STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Lancaster County
Hon. DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case Tracking No. 2016-001303

The State, Respondent,

v.

Shawn Lee Wyatt, Petitioner.

Opinion No. 2016-UP-162 (S.C. Ct. App. filed April 6, 2016)

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Procedural History

The Lancaster County Grand Jury indicted Petitioner for possession with intent to distribute (PWID) cocaine base, PWID cocaine, PWID marijuana, and attempt to furnish contraband to a prisoner. He proceeded to trial and the jury found him guilty as charged. The court sentenced Petitioner to a total sentence of ten years imprisonment.

Petitioner filed his Notice of Appeal and on April 6, the Court of Appeals affirmed his convictions and sentences. On April 20, 2016 Petitioner filed his Petition for Rehearing, which was denied on May 20, 2016. He then filed a Petition for Writ of Certiorari on July 11, 2016. The State filed its Return to the Petition for Writ of Certiorari, and this Court subsequently granted the Writ of Certiorari on February 10, 2017. Petitioner filed his Brief of Petitioner on March 13, 2017, and this Brief of Respondent follows.

Factual Background

The trial court conducted a hearing regarding the admissibility of two officers' identifications of Petitioner in which both officers testified. Officer Lippe testified she was headed into work at the Kershaw Correctional Institution (KCI) in the early morning on July 12, 2013. (T.17; R. 5). As she headed down Highway 601, she passed an individual walking on the opposite side of the road toward her. She observed the individual and described him as a "medium build, light skinned black gentleman in a black colored shirt with looked to be charcoaled colored shorts." (T.18-19; R. 6-7). She also indicated he had a "nice neat haircut." (T.20; R.8). Officer Lippe indicated she saw him roughly a half a mile from the driveway to KCI.

A sheriff's deputy brought Petitioner back to KCI to be identified by Officer Lippe. The gentleman stepped out of the sheriff's department vehicle and was identified by Officer Lippe. (T.24-25; R. 12-13). She identified him about an hour after seeing him on Highway 601 and was "100 percent sure" of her identification. (T.27; R.15).

Officer Schnettler also testified at the pre-trial hearing. He indicated he was working in an observation tower at KCI in the morning hours of July 12, 2013. (T.31; R. 19). He testified he saw a man run from the tree line up to the fence of the prison and throw several packages over the fence and then run back to the trees. (T.34; R. 22). He indicated the area is well lit from the prison's perimeter lighting as well as cluster lights above the prison. He testified he saw a "light complected [sic] man run from the treeline in a pair of jean shorts, long jean shorts and dark shirt." (T.34; R. 22). He indicated at the time of the incident he believed the individual to be a white male. (T.35; R. 23). He viewed him from about 80 yards away for approximately 30 seconds. (T.35-37; R. 23-25).

Officer Schnettler exited the tower and met a sheriff's deputy on the side of the road to make an identification of Petitioner. He then viewed the man in the back of the sheriff's department vehicle and he looked like the man. Officer Schnettler asked that the man get out of the car to see him standing and indicated it was the man he saw throwing contraband into the prison. (T.39; R. 27). Officer Schnettler noted how light the skin on Petitioner's legs was as well as the clothing Petitioner wore. (T.39; R. 27). He indicated he was "100 percent" certain the man in the sheriff's car was the man he saw throw packages over the fence. The viewing took place less than a half hour after he originally witnessed Petitioner throw packages over the fence. (T.40; R. 28).

The trial court conducted a thorough analysis of whether the identifications were reliable not withstanding the show-up procedure used. (T.66-68; R. 54-56). Specifically, the court found 1) both officers had opportunity to view Petitioner at or near the scene of the crime; 2) while Officer Schnettler mistakenly believed the individual to be a white male, the court took judicial notice Petitioner was an African-American male "of a lighter skin complexion," and the remaining descriptions offered by both officers were accurate; 3) both officers were paying close attention at the time they viewed Petitioner; 4) both officers were "100 percent certain" Petitioner was the individual seen previously; and 5) the show-up occurred a short time after the crime and the viewing by the officers. (T.66-68; R. 54-56).

ARGUMENT

I. The Court of Appeals correctly affirmed the trial court's decision based on the totality of the circumstances that the identification made by both Officers Schnettler and Lippe were reliable and the Court of Appeals correctly held the trial court did not err in denying Petitioner's motion to suppress their identifications. (Petitioner's Questions I and II).

The Court of Appeals correctly found the trial court did not err in denying Petitioner's motion to suppress the identifications by two Correctional Officers who observed Petitioner and then identified him during a single person show-up identification procedure. The officers each had ample time to view Petitioner during the crime or during his departure from the scene, provided a reasonably accurate description of Petitioner and his clothing, made the identification a short time after initially viewing Petitioner, and were one hundred percent confident in their identification.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). 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 the commission of prejudicial legal error. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000); State v. Govan, 372 S.C. 552, 556, 643 S.E.2d 92, 94 (Ct. App. 2007) (same).

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. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); see State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) ("Due process requires courts to

assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed."). An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

This Court explained:

> The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Manson v. Brathwaite, supra. First, "[a] court must first determine whether the identification process was unduly suggestive.... [It] next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." Curtis v. Commonwealth, 11 Va.App. 28, 396 S.E.2d 386, 388 (1990) (citing Neil v. Biggers, 409 U.S. at 198, 93 S.Ct. 375).

State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000). This Court has further explained:

> In general, "one-on-one show-ups have been sharply criticized, and are inherently suggestive." Moore, 343 S.C. at 287, 540 S.E.2d at 448 (quoting Jefferson v. State, 206 Ga.App. 544, 425 S.E.2d 915, 918 (1992)). Nevertheless, there is no bright line rule concerning show-ups, as the ultimate decision is controlled by the particular facts and circumstances. For example, courts have deemed a show-up procedure proper "where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching." State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000) (quoting 22A C.J.S. Criminal Law § 803). "The closer in time and place to the scene of the crime, the less objectionable is a show-up." Id.

Gibbs v. State, 403 S.C. 484, 494, 744 S.E.2d 170, 175 (2013). This Court continued:

> Thus, the inquiry turns upon "whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." In other words, "[s]uggestiveness alone does not mandate the exclusion of evidence." Instead, "[r]eliability is the linchpin in determining the admissibility of identification testimony."

Id. (Internal citations omitted). A trial judge should only exclude the identification evidence if there is "'a **very substantial** likelihood of irreparable misidentification.'" Perry v. New Hampshire, 565 U.S. 228, 232, 132 S. Ct. 716, 720 (2012) (emphasis added and citation omitted); see also, State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003) ("Suggestiveness alone does not mandate the exclusion of evidence."). Significantly, the exclusion of evidence is a "**drastic sanction**" and should be "limited to identification testimony which is **manifestly suspect**." Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983) (emphasis added).

If a show-up is conducted, the show-up **may be proper** where it occurs: (1) shortly after the alleged crime; (2) near the scene of the crime; (3) while the witness' memory is still fresh; (4) when the suspect has not had time to alter his looks or dispose of evidence; and (5) when it may expedite the release of innocent suspects and enable the police to determine whether they need to continue searching. Brown, 356 S.C. at 503-504, 589 S.E.2d at 785. The use of a show-up is less objectionable the closer the show-up is in time and proximity to the scene of the crime. Id. Furthermore, a show-up may even be proper when the police refer to the individual as a suspect and he is handcuffed and in the presence of law enforcement officers. Id.

Assuming the single-person show-up identification procedure was unduly suggestive, the Court must determine "whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." Biggers, 409 U.S. at 199. The United States Supreme Court enounced:

> As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' 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.

Id. at 200. "[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." Perry, 132 S. Ct. at 720.

In State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000), the Court of Appeals considered an analogous situation regarding whether identification evidence obtained from a show-up identification procedure conducted at a police station was properly admitted during trial. In that case, a neighbor of the victim witnessed a man later identified as Mansfield attempting to break into the victim's home in the middle of the afternoon. Id. at 69-70, 538 S.E.2d at 259. During the attempted break-in, the neighbor looked right at Mansfield's face and attempted to speak with him before Mansfield quickly exited the area. Id. at 70, 538 S.E.2d at 259. Thereafter, the neighbor contacted the authorities and correctly described Mansfield's height, race, skin tone, and shirt but incorrectly indicated that Mansfield was wearing white shorts and tennis shoes and had his hair in plaits. Id. A short time later, Mansfield was apprehended while wearing grey sweat pants pulled up to his knees and boots and with his hair in an afro. Id. at 70-71, 538 S.E.2d at 259. Following his apprehension, Mansfield was transported to a police station, and the neighbor identified him as the attempted burglar. Id. at 71, 538 S.E.2d at 259.

On appeal, the Court of Appeals affirmed Mansfield's conviction after finding the neighbor's identification of Mansfield to be reliable under totality of the circumstances. Id. at

79-80, 538 S.E.2d at 263-264. In reaching its conclusion, this Court relied upon the following circumstances supporting the reliability of the identification: (1) the neighbor's attention was heightened; (2) the neighbor had a good opportunity to view the attempted burglar in good lighting; (3) the neighbor expressed certainty in his identification of Mansfield; (4) the neighbor's description "description on the whole was accurate" even though there were slight discrepancies in the description of Mansfield's hair and clothing; and (5) the show-up was conducted less than an hour after the crime. Id. Similar circumstances support the trial court's finding in this case. See State v. Frazier, 394 S.C. 213, 222, 715 S.E.2d 650, 654 (Ct. App. 2011) (finding an out-of-court identification to be sufficiently reliable even though the witness did not provide a description of Frazier's physical appearance); Govan, 372 S.C. at 555, 643 S.E.2d at 93-94 (finding an out-of-court identification to be sufficiently reliable based on the consistency of the prior description even though the description of the suspect was simply "a black guy in a long black jacket and black hat (or rag)"); State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct. App. 1993) (finding identification evidence to be reliable even though the victim described the robber as wearing a ski jacket and cap and Johnson was not wearing a jacket or hat when he was apprehended); see generally U.S. v. Saunders, 501 F.3d 384, 392 (4th. Cir. 2007) (characterizing a witness's incorrect report Saunders was wearing jeans when he was, in fact, wearing gray sweatpants as a "minor inaccuracy" and concluding that inaccuracy did not negatively impact the reliability of the identification).

In the instant case, the trial court conducted a hearing in which both officers testified. Officer Lippe testified she was headed into work at the Kershaw Correctional Institution (KCI) in the early morning on July 12, 2013. (T.17; R. 5). As she headed down Highway 601, she passed an individual walking on the opposite side of the road toward her. She observed the

individual and described him as a "medium build, light skinned black gentleman in a black colored shirt with looked to be charcoaled colored shorts." (T.18-19; R. 6-7). She also indicated he had a "nice neat haircut." (T.20; R.8). Officer Lippe indicated she saw him roughly a half a mile from the driveway to KCI.

A sheriff's deputy brought Petitioner back to KCI to be identified by Officer Lippe. The gentleman stepped out of the sheriff's department vehicle and was identified by Officer Lippe. (T.24-25; R. 12-13). She identified him about an hour after seeing him on Highway 601 and was "100 percent sure" of her identification. (T.27; R.15).

Officer Schnettler also testified at the pre-trial hearing. He indicated he was working in an observation tower at KCI in the morning hours of July 12, 2013. (T.31; R. 19). He testified he saw a man run from the tree line, up to the fence of the prison, and throw several packages over the fence and then run back to the trees. (T.34; R. 22). He indicated the area is well lit from the prison's perimeter lighting as well as cluster lights above the prison. Specifically regarding the area in which he saw Petitioner, he stated the lighting was "very good." (T.34; R.22). He testified he saw a "light complected [sic] man run from the treeline in a pair of jean shorts, long jean shorts and dark shirt." (T.34; R. 22). He indicated at the time of the incident he believed the individual to be a white male. (T.35; R. 23). He viewed him from about 80 yards away for approximately 30 seconds. (T.35-37; R. 23-25). Officer Schnettler also indicated the legs of the individual throwing the packages over the fence looked different than his other skin. He indicated they were "shiny." (T.37; R.25).

Officer Schnettler exited the tower and met a sheriff's deputy on the side of the road to make an identification of Petitioner. He then viewed the man in the back of the sheriff's department vehicle and he looked like the man. Officer Schnettler asked that the man get out of

the car to see him standing and indicated it was the man he saw throwing contraband into the prison. (T.39; R. 27). Officer Schnettler noted he could identify the man in part by how light the skin on Petitioner's legs was when he saw him standing outside the vehicle as well as the clothing Petitioner wore. (T.39; R. 27). He indicated he was "100 percent" certain the man in the sheriff's car was the man he saw throw packages over the fence and stated he had no doubt in his identification. (T.40; R. 28). The viewing took place less than a half hour after he originally witnessed Petitioner throw packages over the fence. (T.40; R. 28).

The show-up procedure in this case was not unduly suggestive. The show-up occurred a short time after the incident and shortly after Petitioner was viewed by both officers. The identification took place at or very near the site of the incident, and precluded any opportunity for Petitioner to have altered his appearance. The close proximity and time to the incident allowed the officers' memories to remain fresh and allowed the sheriff's department to quickly determine whether Petitioner was the individual throwing contraband into KCI or whether they needed to continue a search for another individual. See Brown, 356 S.C. at 503-504, 589 S.E.2d at 785.

Even assuming the show-up procedure was unduly suggestive,[1] the trial court properly admitted the out-of-court and in-court identifications of Petitioner by Officers Lippe and Schnettler. The trial court conducted a thorough analysis of whether the identifications were reliable not withstanding the show-up procedure used. (T.66-68; R. 54-56).[2] Specifically, the court found: 1) both officers had opportunity to view Petitioner at or near the scene of the crime; 2) while Officer Schnettler mistakenly believed the individual to be a white male, the court took

[1] The State conceded at the hearing the show-up procedure was inherently suggestive. (T.61; 66; R. 49; 54). The State did not concede it was unduly suggestive but did argue exclusively regarding the indicia of reliability regarding the officers' identifications.

[2] It should also be noted the trial court thoroughly charged the jury regarding its role in assessing and using the identifications. (T.236-238; R. 204-206).

judicial notice Petitioner was an African-American male "of a lighter skin complexion," and the remaining descriptions offered by both officers were accurate; 3) both officers were paying close attention at the time they viewed Petitioner; 4) both officers were "100 percent certain" Petitioner was the individual seen previously; and 5) the show-up occurred a short time after the crime and the viewing by the officers. (T.66-68; R. 54-56).

The trial court explicitly considered all factors provided by Biggers and found, based on a totality of the circumstances, "the show-up identification procedures used in this arrest did not create a substantial likelihood of irreparable misrepresentation" and the identification by the officers was "reliable." (T.68; R. 56). The trial court's decision is amply supported by the testimony of the officers and the evidence presented during the pre-trial hearing, and, therefore, the court properly admitted the identification. Accordingly, the Court of Appeals properly affirmed the trial court's decision and correctly affirmed Petitioner's convictions and sentences.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed.

Respectfully submitted,

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April 11, 2017

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Shawn Lee Wyatt, Petitioner.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 11th day of April, 2017.

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