STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Anderson County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN JAMAL WARNER,

APPELLANT

APPELLATE CASE NO. 2017-001313

RECEIVED
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SC Court of Appeals

INITIAL BRIEF OF APPELLANT

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3.

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4.

Whether the court erred by refusing to grant appellant a Neil v. Biggers hearing on the unduly suggestive nature of the identification by Probation Agent Nathan Goolsby, who claimed he recognized appellant from a surveillance video, even though the man in the video clip was wearing a hat and sunglasses, and where the police asked Goolsby if the man in the video was

appellant, since it was an abuse of discretion to deny appellant an in camera hearing under these highly suggestive circumstances?

STATEMENT OF THE CASE

Appellant was indicted by the Anderson County Grand Jury for the offenses of murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime. R. *. His case was called to trial on May 22, 2017, before the Honorable R. Lawton McIntosh, and a jury. Bruce Byrholdt and Bruce Harvey represented appellant. Catherine T. Huey was the Deputy Solicitor. Tr. 1.

On May 25, 2017, the jury found appellant guilty on all three counts. Tr. 676, ll. 4-14. Judge McIntosh sentenced appellant to life imprisonment for murder, twenty years for attempted armed robbery, and five years for possession of a weapon during the commission of a violent crime. Tr. 689, ll. 1-14.

This appeal follows.

ARGUMENT

1.

The court erred by failing to suppress the cell phone evidence where that evidence was obtained pursuant to an invalid search warrant, where the state successfully and incorrectly argued a warrant was not even required, since appellant had some privacy interest in his cell phone records.

Introduction

This case involves the attempted robbery and murder of a woman working at the BP station she owned with her husband in Anderson County. A black male was seen on the surveillance tape but he was wearing sunglasses and a hat. A probation agent, Nathan Goolsby, in Georgia was asked by the Anderson Police if this man was "Nathan Warner," and Goolsby confirmed it was appellant. Goolsby told the jurors he identified appellant from his "walk." The judge refused to give appellant a Neil v. Biggers hearing.

In addition, the judge allowed cell phone tower testimony, and written maps and arrows evidence to be admitted over appellant's objections that it was not science, it was speculative evidence, and that if it was admitted it should only be used as demonstrative evidence, and it should not go to the jury. The state used this evidence to argue that it showed appellant came from Atlanta on I-85, his phone was near the crime scene in Anderson County, and that he returned to Atlanta on I-85. State's exhibits 23 A-E are on file with this Court.

Relevant Facts

Defense counsel Harvey argued that the state illegally obtained appellant's cell phone records in this case. Defense counsel told the judge that a South Carolina magistrate judge did not have the authority to issue a search warrant "directed to T-Mobile custodian of records in

New Jersey." Counsel argued local authorities in Anderson did not follow the "particular procedure that must be followed in order to obtain out-of-state witnesses or documents. That's under the uniform act." Tr. 131, l. 1 – 133, l. 1.

The solicitor responded "Your Honor, we follow what the telephone companies require of us. We do this all the time. Even though they are out of state, they are almost always out of state. That is what they require of us. And my understanding is as long as we say that you don't have to come, that it doesn't matter." Tr. 133, l. 2 – 137, l. 6.

Defense counsel Harvey responded that the search warrant was issued by a local Anderson, South Carolina judge, the Honorable Judge Sharp, requesting appellant's phone records from April 26, 2015 – May 4, 2015 from the New Jersey Corporation. "The information can be emailed back or mailed directly to me through any contact information below. Thank you for the help -- for all the help in this matter." Defense counsel repeated that the cell phone records were illegally obtained because the search warrant was outside of the judge's jurisdiction, and that the local judge did not have the authority to issue this warrant. Even though that court did not have jurisdiction to issue a search warrant, law enforcement did not even provide probable cause if they would have been before a proper court. Tr. 137, l. 13 – 142, l. 17.

The solicitor then argued to the judge that the state did not even need a search warrant to obtain the cell phone records. Defense counsel disagreed with the judge that records belonged to the company, and that appellant had no standing to challenge their disclosure. Defense counsel Harvey responded that although there was a split of authority in state jurisdictions and the federal courts, that appellant did have a privacy interest in the records and that the Fourth Circuit case of

United States v. Graham was pending before the United States Supreme Court. Tr. 144, l. 5 – 148, l. 9.

When the court returned to the issue of the cell phone records being illegally obtained, he noted that the defense argued the magistrate's jurisdiction was limited pursuant to S.C. Code § 17-13-140. The judge reasoned that if the cell phone company voluntarily complied "with whatever process they were doing," and he did not think it made a difference if the search warrant was invalid. The judge rejected the defense argument that the state needed either a valid search warrant or a court order to obtain appellant's cell phone records. Tr. 210, l. 5 – 212, l. 13.

During the trial, as seen infra, defense counsel would repeatedly object to the cell phone testimony of FBI agent David Church. Susan Johnson was the custodian of records for T-Mobile who appeared with the cell phone records. Tr. 358, l. 3 – 362, l. 16.

Standard of Review

When reviewing a trial court's ruling on the admissibility of evidence in a Fourth Amendment search and seizure case, the appellate court "will review the trial court's ruling like any other factual finding and reverse if there is clear error." State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). The appellate court "will affirm if there is any evidence to support the ruling." Id.; see also Robinson v. State, 407 S.C. 169, 180–81, 754 S.E.2d 862, 868 (2014) ("On appeal from a motion to suppress on Fourth Amendment grounds, [appellate courts] apply a deferential standard of review and will reverse only if there is clear error.").

Discussion

Defense counsel correctly argued that appellant had some privacy interest in his cell phone records, and that the search warrant to obtain those records was invalid because the local judge did not have the power to order their disclosure from New Jersey. Defense counsel

acknowledged the split in authority on this subject, but asserted appellant had a privacy interest in the records, and that the cell phone company could not give the cell phone records to law enforcement with a valid search warrant or court order.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). Protection under the Fourth Amendment is afforded to those who have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). To demonstrate an expectation of privacy, the defendant must show he had a subjective expectation of not being discovered and the expectation was one that society recognized as reasonable. Katz v. United States, 389 U.S. 347, 351, (1967); Oliver v. United States, 466 U.S. 170, 177 (1984). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

In State v. Drayton, 411 S.C. 533, 769 S.E.2d 245 (2015), the Supreme Court held an individual does not have an expectation of privacy pursuant to the Fourth Amendment in his historical cell site location records. However, our Supreme Court held this Court "erred in reaching the novel issue of whether [Drayton] had an expectation of privacy in his HCSLD [historical cell site location data] because . . . the affidavits in support of the warrants [obtained by law enforcement in the case] established probable cause for the search." State v. Drayton, 415 S.C. 43, 45, 780 S.E.2d 902, 903 (2015). Consequently, our Supreme Court vacated that part of this Court's opinion in Drayton. Id.

A careful examination of recent United States Supreme Court precedent indicates that an

individual has an expectation of privacy in his cellular telephone records, including the call detail records and the historical cell site location records.

The Supreme Court's recent decision in Riley v. California, 134 S.Ct. 2473 (2014) supports Appellant's argument that individuals have an expectation of privacy in cellular telephone records.

In Riley v. California, 134 S. Ct. 2473 (2014), the Court held that privacy interests are involved and at stake involving a citizen's cell phone data. While the data involved in this case did not involve text messages, the disclosed cell phone information was used by the state, as will be seen infra, to reconstruct appellant's "specific movements . . ." to claim that appellant's cell phone information showed he drove from Atlanta to the "crime scene," then to Greenville and then back to Atlanta. The cell phone information in this case could not have been more prejudicial. See Riley v. California, 134 S. Ct. at 2490, *citing* United States v. Jones, 565 U.S. ___, 132 S. Ct. 945, 955 (2012) (Sotomayer, J. concurring).

In United States v. Graham, 824 F.3d 421 (4th Cir. 2016), the Fourth Circuit, en. banc, reversed the three judge panel, and held that the government did not violate the Fourth Amendment by obtaining historical cell-site location information from the cell phone provider without a warrant. United States v. Graham, 824 F.3d 421 (4th Cir. 2016), is now pending before the United States Supreme Court.[1] The resolution of the issue cell phone evidence involved in this case may be controlled by the disposition of the United States Supreme Court in Graham.

Appellant maintains that he had a privacy interest in his cell phone records, and they were certainly used to obtain his conviction in this case. "[I]n order to claim the protection of the Fourth amendment, a defendant must demonstrate that he personally has an expectation of

[1] Graham was conferenced in the United States Supreme Court on June 2, 2017.

privacy in the place searched, and that his expectation is reasonable; i.e., one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" Rakas, 439 U.S. at 143-144, and n.12. Appellant has such a privacy interest in this case.

The search warrant issued by the local Anderson judge was not valid, and there was no court order for the records. The trial judge agreed with the solicitor that a warrant or order court was not required. The solicitor said the cell phone company was happy to cooperate with law enforcement's request so long as they did not have to come to court. The invalid local search warrant that was used that was used in this case, and respectfully, the trial judge's ruling that a warrant or court order was not even required showed a blatant disregarded of appellant's privacy interest in this cell phone records. Appellant should be granted a new trial.

2.

The court erred in allowing witness David Church to give very detailed cell phone testimony about appellant's alleged whereabouts according to his interpretation of the cell phone towers evidence, since the state failed to prove this evidence was sufficiently reliable pursuant to the court's gatekeeping function, and in reality the evidence was speculative, and should not have been admitted.

Relevant Facts

David Church was an FBI agent in Roanoke, Virginia. Church testified pre-trial: "I became a national asset. It's just a full-time position with a cellular analysis survey team. Tr. 158, l. 2 – 159, l. 22. Church said he had testified in court as an expert in cellular telephone record analysis on eleven previous occasions. Tr. 166, ll. 17-23. When questioned by the solicitor, Church said in conclusory fashion that this cell phone analysis was reliable. Tr. 166, l. 24 – 167, l. 23.

Church admitted that he entered latitude and longitude information into Google for assistance with finding out where a particular cell phone tower was. Tr. 171, l. 9 – 179, l. 20.

The judge asked Church what he was concluding from his interpretation of the records. Church answered, "The end result is we are drawing conclusions of the approximate locations of where a phone could be." The judge responded, "It sounds like you're describing information from one set of records and then plugging them into another set like Google." Church said he was extrapolating information from the records he received from the phone companies and also coming to his own conclusions on what the records showed. Tr. 180, l. 25 – 182, l. 10.

The judge also asked, "Besides a boilerplate response, how do you determine that it's, in fact, reliable?" Church responded, "There are sixty-two of us now that are doing it, and we

regularly find people that are looking for, or help look for, by analyzing those records . . . so to me, I mean, *the practical application is the best study.*" Tr. 182, l. 13 – 183, l. 9. (emphasis added).

Defense counsel Harvey argued he did not think that this "expertise" even qualified as a science. Harvey argued, "My position, Judge, is that this does not require an FBI agent to say, 'Hey, we get the longitude and latitude from the phone company. We can plug it in with our software, and we can identify where a cell tower is.' I can do that. I promise you I can do that." Tr. 186, ll. 8-22. Counsel argued there was not a need for expert testimony. Tr. 186, l. 11 – 188, l. 18.

The judge disagreed with defense counsel, and he ruled that Church was an expert and that Church would be allowed to give his opinion testimony in this area of cell phone analysis to the jury over the defense objections. Tr. 188, l. 19 – 189, l. 8.

As will be seen infra, defense counsel also argued that if cell phone evidence was going to be allowed – it should only be for demonstrative purposes as "a summary exhibit." The solicitor told the judge that she would use the cell phone documents as demonstrative exhibits but she wanted some of them introduced into evidence. The solicitor wanted the "arrow indicates direction of travel" documents (pages 8-12 of State's Exhibit 23 A-E) before the jury as evidence. The judge overruled the defense objections, and defense counsel reminded the judge he was objecting "to his testimony in whole" based on his prior motion. Tr. 521, l. 23 – 529, 11.

When Church testified in the presence of the jury, defense counsel continuously repeated his previous objections. Over objection, Church was qualified as an expert in record and cell-site analysis. Defense counsel also objected to Church opining that this analysis was reliable. Tr. 536, l. 22 – 538, l. 10. The judge also allowed Church to use his records as trial exhibits

admitted into evidence subject to appellant's prior objection that they could only be used for demonstrative purposes, if the court allowed them at all. Tr. 546, l. 11 – 547, l. 15.

Church told the jury that, in his opinion, the cell phone evidence showed the phone travelled from metropolitan Atlanta up to the Greenville/Anderson County area, and "the phone traveled within Anderson and Greenville County up towards the Pellham Road area back down *to the area of the crime scene* and utilized the two sectors shown in slide 11, I believe." Tr. 568, l. 10 – 569, l. 1. (emphasis added).

Over appellant's prior records, maps, arrows, and other information from Church's report were introduced into evidence as State's Exhibit 23-A through 23-E. They jury therefore had the documents in the jury room during deliberations. Tr. 569, l. 21 – 570, l. 5. The following occurred on cross-examination of Church:

> Q: Okay. So we have a number of factors to be taken into consideration in these particular instances, but we can't and we don't have the data to determine what kind of phone, the generation of the phone, the wattage of the phone, the actual coverage area, or the data to determine the actual coverage area, correct?
>
> A: From the records that I analyzed, no.

Tr. 583, ll. 16-22.

Church admitted that there is a "drive test" where the agent physically drives with equipment "to determine the actual coverage area of a particular cell tower." Church admitted he did not do that test in this case. Tr. 584, ll. 2-21.

Church maintained that appellant's phone "pinged" off a tower approximately two and a half miles from the BP station where the decedent, Mrs. Patel, was shot and killed. Tr. 593, ll. 14-22.

In her closing argument, the solicitor argued that Church had analyzed the cell phone information and "it was in Special Agent David Church's expert opinion that the defendant's phone was in the area of the crime scene just before the incident and just after the incident took place. Not to mention it had traveled from Atlanta all the way up to Greenville and then back through and back to Atlanta." Tr. 628, ll. 6-13.

Standard of Review

A trial court's decision to admit or exclude expert testimony will not be reversed absent an abuse of discretion, and prejudice. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

Discussion

The trial court has a gatekeeping function in assuring the reliability of expert and non-expert testimony. See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). The trial judge here noted that Church only testified in a "boilerplate" fashion that this evidence was reliable.

All Church could say as to reliability when the judge also questioned him was that he had colleagues who also dealt with this cell phone evidence, and that their "practical application" was the best test of its reliability. In other words, there was no outside or independent review of the accuracy of reliability of this evidence.

Defense counsel argued that this evidence should not even be considered a science, and he continued to maintain that this evidence was speculative and therefore not reliable. Rule 702, SCRE, provides that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 698 (2009), the Court wrote: "We hold that trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or non-scientific. In the discharge of its gatekeeping role, the trial court must assess the threshold foundational requirements of qualifications and reliability, and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence."

"When a cell phone is turned on, it identifies its location to nearby cell towers, every seven seconds, on a continuous basis." Eric Lode, Validity of Use of Cellular Telephone or Tower to Track Prospective, Real-Time, or Historical Position of Possessor of Phone under State Law, 94 A.L.R. 6, 579 (2014). When appellant's cell phone was on in this case is another unknown.

In Watson v. Ford Motor Company, 398 S.C. 434, 699 S.E.2d 169 (2010), the Court held that an electrical engineering witness was not qualified and his testimony was not sufficiently reliable to be admitted on the issue of alternative design for a cruise control system. The Court found that to allow expert testimony, the court must first find the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009). The trial court must also find the proper witness is qualified, *and that the evidence is reliable.* State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

Although the judge seemed troubled by Church's "boilerplate assertions" that this evidence was reliable, he nonetheless admitted it, rejecting all of the defense challenges to it.

The state failed to prove that the cell phone tower tracking evidence was reliable, and not speculative. This evidence was extraordinarily prejudicial to appellant because Church alleged the evidence showed that appellant's phone went from Atlanta to very near the crime scene, to Greenville, and back to Atlanta. It was the center piece of the solicitor's closing argument as seen above. The judge abused his discretion in admitting this speculative evidence, and given its extraordinarily prejudicial effect, appellant should be granted a new trial.

3.

The court erred by admitting written cell phone interpretation evidence, State's exhibits 23 A-E, since this evidence, if admitted, should only have been allowed as demonstrative evidence before the jury, but it should not have been admitted into evidence to be in the jury room during deliberations where it would be given undue prominence by the jury

Relevant Facts

Defense counsel earlier argued that the state could use the cell phone "map" evidence as a demonstrative exhibit but that it should not go to the jury. Tr. 521, l. 23 – 529, l. 12. Defense counsel asked for a continuing objection to this evidence. Tr. 527, l. 20 – 528, l. 6. Defense counsel again objected when the evidence was introduced. Tr. 569, l. 12 – 570, l. 7.

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Discussion

In State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982), the Supreme Court held that the trial judge abused his discretion in allowing the jury to take a transcript into the jury room because it unduly emphasized that evidence. Here, while defense counsel objected to all of Church's cell phone analysis evidence because it was not a science, and that it was speculative, and not admissible; his backup position was such evidence should only be used for demonstrative purposes (if admitted), and should not go to the jury.

In State v. Gulledge, the Court noted that the tape of Patrolman Murphy radioing patrol headquarters that he had been shot was admissible, and it was played in court. However, the Court held that the trial judge abused his discretion in allowing this evidence into the jury room because it unduly emphasized that evidence. See State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980). The same is true here.

As argued above, the cell phone analysis evidence was extraordinarily prejudicial. As in State v. Gulledge, to the extent the evidence ever should have been allowed before the jury, the cell phone "map arrow-time evidence" itself, State's exhibit 23 A-E -- showing the alleged times and directions of appellant's travel -- should not have been admitted into the evidence so that it was in the jury room with the jurors deliberating.[2]

[2] Those "maps, times, and directions of travel exhibits are on file for this Court's consideration.

4.

The court erred by refusing to grant appellant a *Neil v. Biggers* hearing on the unduly suggestive nature of the identification by Probation Agent Nathan Goolsby, who claimed he recognized appellant from a surveillance video, even though the man in the video clip was wearing a hat and sunglasses, and where the police asked Goolsby if the man in the video was appellant, and he confirmed it was, since it was an abuse of discretion to deny appellant an in camera hearing under these unusual circumstances.

Relevant Facts

Defense counsel requested a Neil v. Biggers, 409 U.S. 188 (1972) hearing. On its face, the identification here looked unduly suggestive because, as defense counsel told the judge, appellant's probation agent was provided with a film clip of the surveillance tape. The man in the tape was a black male wearing a hat and glasses. Appellant's probation agent in Georgia, Nathan Goolsby, later testified before the jury that he saw appellant once a month. Tr. 347, l. 17 – 348, l. 19.

Goolsby admitted that with the hat and sunglasses "it was hard to see the face" but he maintained he identified appellant because of "the way that he walked, the way he carried himself, and he exhibited the same signs." Tr. 350, l. 23 – 351, l. 9. In short, Goolsby said that he was able to identify appellant from his walk, and "how he carried himself" – the specifics of which were never provided in this case despite the enormous prejudice of this identification. Tr. 352, l. 11 – 353, l. 8; Tr. 148, l. 19 – 151, l. 10.

The solicitor said that a Neil v. Biggers hearing was not necessary because Goolsby was not an eyewitness and because he knew appellant. The judge found this reasoning persuasive and ruled that a Neil v. Biggers hearing or analysis was not even involved in this case. Tr. 148, l.

15 – 152, l. 19. Thus, Goolsby's identification of appellant where the Anderson police asked him if the man in the video clip was appellant, and where Goolsby confirmed it was from appellant's walk and how he "carried himself" was never subject to challenge given the trial judge's ruling.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. Id. 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 discretion. Id.

Discussion

In State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012), the Supreme Court dealt with a similar case where a Neil v. Biggers pre-trial hearing was not allowed. The Court noted that a criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification. See State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004).

The Supreme Court in Liverman noted that Neil v. Biggers set forth a two-pronged inquiry to determine whether due process requires suppression of 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 out-of-court

identification was nevertheless so reliable that no likelihood of misidentification existed. Neil v. Biggers, 409 U.S. at 198.

In Liverman, the trial court also relied heavily on the fact the witness knew the defendant. Our Supreme Court held that the reliance on State v. McLeod, 260 S.C.445, 196 S.E.2d 645 (1973) could not stand after the Supreme Court issued its opinion in Perry v. New Hampshire, 565 U.S. 228 (2012), in which the Supreme Court made clear that due process requires a trial court to conduct a preliminary assessment of the reliability of an eyewitness identification made *under suggestive circumstances arranged by law enforcement.* That is what happened in this case when Anderson law enforcement asked Agent Goolsby if the robber and murderer in the film clip was appellant even though he essentially admitted he could not even see his face.

Again, Agent Goolsby was shown a film clip of a black man wearing sunglasses with a hat on and asked by another branch of law enforcement whether this man was "Justin Warner." Goolsby confirmed to the Anderson police that the man in this surveillance tape they suspected was appellant was indeed appellant. On its face, that is a very unduly suggestive identification.

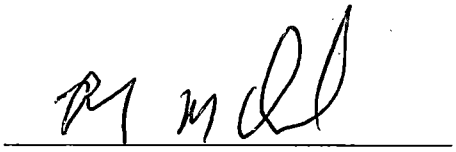
In State v. Liverman, the Supreme Court rejected the state's invitation to hold that the denial of the Neil v. Biggers pretrial hearing fully comported with due process requirements nonetheless. In Liverman, the witness also previously knew Liverman. Here, however, the identification of appellant was definitely procured by a state action. The Anderson police asked Agent Goolsby if the man in the film clip was appellant, and Goolsby confirmed that it was. Therefore, as the United States Supreme Court explained in Perry v. New Hampshire, 565 U.S. 228 (2012), due process concerns were implicated, and the trial court erred by denying appellant a preliminary judicial inquiry into the reliability of Goolsby's identification that was procured under unnecessarily suggestive circumstances arranged by law enforcement.

The fact that Agent Goolsby was not an eyewitness to the crime, but served the same function by identifying appellant from the BP surveillance film clip should not have been the deciding factor where Goolsby's identification of appellant from the film clip was critical evidence for the state during appellant's trial.

Appellant's conviction should be reversed based on the denial of his right to a Neil v. Biggers hearing.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Anderson County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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MAY 09 2018
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Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN JAMAL WARNER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Justin Jamal Warner, #372737, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 9th day of May, 2018.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of May, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.