CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on 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 22nd day of March, 2017.



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 22nd day of March, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.