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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Edward W. Miller, Circuit Court Judge

PATRICK DEAN LOWRANCE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000494

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err by ruling petitioner was not prejudiced by defense counsel's failure to request a *Biggers*[1] hearing or otherwise object to Officer Cruell's in court identification of petitioner where the procedure for identification was unduly suggestive and the issue was found procedurally barred on direct appeal?

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

<u>**STATEMENT**</u>

In March 2012, petitioner was indicted by a Greenville County grand jury for possession of a stolen vehicle, two counts of attempted murder, failure to stop for a blue light, and possession of a weapon during the commission of a violent crime. App. 1228-35. On October 8, 2012, petitioner proceeded to trial before the Honorable Steven H. John and a jury. App. 1. Brian Johnson and John Crangle represented petitioner, and Lucas Marchant, assistant deputy solicitor, represented the state. App. 1.

On October 11, 2012, the jury found petitioner guilty of possession of a stolen vehicle but was unable to reach a verdict as to the remaining offenses. App. 379, ll. 7-13. Judge John declared a mistrial as to the indictments for attempted murder, possession of a weapon during the commission of a violent crime, and failure to stop for blue lights. App. 381, ll. 15-18. Judge John gave petitioner a sentence of three years imprisonment, suspended to one year of probation. App. 383, ll. 2-6.

On January 7, 2013, the petitioner proceeded to trial on the indictments for which Judge John declared a mistrial. App. 392. Petitioner was tried by a jury with the Honorable Letitia H. Verdin presiding. App. 392. On January 10, 2013, the jury found petitioner guilty of failure to stop for blue lights, two counts of attempted murder, and possession of a weapon during the commission of a violent crime. App. 1086, ll. 6-20. Judge Verdin sentenced petitioner to an aggregate term of twenty-eight years' imprisonment. App. 1103, ll. 5-14.

Petitioner filed a timely notice of appeal. Appellate counsel, David Jones, argued the trial court erred in ruling Officer Brittany Cruell's single-photo identification of petitioner was sufficiently reliable to be presented to the jury. App. 1240-51. The South Carolina Court of Appeals affirmed petitioner's convictions in an unpublished opinion, finding the issue had not

been preserved for appellate review. *State v. Lowrance*, Op. No. 2017-UP-154 (S.C. Ct. App. filed April 12, 2017). App. 1284-85.

Thereafter, petitioner filed an application for PCR on April 23, 2018. App. 1105-11. An evidentiary hearing was held before the Honorable Edward W. Miller on October 21, 2019. App. 1118. R. Mills Ariail, Jr. represented petitioner, and Taylor Smith, assistant attorney general, represented the state. App. 1118.

On February 14, 2020, Judge Miller signed an order denying petitioner's application for PCR. App. 1203-27. The court found neither Brian Johnson nor Ben Crangle, petitioner's attorneys at trial, was ineffective for failing to object to Officer Cruell's in court dentification of petitioner. The court found petitioner failed to show that either attorney should have objected or that their objection would have been successful or that there was a reasonable likelihood that the outcome of petitioner's trial would have been different had either attorney objected. The court further found even if petitioner's attorneys had properly objected and preserved the issue for appellate review that petitioner would have been unsuccessful on appeal. App. 1221-26.

This petition for a writ of certiorari follows.

ARGUMENT

The PCR court erred by ruling petitioner was not prejudiced by defense counsel's failure to request a *Biggers* hearing or otherwise object to Officer Cruell's in court identification of petitioner where the procedure for identification was unduly suggestive and the issue was found procedurally barred on direct appeal.

Relevant facts

The state alleged, that on October 11, 2011, petitioner, in a stolen SUV, led police on a high-speed chase in Greenville County, eventually getting away. When the SUV was later found, the state claimed, that petitioner, unprovoked, opened gunfire on two officers in the breezeway of an apartment building and then evaded law enforcement for a second time.

At petitioner's first trial during pretrial motions defense counsel Johnson requested the court conduct a *Biggers* hearing, arguing Officer Cruell's out-of-court identification of petitioner from a mugshot was unduly suggestive. App. 58, ll. 9-19; 59, ll. 1-7.

Officer Cruell testified that the incident began as an investigation into a suspicious vehicle. Cruell was on patrol and ran the tag on an SUV parked in a hotel parking lot. App. 60, ll. 1-6. The plate came back as registered to a different vehicle. Cruell went into the hotel to find out more about the SUV. While speaking with a hotel employee, Cruell claimed she saw a black male with long hair who appeared to be thirty-five to forty years old walking through the hotel lobby. The following day when Cruell reported to work another officer told her the name of the person they arrested in connection with the incident. Cruell searched the police department's "internal database" where officers are able to view recent photographs from the detention center and identified petitioner as the person she had seen walking through the hotel lobby the previous day. App. 63-68.

Defense counsel Johnson argued that the process by which Cruell made the identification was unduly suggestive. Cruell was told petitioner was arrested and looked up only his picture and then made the identification. App. 67, l. 18-68, l. 7. Judge John ruled he would allow Cruell's in-court identification, finding the identification was reliable under the standard of *Biggers*. App. 60-74.

At the beginning of petitioner's second trial the solicitor stated that he and the defense agreed they would adopt Judge John's pretrial rulings from petitioner's first trial, including Judge John's ruling on Cruell's in-court identification of petitioner. App. 407.

Before the jury, during the second trial, Cruell testified, that while she was in the lobby of the hotel, she noticed a black male walk past her. Cruell said the lobby was well lit and that she looked the man directly in the face. However, she also testified, "I just barely noticed him" and "I didn't pay a lot of attention to him." Cruell recalled when she saw the man, she thought he had long hair, maybe pulled back. App. 497, ll. 1-24. The following day when Cruell reported to work during the pre-shift meeting she found out the suspect in the incident had been arrested and was told his name. App. 510, ll. 11-19. Cruell searched the internal database and pulled up petitioner's mugshot and "immediately recognized" him as the same man that walked past her in the hotel. At that point, Cruell made the in-court identification of petitioner without objection. App 512, ll. 1-16.

The state presented evidence that the SUV was stolen, and forensic analysis revealed petitioner's fingerprints were on the SUV and items found inside the vehicle. App. 799-801. Additionally, personal items of petitioner's were found at the apartment building where the shooting occurred, including his social security card. App. 669, l. 12-670, l. 12. Police also found petitioner's license at the hotel where the stolen SUV had been parked before the high-

speed chase. App. 673, ll.8-17. Later in the evening, police found petitioner at his friend's house, and he had suffered a gunshot wound. App. 683, l. 2-684, l. 25. A handgun was recovered from the bedroom of the home where petitioner was found, and it was determined to be the gun used at the incident.

At the conclusion of trial, the jury found petitioner guilty of all charges and Judge Verdin sentenced him to an aggregate sentence of twenty-eight years' imprisonment. App. 1103, ll. 7-14.

At the PCR hearing, Johnson testified that he believed Officer Cruell's out-of-court identification of petitioner was unreliable and had been made under impermissibly suggestive circumstances. App. 1173, ll. 3-13. Johnson said he thought at the time of the second trial that he was bound by the court's rulings from the first trial. At the time of trial, Johnson believed he had preserved the issue but now realized he had not. App. 1180, ll. 1-7.

PCR counsel argued that because the first trial ended in mistrial, defense counsel Johnson was ineffective for agreeing to adopt the court's rulings from the first trial and failing to object to Cruell's identification of petitioner during the second trial. App. 1194-96.

Discussion

Defense counsel was deficient in petitioner's second trial for failing to request a *Biggers* hearing or otherwise object to Cruell's out-of-court identification of petitioner. Petitioner was prejudiced by defense counsel's failure to preserve the issue for appellate review.

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. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012). A witness's subsequent in-court identification is inadmissible "if a

suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added); *see also Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 381, 34 L.Ed.2d 401, 410 (1972).

Trial courts use a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426. First, the court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. *Biggers*, 409 U.S. at 198–99, 93. If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (citing *Biggers*, 409 U.S. at 199, 93).

To determine whether an identification is reliable, it is necessary to consider the factors set forth in *Biggers*: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the confrontation. *Biggers* at 199-200.

Defense counsel was not bound by the rulings of the trial court in petitioner's first trial which ended in a mistrial. *State v. Mills*, 281 S.C. 60, 314 S.E.2d 324, cert. denied 469 U.S. 930 (1984) (when a mistrial occurs because of inability of jury to agree on verdict, it is the same as if no trial took place). Had counsel properly requested a *Biggers* hearing or otherwise objected to Cruell's out-of-court identification of petitioner, the trial court likely would have found the identification unreliable.

The PCR court erred in ruling that Cruell's identification was not tainted by police conduct. Cruell herself is a police officer and she was told petitioner's name, presumably by a fellow police officer, and then went and looked up his mugshot. That she was a police officer herself does not remove the suggestive circumstance, and the PCR court erred in ruling otherwise. Additionally, Cruell's identification was not reliable. While Cruell claimed she looked directly at petitioner, she also said the following, "I just barely noticed him" and "I didn't pay a lot of attention to him." She also testified that the man she saw in the lobby was thirty-five or forty years old and had long hair. Petitioner did not have long hair and was in his twenties at the time of the incident.

The corrupting effect of a suggestive identification is to be weighed against these factors. Id. at 79, 538 S.E.2d at 263. After the trial court determines the witness's identification is reliable, the witness is permitted to testify before the jury. Id.

If defense counsel had preserved the issue for appellate review, even had the trial court erroneously allowed Cruell's out-of-court identification of petitioner, petitioner likely would have been successful on appeal. As set forth above, the out-of-court identification was made under unduly suggestive circumstance. The day before Cruell made the out-of-court identification, Cruell was involved in a high-speed chase. Cruell then responded to the scene of the shooting of two fellow officers. The next morning Cruell was give petitioner's name and went, of her own volition, and looked a photograph of only petitioner without any other potential suspects to compare the photography to. The photograph just happened to be a mugshot of petitioner.

Under the *Biggers* factors Cruell's identification is not reliable. Only two factors established any degree of reliability and those are numbers four and five. Cruell claimed to have

recognized petitioner as the man she saw in the hotel from the photograph immediately and the incident happened less than twenty-four hours before Cruell made the out-of-court identification. However, those factors are outweighed by the other three factors. While Cruell claimed that the lobby was well lit and that the man was not far from her as he passed her, Cruell testified she barely noticed petitioner. More importantly, petitioner did not match the characteristics Cruell described.

While it is true the state had other evidence that pointed toward petitioner's guilt, Officer Cruell's in-court identification of petitioner was incredibly damaging to petitioner in light of the state's allegation that petitioner, the person Cruell claimed to have seen in the hotel, had opened fire on two police officers.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on the issue.

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of October, 2020.