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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HENRY JERMAINE DUKES,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the judge err in refusing to find that the pre-trial hearing in regard to identification failed to comport with due process requirements when the detective who conducted the identification procedure was not available to testify?

2. Did the judge err in refusing to suppress the in court identification testimony when the out of court identification procedure used was unduly suggestive and created a substantial likelihood of irreparable misidentification?

STATEMENT OF THE CASE

In August of 2008, the Horry County Grand Jury indicted Dukes for murder, indictment #2008-GS-26-2911. On July 20, 2011, the Honorable Steven H. John heard pretrial motions. On August 1, 2011, Dukes proceeded to jury trial before Judge John. Attorney Jonathan Eric Fox represented Dukes during the pre-trial hearing and at trial. The jury found Dukes guilty and Judge John sentenced Dukes to 47 years. A timely notice of intent to appeal was filed on August 3, 2011. This appeal follows.

ARGUMENT

1. The judge erred in refusing to find that the pre-trial hearing in regard to identification failed to comport with due process requirements when the detective who conducted the identification procedure was not available to testify

The jury convicted Dukes of the murder of Andrico Gowans. The State's case against Dukes was based primarily on the identification testimony of Cornelius Ford. There was no forensic evidence linking Dukes to the murder. Prior to trial during the pre-trial hearing, Dukes argued that the State could not meet its burden in regard to the admission of Gowans' identification testimony when Detective Addison, the detective who conducted the identification procedure, was not available at trial. (R. p. 11, lines 15 – p. 12, lines 1-13). The judge found that he could not make that determination until he heard the testimony of Ford. (R. p. 12, lines 14-16). In a separate motion, Dukes then moved to suppress identification testimony of Ford based on the unduly suggestive identification procedure used that created a substantial likelihood of misidentification. (R. p. 29, lines 3-15).

The judge held a hearing pursuant to Neil v. Biggers¹. The State called Ford as a witness. (R. p. 29, line 21). Ford testified that on the morning of the shooting he was at Gowans' house and there was a knock on the door. (R. p. 32, lines 6-10). According to Ford, Gowans opened the door and Dukes came inside the house. (R. p. 32, lines 9-10). According to Ford, there was a brief conversation and then Dukes pulled out a gun and shot Gowans. (R. p. 32, lines 12- p. 33, lines 1-18). Ford testified that he had seen Dukes on two prior occasions. (R. p. 30, lines 7-13). Ford described the shooter as having a funny accent and a big smile. (R. p. 34, lines 3-8). After the shooting, Ford called his father, Rasheed Muhammad. (R. p. 38, lines 17 – p. 39, p. 40, lines 1-2). Muhammad came to the house

and met the police. Ford did not wait for the police and fled the scene when his dad arrived. (R. p. 40, lines 4-19). Later, at trial, Muhammad admitted that on the morning of the shooting, he did not tell police that his son had been at the house and he admitted that he lied about how he came to be at the house on the morning of the shooting. (R. pp. 85 – 90).

Later that evening the police contacted Muhammad about speaking with his son, Cornelius Ford. (R. p. 44, lines 6-10). Muhammad and Ford went to the police substation and met with a detective. (R. p. 44, lines 9-12). Ford testified, “When I went to get a interview I was giving – telling them what happened, and while I was talking – while I was talking to them they said they was going to get some pictures, like a photo book or whatever, but I seen like some pictures on the table, and when I seen the pictures on the table I pointed him out, because I knew that’s who it was.” (R. p. 34, lines 24 – p. 35, lines 1-5). Ford testified that the detective opened up his file to take notes and Ford saw three or four pictures inside the detective’s file. (R. p. 35, lines 12 – p. 36, 37, line 1).

After the testimony, Dukes again objected to the fact that Detective Addison was not available to testify about the identification procedure used in this particular case. (R. p. 50, lines 13-20; p. 50, lines 25 – p. 51, lines 1 – p. 52 lines 1-10). The judge found, “I do not find it is necessary for the Court to hear the testimony of the detective who is unavailable. I mean, there is no argument, Mr. Fox, that that detective is unavailable. He is in the service of his country in Afghanistan. It’s not possible for him to be at the trial. I mean, that’s clear, correct?” (R. p. 52, lines 12-18). Defense counsel agreed that the detective was unavailable. (R. p. 52 line 19). The judge then found, “All right, so with that circumstance, the Court does not find it obviously, number one, within the court’s power to

¹ 409 U.S. 188, 93 S.Ct. 375 (1972).

have him here. Secondly, I find it is not necessary for the court to make the determination on your motion to suppress the identification to have the testimony of the officer in this particular case.” (R. p. 52, lines 20-25). The judge erred. The detective’s testimony was necessary in order for the State to meet its burden in regard to the admissibility of the identification testimony. The pre-trial hearing in regard to identification testimony did not meet due process requirements.

In State v. Liverman, 727 S.E.2d 422 (2012), the South Carolina Supreme Court overruled State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973) creating a bright line rule excusing a Neil v. Biggers hearing where the eye witness knows the accused. In Liverman the defense requested a Neil v. Biggers hearing and the State objected, based on McLeod, because the witnesses knew the accused. The judge required the State to proffer the testimony of the witness. The judge first found the identification testimony admissible pursuant to McLeod. The judge then made a secondary finding that, under the totality of the circumstances, the identification testimony was admissible. The identification in Liverman involved an individual show up identification. In discussing the evidence presented in regard to the identification testimony the Court wrote, While the trial court required the State to submit evidence that has many of the traditional features of a Neil v. Biggers hearing (and the trial court made concomitant Neil v. Biggers findings), we decline to hold that the pretrial hearing fully comported with due process requirements. State v. Liverman, 727 S.E.2d at 427. The Court in Liverman then found that any error in the insufficient Neil v. Biggers hearing was harmless.

The identification hearing in the present case which included the testimony of the eye-witness and his father was the equivalent of the proffered testimony of the eye

witness in Liverman. The police who conducted the identification procedures in both Liverman and the present case failed to testify at the pre-trial hearings. As the South Carolina Supreme Court declined to find that the pre-trial hearing in Liverman comported with due process requirements, this Court should find that the identification hearing in the present case failed to comport with due process requirements. Unlike Liverman, the error was not harmless, as discussed below in issue two.

2. The judge erred in refusing to suppress the in court identification testimony when the out of court identification procedure used was unduly suggestive and created a substantial likelihood of irreparable misidentification.

After erroneously finding that the officer was not necessary for purposes of the Neil v. Biggers hearing, the judge found that the identification process was not suggestive. The judge stated:

It does not appear, even taking into consideration the report of the investigator, that there was any corrupting effect, that there was any intentional act, that there was any deliberate act, that there was any act by the police of a suggestive manner. The witness had already identified the Defendant prior to the – looking at the photographs. The seeing of the photographs was either done accidentally through the looking at a file or in a process that the Court finds was not suggestive in – in any manner, and therefore, based upon all that, the motion to suppress the identification is denied.

Ford, the eye witness, testified, “When I went to get a interview I was giving – telling them what happened, and while I was talking – while I was talking to them they said they was going to get some pictures, like a photo book or whatever, but I seen like some pictures on the table, and when I seen the pictures on the table I pointed him out, because I knew that’s who it was.” (R. p. 34, lines 24 – p. 35, lines 1-5). Ford testified that the

detective opened up his file to take notes and Ford saw three or four pictures inside the detective's file. (R. p. 35, lines 12 – p. 36, 37, line 1). It is unclear what subsequent, if any, identification procedure was used because the officer was not available to testify. Even if inadvertent, allowing the witness to view a photograph of the defendant contained in the case file of the officer investigating the shooting is an unduly suggestive identification procedure. The court erred in finding that the procedure was not unduly suggestive.

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).

Considering the five Neil v. Biggers factors in the present case, the out-of-court identification, resulting from the unduly suggestive identification procedure, created a substantial likelihood of irreparable misidentification. Ford testified that he was in the hallway when the gun was pulled. (R. p. 32, lines 12 – 21). Ford testified, “Yes. I stood

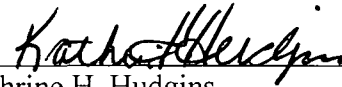
up when I seen him pull the gun out, and then he pointed the gun at me, and the victim - -
-” (R. p. 33, lines 2-3). While Ford was certain of his identification, the only description
given by Ford was that the shooter had a funny accent and a big smile or big mouth. (R.
p. 34, lines 3-8). Ford identified Dukes four to five hours after the shooting and after
Ford fled the scene. (R. p. 34, lines 13-17). Ford testified that he had seen Dukes briefly
on two prior occasions but there is no evidence that he knew Dukes. (R. pp. 30 – 31). In
contrast, the witness in Liverman knew the person he identified and provided police with
that person’s nickname.

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). 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 14
(1977) (citing Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247
(1968)); State v. Stewart, 275 S.C. 477, 272 S.E.2d 628 (1980). The unduly suggestive
identification in the present case created a very substantial likelihood of irreparable
misidentification. Both the out of court identification and the in court identification
should have been suppressed.

CONCLUSION

Based on the above arguments, Dukes' conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of January, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 3rd, 2013



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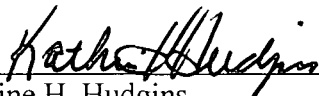
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CERTIFICATE OF SERVICE

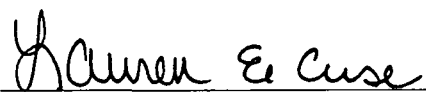
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of January, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of January, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: August 23, 2014 .