

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

RECEIVED

MAR 15 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JARVIS TYRONNE HUGHES,

APPELLANT

APPELLATE CASE NO 2016-001462

ANDERS BRIEF OF APPELLANT

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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TABLE OF AUTHORITIES

Cases

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in admitting an out-of-court photo lineup identification where the eyewitness who identified Appellant had only seen him once before, thereby implying that unnecessary and unduly suggestive police procedures were used in order to ensure that Appellant was identified?

STATEMENT OF THE CASE

A York County Grand Jury indicted Appellant at the November 2015 term of General Sessions for distribution of crack cocaine. R. 311. His case was called to trial on June 20, 2016 before the Honorable John C. Hayes, III and a jury. Assistant Solicitor Matthew Shelton appeared on behalf of the State, and Melissa Inzerillo represented Appellant. R. 1.

At the conclusion of the trial on June 21, 2016, the jury found Appellant guilty as indicted. R. 291, ll. 2 – 8. Judge Hayes sentenced Appellant to twenty years' imprisonment. R. 304, ll. 1 – 10.

This appeal follows.

ARGUMENT

The trial judge erred in admitting an out-of-court photo lineup identification where the eyewitness who identified Appellant had only seen him once before, thereby implying that unnecessary and unduly suggestive police procedures were used in order to ensure that Appellant was identified.

STATEMENT OF FACTS

In 2015, Derrick Doss was working as an informant in York County. R. 33, ll. 12 – 14. He approached law enforcement officers and advised them that he could buy crack cocaine from a person known as Pottie.¹ R. 33, ll. 15 – 24. He received a payment of sixty dollars following the controlled buy during which he purchased fifty dollars' worth of crack cocaine from Pottie. R. 139, ll. 3 – 11; R. 145, ll. 3 – 10.

Prior to the start of trial, Appellant moved to suppress an eyewitness identifications of Appellant under Neil v. Biggers. R. 32 – 84. The State proffered testimony from two witnesses, Derrick Doss and Investigator Leland Harrelson. At the conclusion of the hearing, Defense counsel argued that because Doss only met Appellant on two occasions, his identification was therefore unreliable. R. 75, ll. 21 – 25; R. 78, l. 14 – R. 79, l. 20.

Derrick Doss

Doss testified during the pretrial hearing that he was working for the York County Drug Unit in June 2015. R. 33, ll. 12 – 14. On June 12, 2015, he told officers that he could purchase crack cocaine from someone named Pottie. R. 33, ll. 15 – 25. Although Doss did not know

¹ Although the name “Pottie” is also spelled “Pootie” at times in the transcript, for ease of reference the undersigned will utilize the original spelling offered by the Assistant Solicitor. R. 33, ll. 23.

Pottie's real or legal name at the time, he maintained was still able to purchase crack cocaine from him, and that Pottie was Appellant. R. 34, ll. 1 – 4. Doss allegedly made additional purchases from Pottie on August 7 and August 20, 2015. R. 34, ll. 6 – 13. Between the June 12 and August 7 purchases, Doss learned that Pottie also went by the name of Lucky. R. 34, ll. 14 – 24.

Doss set up each of the buys. R. 35, ll. 18 – 20. Outside of the three purchases that involved law enforcement, Doss allegedly also bought crack cocaine from Pottie on a number of other occasions. R. 39, ll. 3 – 11.

On August 5, 2015, Doss was shown a collection of photographs by Investigator Leland Harrelson. R. 39, l. 16 – R. 40, l. 1. According to Doss, an investigator was present in the room, and Doss was told “to take [his] time” and “that the person [who he purchased the crack from] may or may not be in the photos.” R. 41, ll. 2 – 6; R. 45, ll. 15 – 23. Doss identified Appellant as the seller. R. 42, ll. 1 – 24.

On cross-examination, Doss admitted that he sometimes dealt with other individuals or did not see Pottie when purchasing the drugs. R. 46, l. 14 – R. 47, l. 5. The only times he saw Pottie face-to-face were during the unauthorized buys and on the first purchase involving law enforcement. R. 47, ll. 2 – 5.

Investigator Leland Harrelson

Harrelson met with Doss on June 12, 2015 in order to set up a controlled buy. R. 51, l. 20 – R. 52, l. 8. After the purchase was completed, Harrelson contacted officers with the Rock Hill Street Crimes Unit in order to determine Appellant's real name. R. 53, l. 15 – R. 54, l. 23. Harrelson then generated a lineup which he showed to Doss. R. 56, ll. 15 – 22. He used black

and white pictures which did not indicate height of the individuals in the photographs. R. 68, l. 19 – R. 69, l. 13.

At the conclusion of the Neil v. Biggers hearing, the trial judge ruled that he was not going to suppress the use of the photo lineup as a basis for Doss' in-court identification of Appellant. R. 83, l. 3 – R. 84, l. 11. Defense Counsel renewed Appellant's objections to the admission of photo lineup evidence during trial. R. 213, ll. 18 – 23.

DISCUSSION

An identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification violates an individual's right to due process of law. Stovall v. Denno, 388 U.S. 293 (1967); State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). 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. 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

If a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, the in-court identification is not admissible. Manson v. Brathwaite, 432 U.S. 98 (1977). 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).

Outside of the unauthorized buys, Doss' only time to view Pottie was on June 12, 2015 during his first buy. R. 47, ll. 2 – 5. In fact, prior to that date, Doss had only known Pottie for two or three days. R. 141, ll. 8 – 10. Doss met with Pottie in a parking lot on Riverview Road in Rock Hill. R. 38, ll. 7 – 22. The in-person meeting on June 12 did not allow Doss enough time to memorize the details of Appellant's face in order to allow him to identify Appellant out of a black and white selection of photographs.

The black and white nature of the photographs also distorted Doss' perception of skin tone. As Defense Counsel argued following the Neil v. Biggers hearing:

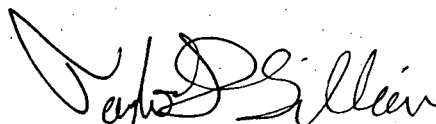
[I]t is a little bit confusing, suggestive in the fact that it is unclear as to who was in the lineup. It doesn't - - Because of the way the photo lineup was [] done, it's unclear as to the skin tone of the men, which I think would be one of the qualities that Mr. Doss highlighted in his description of Mr. Hughes.

R. 76, ll. 11 – 16.

Doss previously testified that the description he gave of Appellant was that he was “about as tall as [Doss], about [Doss'] same age, dark skin, black male” with a short cropped haircut. R. 45, ll. 1 – 8. However, when Harrelson provided the photo lineup to Doss for identification purposes, Harrelson did not offer any details about the “varying degrees of skin tone, [including] light skin [and] dark skin, in any of the pictures in the photo lineup”. R. 69, ll. 10 – 13. Because this information was not ascertainable, the lineup was unduly suggestive and should have been excluded.

CONCLUSION

For the foregoing reasons, Appellant's conviction should be reversed and this case should be remanded to the York County Court of General Sessions for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of March, 2017.

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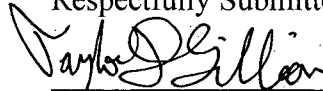
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jarvis Tyrone Hughes states:

1. HE is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. HE has reviewed the record of appellant's trial before Judge John C. Hayes, which was held on June 21, 2016 (Trial), and, in opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. HE 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, he asks the Court to relieve as counsel for Jarvis T. Hughes.

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

This 15th day of March, 2017.

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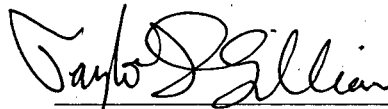
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Trial Transcript; and
- (3) Photo lineup

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

March 15, 2017



Taylor D Gilliam
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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."

March 15, 2017.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Jarvis Tyronne Hughes, #280975, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 15th day of March, 2017.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of March, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: November 3, 2026.