

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Greenville County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TONY LAMETRIUS LEAMON,

APPELLANT

APPELLATE CASE NO 2017-001626

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

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ATTORNEY FOR APPELLANT

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AUG 28 2018

SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to suppress identification testimony and evidence and in finding that the identification procedure used by the police was not unnecessarily suggestive when the investigator mentioned Appellant's first name before showing a witness the photo line-up containing Appellant's photo and the witness identified Appellant from the line-up?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted¹ Appellant, Tony Lametrius Leamon, for murder and possession of a weapon during the commission of a violent crime, indictment #2014-GS-23-07832. On July 17, 2017, Appellant proceeded to jury trial before the Honorable J. Derham Cole. Scott D. Robinson represented Appellant at trial. Lisa B. Parrish and Julia V. Hendricks prosecuted the case. The jury found Appellant guilty as charged. Judge Cole sentenced Appellant to life in prison. A timely notice of intent to appeal was served on July 28, 2017. This appeal follows.

¹ The indictment is stamped December Term 2014. The 2014 year, however, is crossed out and replaced with 2015. The date beneath the witness name is July 25, 2014. There is no date beneath the signature of the foreperson of the grand jury.

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 and in finding that the identification procedure used by the police was not unnecessarily suggestive when the investigator mentioned Appellant's first name before showing a witness the photo line-up containing Appellant's photo and the witness identified Appellant from the line-up.

The jury found Appellant guilty of fatally shooting Joseph Jamal Marion inside of the Black and Mild Club in the early morning hours June 14, 2014. Darion Boyd was inside the club at the time of the shooting. Investigator Fortner with the Greenville County Sheriff's office developed Appellant as a suspect and showed Boyd a six-person photo line-up containing Appellant's photo. Boyd identified Appellant as the shooter. (R. p. 426, line 2 – p. 427, 428, 429, lines 1-17). Prior to trial Appellant moved to suppress Boyd's identification of Appellant. (R. p. 13, line 22 – p. 14, 15, 16, lines 1-17). 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. 16-43). After the hearing the judge denied the motion to suppress Boyd's identification of Appellant writing:

All right. Well, I don't find that the procedure employed by the police was unduly or impermissibly suggestive, even if the fact that this witness – Mr. Fortner used the name "Tony" in some context.

From what I understood from the testimony is that Mr. Boyd didn't know the name of the person who did the shooting. He simply knew him from the neighborhood and knew who he was, but did not know his name. Otherwise, he would have given the name to the police.

So based upon my understanding of the evidence presented, I find that there's no suggestiveness established on the part of the police. And, therefore, the motion to suppress in-court identification by Mr. Boyd is denied.

(R. p. 43, lines 4-18). At trial Appellant renewed the objection when the State moved to admit State's Exhibits #46 and #48, the affidavit and photo line-up, in evidence. (R. p. 267, lines 9-13). The judge overruled the objection. The trial judge erred.

During the identification hearing counsel for Appellant questioned Boyd about whether Investigator Fortner revealed Appellant's name prior to showing Boyd the photo-line-up. (R. p. 30, lines 7-10). The prosecutor told the judge, "The State would stipulate that Investigator Fortner did say the name 'Tony.' I believe he said something along the lines of, The person that you saw shoot him, let's call him Tony. However, I don't believe that that's relevant to the photographic line-up as it – as Mr. Boyd said, he did not see the ones with the names on it. [State's Exhibit #47]. He saw the one without the names on it. [State Exhibit #48]." (R. p. 31, line 22 – p. 32, lines 1-4). Contrary to the State's argument, the fact that the investigator revealed Appellant's first name before showing Boyd the line-up is relevant in determining if the identification procedure was unnecessarily suggestive.

The judge found that the fact that the investigator revealed Appellant's first name did not render the identification procedure suggestive because Boyd did not know Appellant's name. (R. p. 43, lines 4-18). During the pre-trial identification hearing, however, Boyd testified that he knew Appellant's name. When asked if he knew Appellant's name Boyd testified, "I know his name, yeah. I know his name, yeah." (R. p. 21, lines 12-13). At trial Investigator Fortner testified that Boyd did not know Appellant by name. (R. p. 425, lines 19-22). Boyd, however, testified at trial, "At the time it happened, yeah. I knew his name. Yeah I knew his name." (R. p. 265, lines 17-20). Additionally, during the trial when asked why he identified Appellant, Boyd testified, "Because I knew him by face and name. I knew him by name and face, too." (R. p. 268, line 25 – p. 269, line 1). The judge was mistaken in finding that Boyd did not know

Appellant's name. Investigator Fortner unnecessarily suggested that Appellant was the shooter when he referenced the name "Tony" before showing Boyd the photo line-up. Suggesting that "Tony" was the shooter created a substantial likelihood of misidentification. The judge erred in refusing to suppress Boyd's identification of Appellant.

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).


In the present case the identification resulted from an unnecessarily suggestive police identification procedure. Suggesting Appellant's first name to the witness before showing the line-up was both suggestive and unnecessary. 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 identification in the present case was not so reliable that no substantial likelihood of misidentification existed. During the trial Boyd testified that the shooting took place late at night. (R. p. 263, lines 16-21). Boyd admitted that the club was fairly dark in some places but claimed that the time of the shooting the lights were on. (R. p. 263, line 14 – p. 264, lines 1-4). Boyd admitted that he had been drinking at the time of the shooting. (R. p. 275, lines 17-21). Boyd was unable to remember what Appellant was wearing on the night of the shooting. (R. p. 265, lines 8-10). Boyd testified that he did not pay attention to what type of gun was used. (R. p. 262, lines 3-7). 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 Boyd 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 conviction and sentence and remand for a new trial.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of August, 2018.

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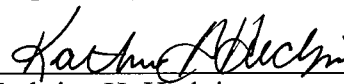
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tony Lametrius Leamon 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 J. Derham Cole, which was held on July 17 - 20, 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 Tony Lametrius Leamon.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

This 28th day of August, 2018.

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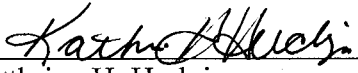
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment and sentencing sheets;
- (2) Trial transcript dated July 17-20, 2017;
- (3) State's Exhibit #46 - Affidavit of Photographic Identification;
- (4) State's Exhibit #48 - Photo line-up.

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

August 28, 2018


Kathrine H. Hudgins
Appellate Defender

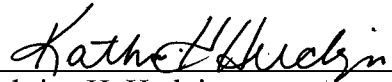
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ATTORNEY FOR APPELLANT

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."

August 28, 2018.



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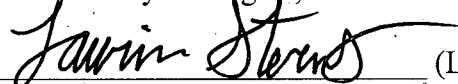
APPELLANT

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 Tony Lametrius Leamon, 320372, at Perry Correctional Institution, 430 Oaklawh Road, Pelzer, SC 29669, this 28th day of August, 2018.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of August, 2018.

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