

IN THE FAMILY COURT
FOR THE FIFTH DISTRICT OF SOUTH CAROLINA
RICHLAND COUNTY

The State,)	
)	
Plaintiff,)	
)	Docket No. [REDACTED]
v.)	
)	
[REDACTED],)	<u>MEMORANDUM IN SUPPORT OF</u>
)	<u>DEFENDANT</u> [REDACTED]
Defendant.)	<u>MOTION IN LIMINE TO SUPPRESS</u>
_____)	<u>OUT-OF-COURT IDENTIFICATION</u>
)	<u>TESTIMONY</u>

This Memorandum is being submitted by the Defendant in support of the Motion in Limine to Suppress Out-of-Court Identification of the Defendant.

“The influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor – perhaps it is responsible for more such errors than all other factors combined.” United States v. Wade, 388 U.S. 218, 229 (1967).

Defendant submits this motion to prevent such a miscarriage of justice in the present case.

The out-of-court identification in this case was performed using unreliable methods that erroneously suggested to the witness that the Defendant was engaged in criminal activity. The identification in this case – a single-person station-house procedure – was inherently suggestive and plainly disfavored under the law. The identification was also so unreliable as to be inadmissible – it was made by a witness who (a) had no prior interaction with the suspect, (b) only viewed the suspect for a brief period of time while allegedly in the midst of a struggle with a different suspect, and, (c) perhaps most importantly, gave a description of the suspect which did not match the defendant. The improper suggestion could have easily been prevented by the

State, and the unreliable fruits of the improper identification should be suppressed to prevent prejudicing the case against the Defendant, and to prevent a violation of the Defendant's due process rights.

STATEMENT OF FACTS

The Defendant has been placed on notice that the state intends to try the defendant on the charge of burglary second degree. The Petition alleges that the Defendant was a party to the entry of an apartment and an attempt to remove items from the apartment. The State alleges that another party engaged in a physical struggle with an occupant of the apartment – [REDACTED] – then [REDACTED] allegedly saw Defendant briefly before both he and other party fled. RCSD Incident Rep.; [REDACTED], Stmt., May 2, 2014. The State alleges that [REDACTED] positively identified both the Defendant and another as the two involved in the incident. RCSD Incident Rep.; [REDACTED], Stmt., May 2, 2014.

In support of this motion the Defendant asserts the following:

1. Upon information and belief, that the State intends to offer the out of court identification by [REDACTED] of the Defendant which took place while the Defendant was handcuffed in the containment area of a police cruiser, then while the Defendant was being detained alone in a holding cell. On information and belief, that [REDACTED] identified the Defendant, in those locations, as an intruder in his apartment that he saw briefly during a struggle with another individual.
2. That the Defendant did not struggle in a way that would merit handcuffs prior to identification. Def.'s Aff. at 13.

3. That the police never engaged in proper identification procedures such as lineups or photo arrays in identifying the Defendant. Def.'s Aff. at 23.
4. That [REDACTED] was brought into the Defendant's presence on three separate occasions by the police while the Defendant was restrained and alone. Def.'s Aff. at 12, 18, 19.
5. That the Defendant had neither met nor interacted with [REDACTED] prior to the out of court identification. Def.'s Aff. at 14; [REDACTED] Stmt., May 2, 2014.
6. That [REDACTED] is white, and the Defendant and his brother are African American. Def.'s Aff. at 4, 16; RCSD Incident Rep. (listing Defendant's race as "B" and [REDACTED] as "W").
7. That [REDACTED] called 911 after the alleged burglary and reported that the two suspects were wearing hoodies. RCSD Agency Incident Rep. Comments at 3 ("wearing a gray hoodie////one had on a blue hood.").
8. That the Defendant was not wearing a hoodie, as confirmed by the jail inventory, which lists the Defendant's clothes as including only a t-shirt, sweatpants, shorts, socks, and underwear. Def.'s Aff. at 21; RCSD Inventory.
9. The Richland County Sheriff's Department Incident Report makes no reference to [REDACTED] description of suspects wearing hoodies. RCSD Incident Rep. The Incident Report makes no reference to finding a hoodie matching [REDACTED] [REDACTED] description anywhere in the vicinity of the alleged crime or the arrest. RCSD Incident Rep.
10. The only match between [REDACTED] description of the suspects and the Defendant is the Defendant's age, race, and sex. [REDACTED] described the

suspects as “two b[lack]/males around ■ yoa [years of age].” RCSD Agency Incident Rep. Comments at 3. No other description served to distinguish the suspect from any other adolescent black boy – other than the hoodie, which, as noted, Defendant was not wearing.

11. The Defendant maintains his innocence of the alleged burglary. Def’s Aff. at 24.

ARGUMENT

I. THE SHOW UP IDENTIFICATION MADE BY ■ WAS UNDULY SUGGESTIVE AND INHERENTLY UNRELIABLE

The Defendant seeks to suppress all previous out of court identification procedures that were unduly suggestive and conducive to irreparable mistaken identification as to deny the Defendant due process, as well as any potential in-court identifications. The Defendant cites as grounds for this motion the 5th and 14th Amendments to the Constitution of the United States and Article I, §3 of the Constitution of South Carolina.

An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. State v. Brown, 356 S.C. 496, 502-03, 589 S.E.2d 781, 784 (Ct. App. 2003). The United States Supreme Court set a two-pronged standard for the admissibility of testimony concerning an out-of-court identification of an accused in Neil v. Biggers: Courts must determine if the identification procedures were suggestive and, if so, whether the identification was nonetheless reliable. 409 U.S. 188, 198-99 (1972). “Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.” Biggers, 409 U.S. at 198.

South Carolina recognizes the two-pronged inquiry of Biggers. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000).

A. SUGGESTIBILITY

A “witness’s recollection of the stranger can be distorted easily by the circumstances or by later actions of the police.” Manson v. Brathwaite, 432 U.S. 98, 112 (1977). Such a distortion occurred in this case through police procedures which the South Carolina Supreme Court has explicitly held to be disfavored because they are unduly suggestive. Specifically, the Defendant was identified in a single-person show up, and again in another single-person station house identification. During these identifications, the Defendant was restrained with handcuffs in a police vehicle and later in a locked police station holding cell – both suggestions of criminality. Def.’s Aff. at 9-12, 18-19. The police engaged in no non-suggestive identification procedures. There was no line up and the Defendant is aware of no use of a photo array. Def.’s Aff. at 23. The Defendant is not aware of any circumstances which would have prohibited the state from conducting a proper lineup or other, less suggestive, identification procedures on the day of the incident. At a minimum, the police could have removed handcuffs from the Defendant or removed him from places generally reserved for criminals – the back of a police car or a station house holding cell; the Defendant did not struggle so as to require handcuffs and other restraints prior to his identification on the day of the incident. Def.’s Aff. at 13.

Appellate courts have repeatedly found such procedures unduly suggestive. In State v. Moore, the South Carolina Supreme Court overturned convictions for second-degree burglary and grand larceny that were obtained in part by a single-person show-up identification similar to [REDACTED] identification. The witness testified that she saw two men coming out of her

neighbor's house, whom she knew was at work. Approximately 90 minutes later, the witness was taken in a patrol car to a location where two men were detained. The witness proceeded to identify the men based primarily off of their clothing. Moore, 343 S.C. at 285, 540 S.E.2d at 446-47.

The Moore Court noted that “[s]ingle-person show ups are particularly disfavored in the law.” 343 S.C. at 287, 540 S.E.2d at 448 (citing Stovall v. Denno, 388 U.S. 293, 302 (1967) and State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 at 719 (Ct. App. 1993)) (emphasis added). As the U.S. Supreme Court has written, “[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police.” United States v. Wade, 388 U.S. 218, 234 (1967). The identification in this case was a single-person show up of a suspect already in police custody, and therefore unduly suggestive, just like the show-up identification in Moore.

Other appellate decisions support this conclusion. For instance, taking a witness to the location where suspects are being detained, and where no other individuals are being detained, is “[c]learly” suggestive. In the Interest of Jamal Rashee A., 308 S.C. 392, 395, 418 S.E.2d 326, 328 (Ct. App. 1992). The only cases where the Court deemed similar single-person identifications to not be unduly suggestive has significantly different facts – such as evidence that the witness had prior knowledge of the defendant. State v. Singleton, 395 S.C. 6, 14, 716 S.E.2d 332, 336 (Ct. App. 2011). Here, ██████████ admitted he had no prior knowledge of the defendant. ██████████ Stmt., May 2, 2014

B. RELIABILITY

As developed in Neil v. Biggers by the United States Supreme Court, the second prong of inquiry in determining the admissibility of an out-of-court identification is reliability. See State v. Moore, 343 S.C. 282, 287 (2000) (citing Neil v. Biggers, 409 U.S. 188 (1972)).

Biggers allowed courts to look at the “totality of the circumstances” to determine if a suggestive identification was nonetheless reliable. The reliability inquiry requires a court to “determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.” Moore, 343 S.C. at 287 (quoting Curtis v. Commonwealth, 11 Va.App. 28, 396 S.E.2d 386, 388 (1990)).

In assessing the reliability of an otherwise unduly suggestive out-of-court identification, a court must weigh the “totality of the circumstances.” Neil v. Biggers, 409 U.S. at 199. That analysis must consider at least five factors: (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 length of time between the crime and the confrontation.” Moore, 343 S.C. at 289, 540 S.E.2d at 448-49 (quoting Biggers, 409 U.S. at 199); see also State v. Liverman, 398 S.C. 130, 138 (2012).

The “totality of the circumstances” analysis must include other relevant factors; in this case, one another important reliability factor is the diminished reliability of cross-racial identifications. See John P. Rutledge, They All Look Alike: The Inaccuracy of Cross-Racial Identifications, 28 Am. J. Crim. L. 207, 208 (2001). Cross-racial identifications occur when a witness of one race identifies an individual of another race. Id. at 211. The U.S. Supreme Court has acknowledged the relative unreliability of cross-racial identifications, noting that reliability is

enhanced when the witness and the defendant were the same race. Manson v. Brathwaite, 432 U.S. 98, 115 (1977). The converse – that reliability is undermined when the witness and the defendant are of different races – is also true, and multiple courts have recognized this reality. State v. Cromedy, 727 A.2d 457 (N.J. 1999); State v. Long, 721 P.2d 483, 489 (Utah 1986); People v. McDonald, 690 P.2d 709 (Cal. 1984). This is commonly referred to as the “own-race effect” or “cross-racial impairment.” Rutledge, They All Look Alike, at 211. The exact cause of the cross-racial impairment is unknown, but many ongoing psychological studies exist. A popular theory is simply that many people lack familiarity and substantial exposure to other races, therefore, making it difficult to adequately remember and identify the smaller physical details which distinguish one individual from another. Rutledge, They All Look Alike, at 213. Notably, multiple studies indicate that cross-racial impairment is particularly strong when Caucasian witnesses identify African American suspects. Id. at 211. For instance, studies have reached the conclusion that “a[n] [African American] innocent suspect has a 56% greater chance of being misidentified as the perpetrator by a [Caucasian] eyewitness than a[n] [African American] eyewitness, even without suggestiveness” by police. Radha Natarajan, Note, Racialized Memory And Reliability: Due Process Applied To Cross-Racial Eyewitness Identifications, 78 N.Y.U. L. Rev. 1821 (2003). Moreover, studies also show that “erroneous identifications occur more frequently when the witness is able to view the suspect for only a short period of time,” thus exacerbating the possibility for a fallible identification in a cross-racial witness identification. Id. at 1836.

In Moore, the Supreme Court held the witness identification to be unreliable because it only satisfied one of the five factors mentioned above. Moore, 343 S.C. at 289. In its consideration of the totality of the circumstances, the Court found only the length of time

between the crime and the confrontation to be favorable to the reliability to the out-of-court witness identification. The Court reasoned that the witness “saw the two defendants for only a very brief period of time, at some distance” away. Id. The Court also found the witness’s accuracy of description to be “tenuous at best” since she primarily focused on “the suspects’ clothing and race and that one was taller than the other.” Id.

In the present case, [REDACTED] out-of-court identification of [REDACTED] are unreliable. Similarly to Moore, [REDACTED] identification only sufficiently meets one of the five factors: the length of time between the crime and confrontation. Here, [REDACTED] opportunity to view the suspect was obstructed by his struggle with the other suspect in the room. The whole incident was rather brief – especially [REDACTED] view of the second suspect (alleged to be the defendant), who he says appeared in a doorway and then fled. As in Moore, “[t]his is not a case in which the witness had an opportunity to observe the defendant at close proximity for some considerable period of time.” 343 S.C. at 289, 540 S.E.2d at 449.

Also as in Moore, [REDACTED] physical description provided to the police focused on the suspect’s clothing and race, id., specifically mentioning that the suspect wore a hoodie in 911 call.

In addition, [REDACTED] physical description was inaccurate; [REDACTED] jail inventory confirms that he was not wearing such a hoodie when apprehended, and the police provided no evidence of finding an abandoned hoodie near the crime scene. Accordingly, [REDACTED] identification is even less reliable than the identification ruled unconstitutionally unreliable in Moore. Beyond the inaccurate description regarding the hoodie, [REDACTED] remaining description of the suspects was vague – simply that they were two

teenage black males. RCSD Agency Incident Report at 3. When a witness’s prior description “was vague and . . . somewhat inaccurate,” the Court of Appeals has ruled such identifications inadmissible. In the Interest of Jamal Rashee A., 308 S.C. 392, 396, 418 S.E.2d 326, 328 (Ct. App. 1992).

Moreover, other factors further undermine the reliability of [REDACTED] out-of-court identifications. [REDACTED] needed to see [REDACTED] multiple times in order to be certain of his identification, and each time the police showed [REDACTED] to [REDACTED] for an identification it was in a suggestive manner, thus compounding the suggestiveness of police procedures.

Finally, [REDACTED] vague physical description of the suspect, who is of another race, illustrates that his identification skills are negatively impacted by the psychological termed cross-racial impairment. In his descriptions of the suspects, [REDACTED] failed to provide specific details regarding the individuals, such as height, body weight, an age estimate, etc.

South Carolina courts have only deemed the reliability of a witness identification to outweigh inappropriate, suggestive police procedure in cases with significantly different facts – such as where the witness knew the suspect beforehand or had an ample opportunity to view the suspect’s face. For example, in State v. Liverman, the South Carolina Supreme Court allowed the admission of an identification by the witness because the witness knew the suspect from childhood and identified him with a familiar nickname and detailed physical description. 398 S.C. at 135-36; see also State v. Starks, No. 2013-000869, 2014 WL 5462548 (S.C. Ct. App. Oct. 29, 2014) (holding a suggestive identification to be reliable due to witness’s recognition of the masked suspect by his voice and body build). Here, as noted, [REDACTED] had no prior interaction with the Defendant. In State v. Turner, the South Carolina Supreme Court reasoned

the suggestive identification to nevertheless be reliable due to the witness's "ample opportunity to view her assailant at the time of the crime . . . [she] had a full facial view of him while he asked her questions," and she gave a detailed and accurate description of the defendant to the police before identifying him. 373 S.C. 121, 128, 644 S.E.2d 693, 697 (2007). Here, [REDACTED] had only a brief opportunity to view the suspect, and gave a vague and inaccurate description of the Defendant.

Thus, weighing the totality of the circumstances, [REDACTED] out-of-court identification of [REDACTED] is unreliable and should be suppressed. To do otherwise would violate [REDACTED] constitutionally afforded due process rights.

CONCLUSION

Accordingly, Defendant [REDACTED] respectfully requests that the Court to grant his motion to suppress any testimony regarding [REDACTED] out-of-court identifications of the Defendant, as well as any in-court identification testimony by [REDACTED].

Respectfully submitted,

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