

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

Honorable Roger M. Young, Circuit Court Judge

RECEIVED
SEP 17 2018
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MAURICE DEMON MITCHELL,

APPELLANT

APPELLATE CASE NO 2017-002474

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to suppress identification testimony and evidence when the identification procedure used was unnecessarily suggestive rendering the identification unreliable?

STATEMENT OF THE CASE

In June of 2016, the Hampton County Grand Jury indicted Appellant, Maurice Demon Mitchell, for murder, burglary first degree, possession of a weapon during the commission of a violent crime and possession of cocaine base, indictments #2015-GS-25-369, 373, 375, 2016-GS-25-229. On November 27, 2017, Appellant proceeded to jury trial before the Honorable Roger Young. Stephen T. Plexico represented Appellant at trial. Solicitor Isaak McDuffie Stone and Deputy Solicitor Sen P. Thorton prosecuted the case. The jury returned verdicts of guilty as charged. Judge Young sentenced Appellant to life without parole for murder and burglary, five (5) years concurrent for the weapon charge and three (3) years concurrent for the drug charge. A timely notice of intent to appeal was served on November 30, 2017. This appeal follows.

STANDARD OF REVIEW

“[W]hether 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) (finding show-up identification unreliable as a matter of law); see also State v. Traylor, 360 S.C. 74, 81-82, 600 S.E.2d 523, 526-27 (2004) (citing Moore and holding that photographic line-up procedure was “patently suggestive”). “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 such, or the commission of prejudicial legal error.” Moore at 288, 540 S.E.2d at 448. “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. Questions of law are reviewed *de novo*. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

ARGUMENT

The trial judge erred in refusing to suppress identification testimony and evidence when the identification procedure used was unnecessarily suggestive rendering the identification unreliable.

The jury found Appellant guilty of the fatal shooting and beating of Eddie Mole on October 28, 2015. Shelleveese and Rodney Stokes lived in the apartment next door to the deceased. (R. p. 34, line 21 – p. 35, lines 1-3; p. 45, lines 1-5). On the day of the incident the Stokes saw a man with a gun standing over the deceased. (R. p. 35, line 19 – p. 36, lines 1-25; p. 45, lines 16-24). Shelleveese Stokes testified that the man she saw standing over the deceased also lived in the apartment complex. (R. p. 36, lines 6-17). The Stokes called 911 and officers with the Hampton Police Department arrived at the apartment complex. (R. p. 37, lines 13-16; p. 20, line 15 – p. 21, lines 1-21). Sergeant Rhett Long with the Hampton Police Department saw a suspect run into the woods. (R. p. 21, lines 2-6). Appellant was arrested coming out of the woods behind the apartment complex. (R. p. 56, line 14 – p. 57, lines 1-7).

Sergeant Long showed the Stokes a six-person photo line-up containing Appellant's photo. The Stokes identified Appellant as the man they saw standing over the deceased. (R. p. 40, lines 2-21; p. 48, line 6 – p. 49, lines 1-25). Prior to trial the judge conducted an identification hearing pursuant to Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). (R. pp. 19 - 54). After the hearing Appellant argued that the line-up was suggestive because the photo of Appellant was "a closer up shot," centered with Appellant having a different skin tone. (R. p. 52, lines 18-23). Appellant also argued that the identification procedure was unduly suggestive because the Sergeant never told the witnesses that the suspect

might not be in the line-up. (R. p. 52, line 24 – p. 53, lines 1-4). The judge denied the motion to suppress the identifications of Appellant stating:

Well, I don't really find a significant difference in the photographs. There is a color print on one of them and a black and white on the other. The shades between one and the other really aren't significant. The procedure was to get SLED to generate it and it wasn't put together by the officer who showed it to them. It looks like the witnesses had ample opportunity to view the crime. They were there when it happened. They were fully focused on what was going on and wasn't a peripheral vision. It was alarmingly close. They were absolutely certain of who it was. They knew the person, the defendant, ahead of time. There was a very short period of time between the time the crime took place and the time of identification. I don't find anything at all that's impermissibly suggestive in the procedure nor was there anything unduly suggestive in the lineup or the process of identification. So the motion is denied.

(R. p. 53, line 21 – p. 54, lines 1-12). Appellant renewed the objection to the identification when the State moved to introduce the photo line-ups. (R. p. 155, lines 11-16; p. 164, lines 25 – p. 165, lines 1-4). The judge overruled the objection. (R. p. 155, line 17; p. 165, line 5). The trial judge erred in refusing to suppress the identifications of Appellant by the Stokes.

In State v. Wyatt, 421 S.C. 306, 310–11, 806 S.E.2d 708, 710 (2017), the South Carolina Supreme Court wrote:

When a defendant challenges the admissibility of a witness's identification, trial courts employ a two-pronged inquiry to determine whether due process requires suppression. Biggers, 409 U.S. at 198-200, 93 S.Ct. at 381-82, 34 L.Ed. 2d at 410-11; State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). First, the court must determine whether the identification resulted from “unnecessarily suggestive” police identification procedures. Biggers, 409 U.S. at 198-99, 93 S.Ct. at 381-82, 34 L.Ed. 2d at 410-11; Liverman, 398 S.C. at 138, 727 S.E.2d at 426. 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.” Perry v. New Hampshire, 565 U.S. 228, 238-39, 132 S.Ct. 716, 724, 181 L.Ed. 2d 694, 707 (2012) (citing Manson v. Brathwaite, 432 U.S. 98, 107, 109, 97 S.Ct. 2243, 2249, 2250, 53 L.Ed. 2d 140, 149, 151 (1977), and Biggers, 409 U.S. at 198, 93 S.Ct. at 382, 34 L.Ed. 2d at 411); see also Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (describing the trial court's task under the first prong as determining “whether the identification resulted from unnecessary and unduly suggestive police procedures”). If the court finds the police procedures were not suggestive, or that

suggestive procedures were necessary under the circumstances, the inquiry ends there and the court need not consider the second prong. See United States v. Sanders, 708 F.3d 976, 984 (7th Cir. 2013) citing Perry for the proposition that “courts will only consider the second prong if a challenged procedure does not pass muster under the first”); State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013) (same).

The photo line-up in the present case was unnecessarily suggestive based on the fact that the photo of Appellant stood out from the other photos and the fact that the Sergeant implied that the suspect’s photo was included in the line-up. The first Biggers prong is met. As to the second prong, reliability, in State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012), the South Carolina Supreme Court wrote:

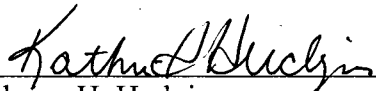
Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of 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 factors above, the out of court identifications in the present case were not so reliable that no substantial likelihood of misidentification existed. Shelleveese Stokes gave a general description of the subject as a black male wearing blue jean pants and a white shirt. (R. p. 42, lines 21-24). Although she knew Appellant’s name, she did not provide a name to the police. (R. p. 43, lines 1-7). Rodney Stokes also provided a vague description of the suspect. (R. p. 51, line 26 – p. 52, lines 1-10). The out of court identification resulting from the unnecessarily suggestive police procedure created a substantial likelihood of irreparable misidentification. Under the totality of the circumstances, the identification was not reliable. The judge erred in refusing to suppress the photo line-up and identification testimony by the

Stokes because it was the result of an unnecessary and suggestive identification procedure and was unreliable.

CONCLUSION

Based on the above argument this Court should reverse the convictions and sentences and remand the case for a new trial.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of September, 2018.

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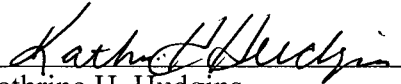
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Maurice Demon Mitchell states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Roger M. Young, which was held on November 27 - 30, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, She asks the Court to relieve her as counsel for Maurice Demon Mitchell.

Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

This 17th day of September, 2018.

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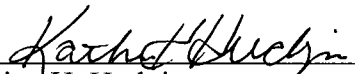
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments and sentencing sheets;
- (2) Trial transcript pages 1-407;
- (3) State's Exhibits #1, #2, #3, #4 – photo line-ups;
- (4) State's Exhibit #12 – Miranda Rights Form;
- (5) State's Exhibit #55 – 2 page written statement.

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

September 17, 2018


Kathrine H. Hudgins
Appellate Defender

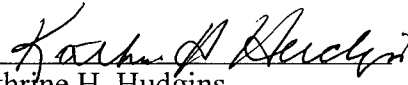
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ATTORNEY FOR APPELLANT

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."

September 17, 2018.


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Appellate Defender

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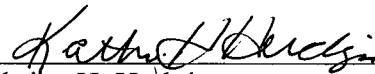
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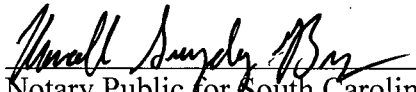
APPELLANT

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 Melody J. Brown, 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 Maurice Demon Mitchell, 331615, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 17th day of September, 2018.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of September, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2018.