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JUL 26 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FREDERICK L. FLOWERS,

APPELLANT

APPELLATE CASE NO. 2012-212907

ANDERS BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
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South Carolina Commission on Indigent Defense
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STATEMENT OF ISSUE ON APPEAL

Did the trial court's admission of the witness's photo lineup identification of Appellant deprive him of due process where the witness admitted he only saw the side of the shooter's face and neck for a few seconds during a frantic shooting and where law enforcement made repeated and prolonged attempts to elicit an identification from the witness?

STATEMENT OF THE CASE

Appellant was indicted by the Charleston County grand jury on one count of murder and one count of possession of a firearm during the commission of a violent crime. R. *. On August 27, 2012, Appellant proceeded to trial before a jury and the Honorable J.C. Nicholson, Jr. Tr. 1. Mary A. Ford and Beattie I. Butler represented Appellant and D. Bruce DuRant represented the State. Tr. 1.

At the conclusion of the trial on August 31, 2012, the jury found Appellant guilty. Tr. Vol. 5 at 65-66. Judge Nicholson sentenced Appellant to forty years imprisonment for the murder charge and five years concurrent for the weapon charge. Tr. Vol. 5 at 84-85.

This appeal follows.

ARGUMENT

LAW ENFORCEMENT'S REPEATED AND PROLONGED ATTEMPTS TO ELICIT AN IDENTIFICATION FROM MR. SMITH MADE THE PROCEDURE UNNECESSARILY SUGGESTIVE AND CONDUCTIVE TO IRREPARABLE MISTAKEN IDENTIFICATION.

STATEMENT OF FACTS

Appellant Frederick Flowers stands six-foot-five and has a medium complexion. Tr. Vol. 1 at 61-62. On, March 1, 2011, he did not have twists in his hair. Tr. Vol. 1 at 60. That day, driving a low-sitting Toyota Celica, Mr. Smith paused in front of a house in North Charleston with a handful of people out front. Tr. Vol. 1 at 59, 115. In the passenger seat was Mr. Smith's son Jason, who got his dad to drive him to the house for a drug deal. Tr. Vol. 1 at 116. A man unknown to Mr. Smith approached the passenger side from the yard. Tr. Vol. 1 at 78. Mr. Smith described the unfamiliar man as between five-foot-nine and six feet with a slim build, dark complexion, and twists in his hair. Tr. Vol. 1 at 58, 107. With his son in the way, Mr. Smith only saw the side of the man's face and his neck. Tr. Vol. 1 at 56.

On March 9, 2011, by the end of his third meeting with Mr. Smith, Detective Osborne from the Charleston Police Department had Mr. Smith giving a description of the same man, who shot and killed his son in the Celica, as having no twists in his hair, a medium complexion, and wearing dark clothes; he was also identifying in a photo lineup a "guy who resembles the individual who shot [his] son" Tr. Vol. 1 at 55, 60-61, 93. He wrote in the comments section of the lineup that "this looked the closest to the person who shot my son." Tr. Vol. 56 at 56.

Mr. Smith had already met with Detective David Osborne on the day of the shooting and again the very next day. Tr. Vol. at 50. On the day of the shooting, Detective Osborne

and another detective conducted a tandem interview with Mr. Smith at the police headquarters. Tr. Vol. 2 at 96-97. He said he would have a hard time identifying the man because he did not get a very good look. *Id.* The officers showed him a number of photo lineups picturing including pictures of individuals the officers knew were present at the house during the shooting. Tr. Vol. 2 at 97. Detective Osborne testified Mr. Smith examined the pictures like he was trying to make an identification. Tr. Vol. 2 at 101. The officers repeatedly pressed Mr. Smith for an identification. Tr. Vol. 1 at 90. Nevertheless, Mr. Smith could not positively identify anyone, frequently studying and pointing to fillers who had nothing to do with the incident. Tr. Vol. 2 at 97-101. The best information he provided was that a few people “resemble[d] the person that was in the yard.” Tr. Vol. 2 at 99. Eventually, he ended up saying he was sixty-five percent sure one picture was the shooter, but he was reluctant to sign the identification. Tr. Vol. 2 at 101-102. His efforts were not helpful to the police:

A: Yes. He stated – I explained to him that 65 percent was not a positive identification.

Q: Okay. But y’all actually talked for like three or four minutes about him wanting to still make an I.D. of this person, correct?

A: No. I mean we weren’t forcing an I.D. on him. I don’t know –

...

A: — he was dancing around a good bit to where none of these lineups that were presented to him were of any value that we know of at the time. And mainly I say that because as I explained to the jury earlier was that he was hitting on fillers.

Q: Right.

A: People of no significance to the case at all.

Q: Okay.

A: So we had some issues there.

Tr. Vol. 2 at 102. The officers gave Mr. Smith “a very hard time” for not being helpful. Tr. Vol. 1 at 88-89.

In the second meeting, Detective Osborne brought in Mr. Smith to make another attempt to get an identification, but Mr. Smith was not feeling well and did not have the ability to look at a lineup and identify the shooter. Tr. Vol. 1 at 51. Detective Osborne charged Mr. Smith with obstruction of justice. Tr. Vol. 1 at 90.

He brought Mr. Smith in again on March 9 to elicit an identification. *Id.* He read Mr. Smith an admonition statement that he could either make a positive identification or no identification at all. Tr. Vol. 2 at 54-55. On the second lineup page, Mr. Smith pointed to Appellant, saying “[s]omething to the effect of this is the guy who resembles the individual who shot my son” Tr. Vol. 2 at 55. He would later claim he did not identify the shooter earlier because he wanted “street justice.” Tr. Vol. 1 at 80-81.

At the hearing in this case, Appellant’s trial counsel moved for a *Neil v. Biggers*¹ hearing, seeking to exclude Mr. Smith’s photographic identification. Tr. Vol. 1 at 48. Mr. Smith testified that he initially saw the shooter approach from twenty to thirty feet away. Tr. Vol. 1 at 77. However, “[w]hen he pulled up and turned the car off [he] looked over to . . . James and okay, we’re here. So basically I just looked forward.” Tr. Vol. 1 at 78. A few moments later he looked back towards the shooter approaching, but James blocked his view. *Id.* The shooter approached the passenger side, pulled a gun from behind his back, and shot

¹ 409 U.S. 188 (1992).

into the car. *Id.* The gun jammed, and in the remaining uncertain moments, Mr. Smith said he looked toward the shooter's face again:

A: He then began to aggressively try to reload the gun, very frantically, twitching, moving – moving extremely fast as I said bobbing back from the car to avoid James from grabbing the gun or being able to grab a hold of him; whatever the case may be. And then he sticks the gun back in to the car and fires it two more times.

Q: Did you get a good look at his face when he was messing with the gun?

A: Yes, definitely.

Q: And what happened after he shot those other two shots?

A: After he shot the other two shots as he was trying to reload the gun I was trying to start the car. During the two shots the car gets started and I began to move. . . .

Tr. Vol. 1 at 79. All of this happened within three or four seconds. Tr. Vol. 1 at 104. Mr. Smith admitted he could not even remember the colors of the clothes the man was wearing. Tr. Vol. 1 at 86.

The trial court ruled that under the totality of the circumstances, the identification was reliable and admissible. Tr. Vol. 1 at 111.

DISCUSSION

Detective Osborne's repeated and prolonged attempts to elicit an identification from Mr. Smith made the procedure unnecessarily suggestive and conducive to irreparable mistaken identification. 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*, 409 U.S. 188 (1992), the United States

Supreme Court created a two-prong inquiry to determine the admissibility of out-of-court identifications. First, the trial court must ascertain whether the identification process was unduly suggestive. Next, the trial court must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.* at 198.

Our courts have found some identification procedures patently suggestive. For example, in *State v. Traylor*, 360 S.C. 74, 600 S.E.2d 523 (2004), our Supreme Court held a line-up procedure wherein three victims were in the same room, sitting within feet of each other, while observing photographic line-ups was blatantly unacceptable. *Id.* at 81-82, 600 S.E.2d at 527.

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); *Moore*, 343 S.C. at 286, 540 S.E.2d at 447. The central issue is whether the identification was reliable even though the confrontation procedure was suggestive under the totality of the circumstances. *Id.* The following factors should be considered when evaluating the totality of the circumstances: (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; and (5) the length of time between the crime and the confrontation. *Id.* at 199; *see also State v. Stewart*, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

In this case, Detective Osborne's repeated and prolonged attempts to elicit an identification from Mr. Smith made the procedure unnecessarily suggestive and

conducive to irreparable mistaken identification. First, the manner in which Detective Osborne obtained the identification was patently suggestive. Between March 1 and March 9, he accosted and brought in Mr. Smith three separate times to make an identification. In the first meeting, officers repeatedly pressed Mr. Smith for an identification. In that meeting and in the following meeting, Mr. Smith expressly informed the officers he could not make an identification, and he did nothing more than dance around fillers. The officers overtly gave him a hard time because he was creating "issues" for them. Finally, the identification then only came after Detective Osborne charged Mr. Smith with obstructing justice.

Taken together, these factors show Detective Osborne's actions were calculated to squeeze out of Mr. Smith the identification of *some* person, if not any particular person. Considering the number of times and duration of the meetings and the conduct of the officers, the natural result was for Mr. Smith either to consciously but reluctantly make an identification of some person to appease law enforcement or to make himself believe he ought to be able to make an identification and convince himself through confabulation that one of the pictures showed the shooter's face.

Secondly, the identification procedures were conducive to irreparable mistaken identification. Mr. Smith did not give a second glance to the shooter when he first saw him at twenty to thirty feet, before he turned his attention forward. The next time he looked over, the shooter was obstructed by James in the passenger seat. He claims he got a good look during the tumult of the actual shooting; however, he said the opportunity to view the shooter at that point was only three or four seconds, and all the while the shooter was twitching and jittering around very frenetically. Moreover, Mr. Smith admitted he was preoccupied with the danger and the panic erupting from the muzzle of the gun and with

starting up the ignition and driving the vehicle down the road in front of him over measuring the shooter's facial features.

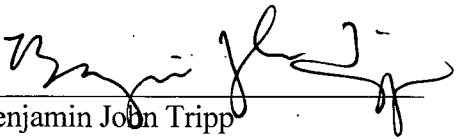
Mr. Smith also gave a description of the shooting starkly different from Appellant's appearance. Appellant stands six-foot-five and has a medium complexion, and he had a plain hair style on the day of the shooting. Mr. Smith described the shooter as medium height with a dark complexion and twists. When he did end up resting on Appellant's photo, he made a point to write in the comments section of the page "this looked the closest to the person who shot my son." And while Mr. Smith's story was that he initially intentionally misled police with the description, he never wavered in conceding he only ever saw the side of the shooter's face and his neck. In fact, at trial he could not even remember the colors of the clothes the shooter was wearing.

Balancing the suggestiveness of the identification meetings with the factors bearing on the reliability of the identification, nothing in this case suggests that the generation of the out-of-court identification and the presentation of this evidence to the jury rose above the level of depriving Appellant of due process of the law.

CONCLUSION

For the foregoing reasons, Appellant requests that this Court reverse the decision of the trial court and remand for a new trial.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of July, 2013.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Frederick L. Flowers 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 J. C. Buddy Nicholson, Jr., which was held on August 31, 2012, and, in his 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 him as counsel for Frederick L. Flowers.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

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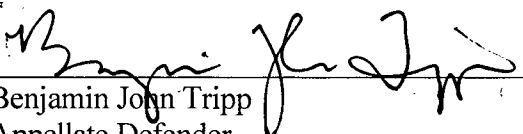
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript

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

July 26th, 2013


Benjamin John Tripp
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Attorney for Appellant

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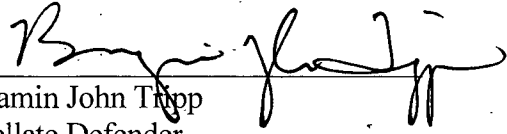
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SC Court of Appeals

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 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."

July 26, 2013



Benjamin John Tripp
Appellate Defender

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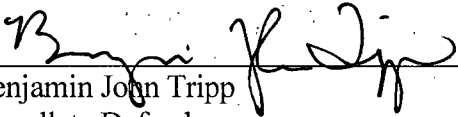
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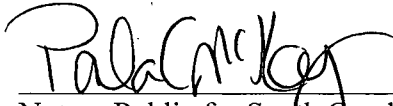
CERTIFICATE OF SERVICE

The undersigned attorney 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 Donald J. Zelenka, 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 and Record on Appeal have been served on Frederick L. Flowers, #352185 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 26th day of July, 2013.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of July, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

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