STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

RECEIVED
JAN 07 2019
SC Court of Appeals

Honorable R. Keith Kelly, Circuit Court Judge

Opinion No. 2018-UP-391 (S.C. Ct. App. Filed October 24, 2018)

2015-GS-42-04753; 04752; 04754; 042754A

THE STATE,

RESPONDENT,

V.

COREY ANDREW BROWN,

PETITIONER

APPELLATE CASE NO 2016-001536

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

CERTIFICATE OF COUNSEL 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT

The Court of Appeals erred in upholding the trial judge's denial of petitioner's motion to suppress the identification testimony in this case as it was tainted and inadmissible because the same emanated from a suggestive pre-trial out-of-court identification based on a media representation where a store worker identified petitioner as the perpetrator after viewing said media feeds where government involvement was connected to the media feeds and as a result, the witness identification at issue should have been dismissed or at the very least tested under Neil v. Biggers.[1] 4

CONCLUSION 10

---

[1] Neil v. Biggers, 409 U.S. 188 (1972).

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that pursuant to the Court of Appeals' opinion issued on October 24, 2018[2], affirming petitioner's convictions and sentences, a petition for rehearing was filed on November 8, 2018, which was denied on December 13, 2018.

[2] State v. Corey Andrew Brown, Unpublished Opinion No. 2018-UP-391 (S.C.Ct. App filed October 24, 2018)

QUESTION PRESENTED

The Court of Appeals erred in upholding the trial judge's denial of petitioner's motion to suppress the identification testimony in this case as it was tainted and inadmissible because the same emanated from a suggestive pre-trial out-of-court identification based on a media representation where a store worker identified petitioner as the perpetrator after viewing said median feeds where governmental involvement was connected to the media feeds and as a result, the witness identification at issue should have been dismissed or at the very least tested under Neil v. Biggers.[3]

[3] Neil v. Biggers, 409 U.S. 188 (1972).

STATEMENT OF THE CASE

Petitioner Corey Andrew Brown was convicted of first degree assault and battery, kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime during the July 2006 term of the Spartanburg County General Sessions Court before Judge R. Keith Kelly. Petitioner was sentenced to imprisonment for an aggregate period of thirty-five years. Paul K. Neely and J. Roger Poole represented petitioner at trial and Assistant Solicitor Joe Barnette appeared on behalf of the state.

Petitioner appealed his convictions and sentences, but his case was affirmed on appeal. See State v. Brown, Unpublished Opinion No. 2018-UP-391 (S.C. Ct. App. filed October 24, 2018). App. 1-2. A petition for rehearing was filed on November 8, 2018. App. 3-10. On December 13, 2018, the petition for rehearing was denied. App. 11. This petition for writ of certiorari to review the decision of the South Carolina Court of Appeals follows.

ARGUMENT

The Court of Appeals erred in upholding the trial judge's denial of petitioner's motion to suppress the identification testimony in this case as it was tainted and inadmissible because the same emanated from a suggestive pre-trial out-of-court identification based on a media representation where a store worker identified petitioner as the perpetrator after viewing said media feeds where government involvement was connected to the media feeds and as a result, the witness identification at issue should have been dismissed or at the very least tested under Neil v. Biggers.[4]

At trial, Mindy Slotin testified that she was working at her husband's Imagination Store located in downtown Spartanburg on the afternoon on August 7, 2015, when a male and female entered to pay for an item previously selected. Slotin testified that after she answered the male's question about another toy, "the next thing she realize[d] [was that] she was laying on the floor [and] he had a gun pointed at [her] face and he had hit [her] in the head with the gun." Slotin added further that the man duck taped her hands, took her ring, led her to the cash register at gunpoint, made her open the cash register, and then led her into the back storage room where he taped her ankles and then fled. R. 55, l. 9 – R. 60, l. 6. Slotin stated she saw the man who was "duct taping" her and made an in-court identification at trial pointing to petitioner as the perpetrator in the case. R. 60, l. 18-24; R. 76, l. 10-25. State's witness Sandra Elaine Pearson testified that she was with petitioner inside the store on the date in question and saw petitioner put a gun to Slotin's head, and that she witnessed him taping her and leading her to the cash register and then to the storage room before fleeing. R. 85, l. 10 – R. 99, l. 4.

---

[4] Neil v. Biggers, 409 U.S. 188 (1972).

Prior to trial, defense counsel objected to the use of the identifications made by Slotin in the case in effect because it was tainted by "the out of court [media] identification" thereby making it "so unreliable...it would create a substantial likelihood of misidentification." R. 4, l. 16 – R. 4, l. 2. Here, the store owner's wife, who was the subject of the attack, called the police station after the incident and advised Investigator Kirky that she saw a mug shot of petitioner on the local evening news in connection with a report about the case and recognized that the mugshot was a picture of the perpetrator. The picture in question was a photograph of petitioner. R. 19, l. 6 – 12; R. 25, l. 13 – R. 26, l. 15. This was problematic because after the crime, Slotin stated that she could only describe the perpetrator's clothing and height (much taller - not exact height), but not his "eyes" or "nose". R. 24, l. 11 – R. 25, l. 12. Defense counsel argued that the source of that news report would be from some police action, and that the "Bigger" standard applied in the case. R. 4, l. 3-20; R. 3, l. 16 – 23. Counsel argued that the "crux of [his] argument" was that Slotin's "[in-court] identification [was] based off the identification that she made when she saw his mugshot on the news" and in effect that the resulting in-court identification was "tainted" and ultimately unreliable. The solicitor argued that there was no governmental involvement connected to the news media report in question and that the media acted alone. R. 5, l. 4 – R. 7, l. 4.

Defense counsel's response was that this was an ongoing investigation because the incidents occurred on August 7, 2015, and then three days later on August 10, 2015, the news received the information from local police (the mugshot) and the story was then aired on television. Counsel argued that the media received the information in the case from law enforcement.

Defense Counsel outlined his objection as follows:

> Your Honor, to allow her to sit on that witness stand and point at [petitioner] and say that that's the man that did it, she's absolutely gonna (sic) be able to just point at the man whose mugshot she saw on tv. At this point, because a law enforcement's involvement in the identification of [petitioner] through that news source, [i.e.] her in-court identification is gonna be so tainted that she's only gonna [sic] see the man whose mug shot was on that news so to allow her to make an in-court identification based on an unreliable out-of-court identification would violate [appellant's] due process rights. R. 9, lines 3 – 13.

The solicitor's response follows:

> <u>Your honor...the newspaper always gets their news from law enforcement reports and everything of from mug shots or whatever, they put this information in news. All these cases the police they have to make a case and then it comes out at that point.</u> To argue that the police intentionally did this, this is not intentional from that stand point. R. 9, lines 15-21.

At the in-camera hearing that followed, Mindy Slotin testified as follows:

> Q: And you identified, your identification [was] based on what you see in the courtroom today, is that right ma'am?
>
> A: Absolutely, it's the same guy, there's not a doubt in my mind.
>
> Q: But ya (sic), also saw it's obviously saw his mug shot at some point a couple of days afterwards, is that right, ma'am?
>
> A: I did but the police never, the police...when I saw them said, I told them that I had seen the mug shot, they said well we can't, we're not even gonna (sic) bother askin' you for identification because you just saw a mug shot. R. 19, l. 2 – 12.

Thus, even police officers realized that the error and stated the following:

> We can't, we're not even gonna (sic) bother asking you for identification because you just told us you saw a mug shot. R. 19, l. 9 – 12.

Slotin stated that she was extremely upset when this happened on August 7, 2015, and could only identify the perpetrator's height (5'10") and that she left town on August 8, 2015, which meant she did not see any photographic line up, but that she saw the media shot on August 10, 2015, and then saw a name in the paper as to who had been arrested in the case. R. 24, l. 13 – R. 26, l. 15; R. 27, l. 3 – R. 28, l. 2.

At the close of Slotin's testimony, the trial judge found no governmental involvement in the case because of the short period of time in which these events in question occurred and thus ruled her in-court identification would be admissible at trial. R. 29, l. 25 – R. 31, l. 19; R. 35, l. 3 – R. 36, l. 11. On appeal, petitioner argued as follows:

> The trial judge erred in allowing identification testimony into evidence that emanated from a suggestive pre-trial out-of-court media identification based on a media representation [from] a store worker who identified [petitioner] as the perpetrator based action connected to the media coverage, which in turn meant that the identifications were unreliable and inadmissible at trial.

On appeal, the South Carolina Court of Appeals held as follows:

> **PER CURIAM:** Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Govan*, 372 S.C. 552, 556, 643 S.E.2d 92, 94 (Ct. App. 2007) ("The decision to admit an eyewitness identification is in the trial [court's] discretion and will not be disturbed on appeal absent an abuse of that discretion, or the commission of prejudicial legal error."); *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972)(setting forth a two-part inquiry to determine the admissibility of an out-of-court identification: first, a court must determine whether the identification process was suggestive; next, it must determine whether the identification, under the totality of the circumstances, was nevertheless reliable such that there was no substantial likelihood of misidentification), *State v. Wyatt,* 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017) ("The Supreme Court of the United States has repeatedly emphasized 'that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." (quoting *Perry v. New Hampshire*, 565 U.S. 228, 238-39 (2012))); *State v. Dukes*, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013) ("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."); *State v. Tisdale*, 338 S.C. 607, 527, 612,527 S.E.2d 389, 392 (Ct. App. 2000) ("Although the reliability of an identification may be affected by media identification, no police deterrence would be achieved by excluding evidence

where there has been no governmental involvement. Thus, we hold that the *Neil* analysis is inapplicable where there is a nongovernmental identification source.").

GOVERNMENT INVOLVEMENT IN MEDIA COVERAGE

Clearly, this case is not on point with this Court's interpretation of State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (2000). In Tisdale, where three bank tellers recognized the robber from the media (one teller saw Tisdale's arrest on television and two tellers saw a photograph of Tisdale in the newspaper), the Court held that the media identifications from the three bank tellers did not involve state action by the police and that no Neil analysis was needed. In the case at bar, however, the solicitor stated that "the newspaper always gets their news from law enforcement reports," which in turn meant that the police, acting as an arm of the state in this case, according to the solicitor's own words, communicated petitioner's suspect status to the media complete with a photograph as news. There was no such admission by the prosecution in Tisdale. Therefore, in the case at bar, government action existed in connection with the media identification of petitioner as a suspect, and hence government action was involved and thus Neil was applicable in this case.

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. State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (2009). In determining whether an out-of-court identification can be admitted, a court must as certain whether the identification process was unduly suggestive and whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Neil v. Biggers, 409 U.S. 188 (1972). Moreover, when determining the likelihood of misidentification, The Biggers Court listed factors to be used to evaluate reliability under the totality of the circumstances:

1.) The witness' opportunity to view the perpetrator at the time of the crime;

2.) The witness' degree of attention;

3.) The accuracy of the witness' 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.

Although Slotin had an opportunity to view the perpetrator, she apparently was unable to focus her attention (she stated that incidents were stressful) because she could not give a detailed or accurate description of the perpetrator at all. Slotin's identification shaped up only after her media representation identification of petitioner as the perpetrator occurred. Not only was Slotin's identification tainted and reliable and thus inadmissible in that it stemmed from media coverage, but also her identification could not pass the Biggers[5] admissibility test.

ANALYSIS UNDER NEIL v. BIGGERS

Note further that in Tisdale, the Court admitted that the tellers' identifications were the result of suggestiveness and included an analysis under Neil v. Biggers notwithstanding its decision regarding the whether Neil was applicable. Moreover, in Tisdale, not only did the Court concede that "the media identifications were suggestive," but the Court went on to acknowledge other cases where appellate courts have "recognized the possibility... where the mind of a witness is so clouded by suggestions from non-governmental sources that a conviction based principally on the testimony of that witness violates due process" and renders the resulting identification "totally unreliable." This is what happened in the instant case. Slotin's identification was not reliable despite the appellate court's holding that no government

---

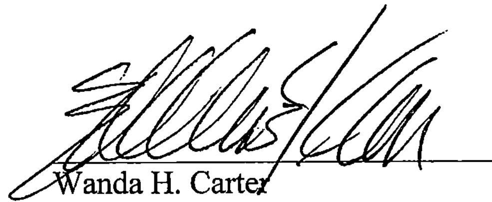
[5] Neil v. Biggers, 409 U.S. 188 (1972).

involvement existed as taint. Reliability is the linchpin in determining the admissibility of identification testimony; and further, the purpose of the strict rule regarding the inadmissibility of evidence of unnecessarily suggestive confrontations is to deter the police from using a less reliable procedure where a more reliable one night be available. Manson v. Braithwaite, 432 U.S. 98 (1977). The trial judge erred in allowing Slotin's identification testimony into evidence at trial in violation of the Due Process Clause of the Fourteenth Amendment, and the South Carolina Court of Appeals erred in upholding the trial judge's ruling in the matter.

CONCLUSION

Based on the forgoing argument, counsel for petitioner would request that this Court grant this petition and allow full briefing in the above raised points.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JAN 07 2019
SC Court of Appeals

Certiorari to Spartanburg County
Honorable R. Keith Kelly, Circuit Court Judge

Opinion No. 2018-UP-391 (S.C. Ct. App. filed 10/24/2018)
2015-GS-42-04753; 04752; 04754; 042754A

THE STATE,

RESPONDENT,

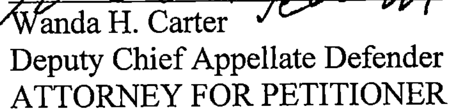
V.

COREY ANDREW BROWN,

PETITIONER

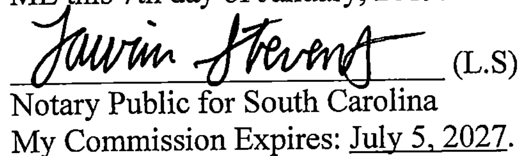
CERTIFICATE OF SERVICE

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 Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Corey Andrew Brown, #368883, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 7th day of January, 2019.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 7th day of January, 2019.


(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.