STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT

V.

KEVIN TYRONE BRYANT,

APPELLANT

APPELLATE CASE NO 2016-002490

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to suppress the identification of the Appellant by two witnesses when the unduly suggestive "show-up" identification procedure resulted in a substantial likelihood of misidentification rendering the identifications unreliable?

STATEMENT OF THE CASE

In April of 2015, the Horry County Grand Jury indicted Appellant Bryant for murder, indictment #2015-GS-26-1708. On December 5, 2016, Appellant proceeded to jury trial before the Honorable Steven H. John. Kia T. Wilson represented Appellant at trial. Joshua D. Holford and Seth A. Oskin prosecuted the case. The jury returned a verdict of guilty. Judge John sentenced Appellant to life in prison. A timely notice of intent to appeal was served on December 12, 2016. This appeal follows.

ARGUMENT

The trial judge erred in refusing to suppress the identification of the Appellant by two witnesses when the unduly suggestive "show-up" identification procedure resulted in a substantial likelihood of misidentification rendering the identifications unreliable.

The jury found Appellant guilty in the fatal shooting of Saequan Vereen outside of Club Levels, in Myrtle Beach. Two private security officers working at Club Levels witnessed the shooting and returned fire. As Officer Daniel Eddy with the Myrtle Beach Police Department was in route to Club Levels in response to the report of shots being fired, he noticed an individual in the parking lot of the Human Resources Building, about a block away from the club. (R. p. 228, line 8 – p. 229, lines 1-23). The individual was later identified as the Appellant. (R. p. 231, lines 13-16). The Appellant had been shot in the arm. (R. p. 237, lines 8-13). At the time Officer Eddy stopped the Appellant he was not sure if he was another victim of the shooting or a suspect. (R. p. 232, lines 2-8).

The private security officers, Sean Pettengill and Ronald Poston, were taken from Club Levels to the Human Resources Building for a show-up identification. (R. p. 47, line 1 – p. 48, lines 1-25; p. 69, line 20 – p. 70, lines 1-25). Prior to the show-up identification, Pettengill described the shooter as an approximately six feet tall black male wearing black pants and a black hoodie. (R. p. 54, lines 18-24). Pettengill admitted that he may have initially described the shooter as having short dreadlocks. (R. p. 57, lines 7-12). Pettengill also admitted that he did not see the shooter's face. (R. p. 61, line 9). Poston described the shooter as a six feet tall black male with a slender to medium build wearing all black and a hat or hoodie. (R. p. 83, lines 9-10). Poston also admitted that he never saw the shooter's face. During the show-up

identification Pettengill and Poston identified Appellant as the shooter. (R. p. 55, lines 10 – 24; p. 85, lines 7-16).

Prior to trial Appellant objected to the identifications made by Pettengill and Poston and the judge held a hearing pursuant to Neil v. Biggers, 409 U.S.188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). (R. pp. 46-107). After hearing testimony and arguments from counsel the judge overruled the objection and found that identifications were reliable. The trial judge erred.

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 .Ct. 1967, 18 L.Ed.2d 1199 (1967). 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). First, a court must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id. -

In State v. Liverman, 727 S.E.2d 422, 426 (2012) the South Carolina Supreme Court wrote:

> In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. 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. Biggers, 409 U.S. at 198, 93 S.Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty

> demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).

Single person show-ups are particularly disfavored in the law. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d. 1199 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law).

The show-up identification procedure in the present case was unduly suggestive. Under the totality of the circumstances and considering the Biggers factors, the identifications by Pettengill and Poston are unreliable because of the substantial likelihood of misidentification caused by the show-up identification. The identifications should have been suppressed. In regard to the witnesses' opportunity to view the perpetrator, Pettengill testified that there was about a twenty second timeframe in which he observed the shooter. (R. p. 58, lines 13-18). Poston testified that it was a five to ten second time frame. (R. p. 92, lines 21-23). The shooting took place at night. Poston testified he was standing 30 to 35 feet away from the shooter. (R. p. 82, lines 3-5). In regard to the degree of attention, both witnesses testified that when they first heard the shots they were facing a different direction and had to turn around to see where the shorts were being fired. (R. p. 62, lines 15-25; p. 78, lines 2-12). Both witnesses gave a vague general description of the shooter. Although Pettengill initially described the shooter as having short dreadlocks, Appellant did not have dreadlocks at the time of the shooting. (R. p. 98, lines 8-16). Both witnesses admitted that they did not see the shooter's face. Importantly, Poston testified that it appeared that the shooter had been shot. (R. p. 93, lines 1-3). When the witnesses made the show-up identification of Appellant he was being treated by medical

personnel. (R. p. 65, lines 2-7; p. 84, line 23 – p. 85, lines 1-2). Pettengill testified that he was certain the person the police had in custody was the shooter "[b]ased on height, weight, a bullet in his arm." (R. p. 55, line 23 – p. 56, line 1).

In Gibbs v. State, 403 S.C. 484, 494, 744 S.E.2d 170, 175 (2013), the South Carolina Supreme Court wrote:

> 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.

Although the show-up identification in the present case was close in time and close to the scene of the shooting, the identifications in the present case are unreliable and there is a substantial likelihood that a misidentification occurred. The witnesses had only seconds to see the shooter. The descriptions of the shooter were vague and general and neither witness saw the shooter's face. The witnesses were aware that the shooter had been shot, making the show-up identification of Appellant, as he was being treated by medical personnel, that much more suggestive. The trial judge erred in refusing to suppress the identifications.

CONCLUSION

Based on the above argument, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of September, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kevin Tyrone Bryant states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Steven H. John, which was held on December 5 - 8, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Kevin Tyrone Bryant.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

This 15th day of September, 2017.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment and sentencing sheet:
(2) Trial transcript;
(3) State's Exhibits #24 and #26 – DVDs of security camera footage TO BE TRANSPORTED TO COURT.

I certify that this designation contains no matter which is irrelevant to this appeal.

September 15, 2017

Kathrine H. Hudgins
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 15, 2017.

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