STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID M. BARAJAS,

APPELLANT

APPELLATE CASE NO 2020-000549

ANDERS BRIEF OF APPELLANT

ADAM SINCLAIR RUFFIN
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying Appellant's motion to suppress an alleged co-conspirator's identification of Appellant pursuant to Neil v. Biggers, 409 U.S. 188 (1972) where Appellant objected to the co-conspirator's identification of him and the co-conspirator had given a previous out-of-court identification of Appellant that was unduly suggestive, making the likelihood of misidentification substantial?

STATEMENT OF THE CASE

Appellant was indicted, along with twenty-eight other co-conspirators, by the State Grand Jury of South Carolina for conspiracy to traffic more than 400 grams of methamphetamine. R. 1253. Appellant's trial was held before the Honorable Perry H. Gravely and a jury from March 9 – 16, 2020. R. 1, R. 1129. Appellant was represented by William Hodge. The state was represented by Joshua Underwood and Creighton Waters. R. 1.

The jury found Appellant guilty as charged. R. 1243, ll. 10 – 24. The judge sentenced Appellant to thirty years imprisonment. R. 1251, ll. 10-23.

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"). Trial courts must hold a preliminary hearing "once it is contended that an identification is obtained under unnecessarily suggestive circumstances arranged by state action, regardless of the witness's prior knowledge of the accused." State v. Liverman, 398 S.C. 130, 140, 727 S.E.2d 422, 427 (2012) (finding error in trial court holding the "functional equivalent" of a Neil v. Biggers hearing).

"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).

STATEMENT OF THE FACTS

Over the course of 2014, the Greenville County Sheriff's Department conducted five purchases of methamphetamine from Sandra Duncan in Greenville County using a "confidential informant." R. 104, l. 5 – 108, l. 20. After these controlled purchases, law enforcement conducted a traffic stop on Duncan and asked for her cooperation in investigating drug trafficking. Duncan agreed to cooperate and told the officers who she was selling methamphetamine to and who she was purchasing methamphetamine from. R. 110, l. 6 – 111, l. 15. Duncan also consented to a search of her house and turned over a bag containing 614 grams of methamphetamine to law enforcement. R. 115, l. 2 – 116, l. 2.

Duncan testified that her son had been selling methamphetamine for a man she knew as "Jose." At some point, Duncan's son was taken into federal custody for a violation of his supervised release. After that, Jose went to Duncan's house and informed her that her son owed him money and that Duncan would now have to pay her son's debt. R. 846, l. 23 – 848, l. 20. Duncan recalled that Jose threatened to kill everyone in her family if she did not satisfy her son's debt. R. 848, l. 21 – 849, l. 16. Duncan then agreed to sell methamphetamine for Jose to pay off her son's debt. R. 850, l. 7 – 851, l. 8.

Law enforcement learned that "Jose" was Eduardo Assad (hereinafter "Assad") and was also known by the nicknames "Gordo" and "Arabe." R. 123, ll. 6 – 18. Law enforcement made a controlled purchase of methamphetamine from Assad using a confidential informant and then conducted a search of his house. R. 124, ll. 5 – 16. After his arrest, Assad agreed to cooperate with law enforcement in their investigation. R. 125, ll. 14 – 126, l. 2.

Assad agreed to become a confidential informant and made several undercover drug buys and undercover drug payments to the people who were supplying him with methamphetamine.

R. 127, ll. 1 – 12. Assad testified that his father-in-law, whose nickname was "Chiva," introduced Assad to selling drugs. R. 278, ll. 2 – 6; R. 284, l. 16 – 285, l. 11. Assad admitted that he was supplying Duncan's son with large quantities of methamphetamine and that Duncan's son "just disappeared" and owed Chiva $80,000. R. 341, l. 4 – 347, l. 9. Assad claimed that Duncan called him and offered to sell meth for Assad and Chiva so that she could pay off her son's debt. R. 347, l. 13 – 350, l. 8.

Assad claimed that Appellant was one of his meth suppliers and that Appellant's nickname was "Chavo."[1] R. 386, ll. 7 – 23. According to Assad, methamphetamine would be transported from Mexico to Georgia where several suppliers were located, including Appellant. Assad said that he had three "drivers" that would travel to Georgia to pick the methamphetamine up and then transport it back to Greenville. R. 388, l. 22 – 390, l. 2. Assad testified that his drivers were Juan Espinoza, Luis Flores and "Alejo."[2] R. 390, ll. 3 – 13. After the methamphetamine was sold in South Carolina, Assad said that he would wire money back to the source of the drugs in Mexico. R. 404, l. 24 – 406, l. 5.

Assad claimed that he met Appellant through another one of his suppliers who Assad knew by the name "Chico."[3] R. 397, ll. 14 – 25. Assad said that his arrangement with Appellant was that he would speak with Appellant over the phone to arrange a drug buy first. Once the

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1 Appellant was also called "Pelon" by some people because he was bald.

2 "Alejo" and Flores both testified that they were directed by Assad to drive to Atlanta, Georgia on several different occasions to pick up methamphetamine from Appellant and bring it back to Greenville. R. 730, l. 4 – 742, l. 13; R. 1058, l. 3 – 1060, l. 17; R. 1063, l. 5 – 1073, l. 25.

3 Isaias Arias testified that his nickname was "Chico" and that he arranged for drugs from Mexico to be given to Appellant which in turn were given to Assad for sale in Greenville. R. 780, l. 24 – 787, l. 4.

drug buy was scheduled, Assad would send one of his drivers to Georgia to pick the drugs up from Appellant and then they would bring the drugs back to Greenville. R. 398, l. 4 – 399, l. 12.

After Assad's arrest, he claimed that he personally went to Atlanta to do a controlled buy from Appellant. R. 400, l. 4 – 401, l. 6. Assad maintained that he told his suppliers in Atlanta that he was going to travel to Atlanta to buy a dog from a special breeder and that he would personally purchase drugs from them while he was there. R. 410, ll. 7 – 19. On March 1, 2015, Assad rode with law enforcement officers from Greenville to Georgia. R. 454, l. 16 – 455, l. 23. Assad said that the officers gave him a phone to record the drug buy with. R. 457, ll. 6 – 10. Assad claimed that he gave Appellant money and Appellant gave him drugs and then Assad left Appellant's house and gave the drugs to the officers.[4] R. 458, ll. 2 – 13.

Jason Wells, who was an officer with SLED, participated in the undercover buy that allegedly occurred between Assad and Appellant. R. 1099, l. 23 – 1100, l. 21. After Assad allegedly purchased drugs from Appellant and left the residence, two Hispanic males came out of the house and got into a silver Hyundai Accent. Wells and several other officers followed this vehicle around for a several hours afterwards and observed the vehicle stopping at different Hispanic grocery stores. R. 1101, l. 16 – 1102, l. 15. Wells checked the license tag on the car and discovered that the car was registered to Appellant. R. 1102, l. 23 – 1103, l. 16.

Appellant testified in his defense that he had never met Assad before and had never spoken with Assad on the phone. Appellant also maintained that he had never sold any drugs to Assad. R. 1145, l. 18 – 1146, l. 14. Appellant testified that he had never met Isaias Arias ("Chico") or Luis Flores and had never sold methamphetamine to either one of them. R. 1146, l.

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4 The drugs that Assad purchased were tested by the Georgia Bureau of Investigations and determined to be methamphetamine with a combined weight of over one thousand grams. R. 524, ll. 1 – 18.

15 – 1147, l. 22. Appellant further testified that he had never been involved in the drug trade in any capacity and was never a member of any drug cartel. R. 1148, ll. 13 – 24.

ARGUMENT

The trial court erred in denying Appellant's motion to suppress an alleged co-conspirator's identification of Appellant pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972) because Appellant objected to the co-conspirator's identification of him and the co-conspirator had given a previous out-of-court identification of Appellant that was unduly suggestive, making the likelihood of misidentification substantial.

Relevant Facts

Prior to Eduardo Assad's testimony, the solicitor indicated that defense counsel had an objection to Assad's identification of Appellant which would require *in camera* testimony. R. 246, l. 20 – 247, l. 2.

Jason Wells, an officer with SLED, testified that as part of his investigation into Appellant's case he made attempts to identify the person who had been referred to as "Chavo" and "Pelon" by other co-conspirators. Tr. 248, ll. 8 – 12. Wells obtained Appellant's driver's license photograph, which he testified matched the description given by co-conspirators of the person known as "Chavo" and "Pelon." Wells also recalled obtaining photographs of Appellant from his Facebook page. R. 248, l. 13 – 249, l. 7.

Wells subsequently interviewed Assad and showed him the photographs he had of Appellant. R. 249, l. 8 – 250, l. 11. Wells stated that he met with Assad and "put the photo in front of him and just merely asked him if he knew who the person was in the photo." According to Wells, Assad "immediately recognized him as the person he knew as Chavo." R. 250, ll. 12 – 25.

Assad also testified in camera. Assad claimed that he knew a person known as "Chavo" because they worked with the same cartel from Mexico together. R. 257, l. 21 – 258, l. 5. Assad admitted that he had previously seen photographs of Chavo on Facebook. R. 258, ll. 6 – 15. Assad said that the person he knew as Chavo had a tattoo on his neck that read "Made in Mexico" and a tribal tattoo on his arm. R. 259, ll. 7 – 14.

Assad recalled that Wells came to interview him while he was being housed at the Oconee County jail. Assad said that Wells "showed [him] a picture [and] said do you know this individual by any chance?" R. 259, ll. 15 – 25. Assad identified the person in the photograph as the person he knew as Chavo. Assad maintained that Wells did not suggest to him who the person was in the photograph and that he was one hundred percent sure that the person in the photograph was Chavo. R. 260, l. 18 – 261, l. 13.

Defense counsel argued that the identification should be suppressed because of its suggestive nature. Specifically, counsel pointed out that Assad was shown only a single photograph of an individual instead of being shown a series of photographs of other individuals with similar physical features. R. 268, l. 5 – 269, l. 14. The judge ruled that the identification was admissible, finding that it was only "marginally suggestive" since the officer only asked Assad if he knew the person in the photograph. R. 269, ll. 15 – 23. The judge further ruled that under the totality of the circumstances, including Assad's testimony that he had worked with Chavo, that the identification was reliable and admissible. R. 269, l. 24 – 270, l. 10.

Discussion

"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'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. Dukes, 404 S.C. 553, 557, 745 S.E.2d 137, 139 (Ct. App. 2013) quoting State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis omitted).

In Neil v. Biggers, 409 U.S. 188 (1972), the Supreme Court established a two-part analysis in determining whether an identification of a defendant violated due process. First, the trial judge must determine whether the identification was the result of an "unnecessarily suggestive" procedure by the police. Id. at 198-199. If the judge finds that the identification was the result of "unnecessarily suggestive" police procedures, it next must determine "whether under the 'totality of the circumstances' the identification was reliable." Id. at 199. However, "[i]f the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong." Dukes, 404 S.C. at 557-558, 745 S.E.2d at 139.

In State v. Liverman, 398 S.C. 130, 139, 727 S.E.2d 422, 426 (2012), the Supreme Court acknowledged that the determination of whether an eyewitness' identification is admissible under Neil v. Biggers "should be made during an *in camera* hearing, outside the presence of the jury." The purpose of this hearing "is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." Id. quoting State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001). The Liverman Court went on to hold that an *in camera* hearing regarding the admissibility of the identification "is required once it is contended that an identification is

obtained under unnecessarily suggestive circumstances arranged by state action, regardless of the witness's prior knowledge of the accused." Liverman, 398 S.C. at 140-141, 727 S.E.2d at 427.

In State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000), the Supreme Court noted that one-on-one show up identifications are inherently suggestive and that "[s]ingle person show-ups are particularly disfavored in the law." In Moore, the neighbor of the victim testified that she saw two men leaving her neighbor's house while her neighbor was at work. When she asked them what they were doing, they seemed "startled" and ran away. Id. at 285, 540 S.E.2d at 446-47. The neighbor described the men to the police:

> [T]wo African-American males, one was taller and darker, "he had on a white hat ... a white t-shirt and blue shorts ... the white hat fell off and she saw braided hair." The taller man was thinner, and [the neighbor] saw only his profile. The other man had on a white t-shirt, either shorts or pants, and a black hat. [The neighbor] could not say whether he was stocky or thin, only that he was the shorter of the two. She saw him only from the back.

Id. at 285, 540 S.E.2d at 447. Ninety minutes later, the neighbor was taken to a show-up identification where two suspects were presented to her by the police and she was asked if she could identify them. The neighbor said that they were the men she had seen. Id. The Moore Court held that because the witness was taken to the show-up where the two suspects were surrounded by uniformed police and wearing clothing similar to the clothes she described, the identification was patently and unduly suggestive. Id. at 287, 540 S.E.2d at 448.

Here, the trial judge erred in allowing Assad to identify Appellant as the person he knew as Chavo and as the person that supplied him with methamphetamine. Assad's original identification of Appellant was influenced by unnecessarily suggestive circumstances by Wells because Wells showed Assad photographs of only Appellant and no one else. This procedure was similar to the show-up identification in Moore because Assad was shown only photographs

of a single person with physical features he had previously used to describe the person he knew as Chavo. This procedure was unduly suggestive and resulted in an inherently unreliable identification. The trial judge erred in allowing this inherently unreliable identification into evidence over defense counsel's objection and Appellant was prejudiced as a result. Appellant's conviction should be reversed. See State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000).

CONCLUSION

By reason of the foregoing argument, Appellant's conviction should be reversed, and this case remanded to the Greenville County Court of General Sessions for a new trial.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of March, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID M. BARAJAS,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for David M. Barajas 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 Perry H. Gravely, which was held from March 9-16, 2020, 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 David M. Barajas.

Respectfully Submitted,

Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR APPELLANT

This 5th day of March, 2021.

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Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

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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.

March 5, 2021

Adam Sinclair Ruffin
Appellate Defender

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ATTORNEY FOR APPELLANT

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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."

March 5, 2021.

Adam Sinclair Ruffin
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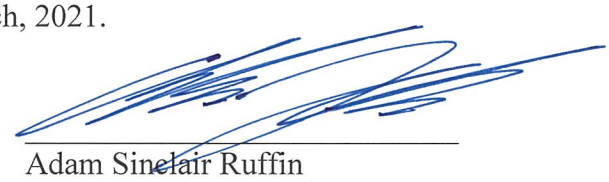
CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Record on Appeal in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Anders Brief of Appellant and Record on Appeal have been served on David M. Barajas, 383245, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 5th day of March, 2021.



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