

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable Daniel D. Hall, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JONATHON ALEXANDER PHILLIPS,

APPELLANT

APPELLATE CASE NO. 2016-000324

FINAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
P.O. Box 11589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the court err by admitting the store clerk's out-of-court and in-court identification of Appellant as the armed robber in violation of Appellant's due process rights when the identification procedure used by law enforcement, specifically showing the clerk a single photograph of Appellant taken after his arrest, was unduly suggestive and tainted the clerk's identification making it so unreliable that a substantial likelihood of irreparable misidentification existed?

STATEMENT OF THE CASE

A York County Grand Jury indicted Appellant on November 12, 2015 for armed robbery. R. 172. His case was called to trial on February 11, 2016 before the Honorable Daniel D. Hall, and a jury. R. 1. Assistant Solicitors Blaine Fleming and Daniel Porter represented the state, and Melissa Inzerillo represented Appellant. R. 1.

On February 11, 2016, the jury found Appellant guilty. R. 165, ll. 7-14. Judge Hall sentenced him to fifteen years' imprisonment. R. 171, ll. 3-9.

This appeal follows.

STATEMENTS OF THE FACTS

Shortly after midnight on the morning of August 13, 2015, a young black man entered the Murphy Express, a convenience store in Lake Wylie, and allegedly robbed the store. After retrieving a beer from the cooler, the man placed the beer on the counter and handed the store clerk a five dollar bill. When the clerk opened the cash register, the man handed the clerk a note written on cardboard that allegedly read, "Give me all the money." The clerk claimed that when he looked up, the man lifted his shirt and showed him a pistol "tucked" in his waistband. The clerk collected all of the cash from the till and handed it to the man, who then "took off out the door." R. 12, l. 14 – 13, l. 19; R. 53, l. 2 – 54, l. 20.

The clerk immediately called the police. R. 54, ll. 18-20. He told the responding officers that the robber was a black male in his mid-twenties with "short-shaved" hair wearing a brown shirt and "camo" shorts. He also described the man as approximately 5'9" and one hundred and forty-five pounds. R. 13, ll. 19-25; R. 17, ll. 4-18. The clerk recorded this description in a written statement he gave to law enforcement that morning. While the clerk later claimed the robber had a beard and a "bloodshot" left eye, he did not tell law enforcement about these details that morning nor did he include them in the written statement he provided. R. 74, ll. 13-16.

Security cameras at the store captured the man getting a beer from the cooler and the interaction between the man and the clerk at the counter. The footage failed to corroborate the clerk's allegations that the man showed him a pistol. The footage never shows the man with a weapon. R. 80, ll. 13-16; See State's Exhibit No. 12 (Surveillance Video).

On the afternoon after the robbery, law enforcement released still shots from the surveillance footage to the media in an attempt to identify the robber. Based on a tip from an individual identifying the man in the footage as Appellant, police arrested Appellant on August 17,

2015, four days after the robbery. R. 92, l. 1- 93, l. 16; R. 97, l. 8 – 100, l. 24; R. 107, l. 1 – 108, l. 14.

On August 18, 2015, now five days after the robbery, a detective with the York County Sheriff's Office showed the store clerk the photograph of Appellant taken the previous day when he was booked into the local detention center. The clerk identified Appellant as the man who robbed the Murphy Express. This was the only photograph the officer showed the clerk. R. 17, l. 21 – 19, l. 8. In this picture, which was a headshot, Appellant had a noticeable red or “bloodshot” left eye. R. 174. That very same night after viewing the photograph, the clerk provided law enforcement with a second written statement. In this statement, the clerk *for the first time* claimed the robber had a red left eye. R. 124, l. 20 - 125, l. 8.

***Neil v. Biggers*¹ Hearing and Motion to Suppress**

Appellant moved pretrial to suppress the out-of-court identification of Appellant made by the store clerk and any subsequent in-court identification based on the unduly suggestive procedure used by the detective that tainted the clerk's identification.

The clerk testified *in camera* that on the morning of the robbery he described the robber as a black male in his mid-twenties with a “short-shaved” haircut. He also provided a height, weight, and clothing description. R. 17, ll. 13-20. The clerk gave this description to the 911 operator and included it in the written statement he gave to police that morning. R. 16, l. 20 – 17, l. 20.

Five days after the robbery, Detective Eddie Strait showed the clerk a photograph of Appellant. The clerk admitted that this was the *only* picture he was shown. R. 19, ll. 6-8. In the picture, which is only a headshot, Appellant has a noticeable red or “bloodshot” left eye. R. 18, l. 24 – 19, l. 8; R. 174. The clerk identified Appellant as the robber. That same night, the clerk gave

¹ Neil v. Biggers, 409 U.S. 188, 198 (1972).

the police a second written statement. In this statement, the clerk asserted the robber had a red left eye *for the first time*. In his *in camera* testimony, based on a leading question from the solicitor, the clerk claimed he verbally told the responding officers on the morning of the robbery that the robber had a bloodshot eye. R. 21, ll. 9-15. Despite completely failing to mention the bloodshot left eye to the 911 operator or in his first statement, the clerk maintained that the red left eye “was the prominent feature [he] remembered” about the robber. R. 19, ll. 14-21.

However, the clerk admitted that he “[m]ight’ve forgotten” to mention that the individual also had a beard. The first time he asserted the robber had a beard was at trial. R. 74, ll. 13-16. Significantly, Appellant had a beard in the booking photograph shown to the clerk by Detective Strait five days after the robbery. R. 174.

During his *in camera* testimony, the clerk admitted that he did not pay attention to the robber before he approached the counter. However, he claimed his interaction with the robber at the counter lasted about thirty to forty-five seconds. R. 16, ll. 14-19. Notably, the clerk did not testify about his degree of attention to the robber during the robbery, whether he was able to obtain a good look at the robber’s face or his facial features, or about any of the conditions inside the store that would have affected his ability to view the robber, such as the lighting or whether there were any objects obstructing his view of the robber. The clerk also never testified about his level of certainty regarding his identification.

During arguments, defense counsel challenged the accuracy of the clerk’s prior description of the robber. She emphasized that the clerk did not claim the robber had a red eye until after he was shown the booking photograph of Appellant five days after the robbery. She also argued the clerk did not mention the red eye in his first written statement to the police on the morning of the

robbery or verbally to the responding officers. She concluded that the out-of-court identification was not reliable. R. 43, l. 17 – 44, l. 15.

The court ultimately found the clerk's out-of-court identification of Appellant was reliable.

In support of this ruling, the court said:

He [the store clerk] did indicate that he spent 30 to 45 seconds of interaction with the defendant while he was at the counter, that he . . . had details about him coming to the counter with beer, that he received a note from the defendant to give . . . all the money, he indicated that he looked up at the defendant and said, really; he saw him lift up his shirt, saw the pistol; he saw the defendant ask for any hundred bills that are under the drawer. He testified that he handed the defendant what money he had and the beer and that during that time he was able to get a - - was able to - - those are circumstances in which his identification is reliable.

R. 44, l. 16 – 45, l. 5.

ARGUMENT

The court erred by admitting the store clerk's out-of-court and in-court identification of Appellant as the armed robber in violation of Appellant's due process rights when the identification procedure used by law enforcement, specifically showing the clerk a single photograph of Appellant taken after his arrest, was unduly suggestive and tainted the clerk's identification making it so unreliable that a substantial likelihood of irreparable misidentification existed.

The store clerk's out-of-court and subsequent in-court identification of Appellant as the robber should have been suppressed since the one-photograph identification procedure used by law enforcement was unduly suggestive and tainted the clerk's identification making it so unreliable that a substantial likelihood of irreparable misidentification existed.

"An out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification." State v. Dukes, 404 S.C. 553, 557, 745 S.E.2d 137, 139 (Ct. App. 2013) (citing State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012)). "A witness' subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of *irreparable* misidentification." Id. (citing State v. Taylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004)) (emphasis in original).

In Neil v. Biggers, 409 U.S. 188, 198 (1972), the United States Supreme Court articulated a set of factors by which a trial court judge should evaluate both out-of-court identifications and their subsequent use by a witness in court. Those factors include: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the

accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Id. at 199. The Court said the trial judge should look at the totality of the circumstances when evaluating the likelihood of misidentification. Id. at 196. "Reliability is the linchpin in determining admissibility of identification testimony" and the Biggers factors must be weighed against the "corrupting effect of the suggestive identification itself." Manson v. Braithwaite, 432 U.S. 98, 114 (1977).

The United States Supreme Court recognized that single photographic lineups are inherently suggestive. Simmons v. United States, 390 U.S. 377, 383 (1968). The Court explained that after a suggestive lineup, such as using a single photograph, "the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." Id. at 383-384.

Here, the detective showing the store clerk a single photograph of Appellant five days after the robbery and less than six months before trial was unduly suggestive because it was a single photograph lineup conducted by a governmental agent. See Simmons, 390 U.S. at 383. This suggestive identification procedure used by Detective Strait tainted the clerk's out-of-court and subsequent in-court identification of Appellant as the man who robbed the Murphy Express. An analysis of the Biggers factors demonstrates the unreliability of the identification.

While the clerk failed to specifically testify about his opportunity to view the robber and his degree of attention, neither factor supports a reliable identification. The clerk admitted that he did not pay attention to the robber in the store until he approached the counter to pay for the beer. R. 53, ll. 18-22. He claimed his interaction with the robber lasted about thirty to forty-five

seconds. R. 16, ll. 14-19. However, once the robber was at the counter, the surveillance footage shows the clerk's view of the robber was obstructed during part of their interaction by the register and what appears to be a lottery ticket display. It also appears from the footage that the clerk did not pay much attention to the man until the man presented the cardboard note and even then, the clerk is looking down and is focused on the register and collecting the cash from the till. See State's Exhibit No. 12 (Surveillance Video).

The clerk's prior description of the robber was also not accurate. On the morning of the robbery when describing the robber to the 911 operator, the clerk never stated the man had a beard or a "bloodshot" left eye despite claiming that the red eye "was the prominent feature [he] remembered." R. 19, ll. 14-21. The clerk also failed to mention the beard or the red left eye in the written statement he gave to law enforcement immediately after the robbery. These are the two main features visible in Appellant's booking photograph, which again is only a headshot, that was shown to the clerk five days after the robbery. Surprisingly, the clerk all of a sudden claimed in the written statement he provided the same day he viewed Appellant's picture that the robber had a "bloodshot" left eye.

Moreover, the clerk wholly failed to testify about his level of certainty in his identification of Appellant as the man who robbed the store. Appellant can only assume the clerk was not overly confident, otherwise the assistant solicitor at trial most certainly would have elicited this testimony. Lastly, as discussed, five days had passed between the robbery and the clerk's identification. During those five days, the clerk was unable to provide a more specific description of the robber besides his race, hairstyle, age-range, and height and weight. More specifically, the clerk never claimed the robber had a beard or a "bloodshot" left eye or recorded these details in a written statement during that period.

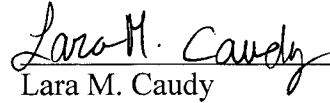
An analysis of the Biggers factors does not overcome the inherently suggestive one-photograph identification procedure employed by law enforcement in this matter. Therefore, the trial court erred in failing to exclude the clerk's out-of-court and in-court identification of Appellant.

Significantly, the trial court did not address the Biggers factors when it refused to suppress the identification. Instead, the court focused on the clerk's recitation of what occurred in the store during the robbery as evidence of reliability. R. 44, l. 16 – 45, l. 5. This was error. The trial judge was required to evaluate the reliability of the identification by utilizing the Biggers factors as articulated by the United States Supreme Court. If the court would have properly weighed the Biggers factors against the "corrupting effect of the suggestive identification," it ultimately would have suppressed the clerk's identification. Manson v. Braithwaite, 432 U.S. 98, 114 (1977).

Respectfully, based on the trial court's error in admitting the clerk's unreliable identification, this Court should reverse Appellant's conviction and sentence and remand for a new trial.

CONCLUSION

Appellant respectfully requests this Court to reverse his conviction and sentence and remand for a new trial.



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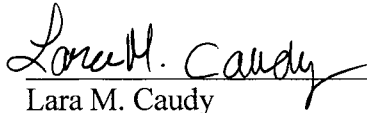
ATTORNEY FOR APPELLANT

This 1st day of March, 2017.

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 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."

March 1, 2017



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