

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

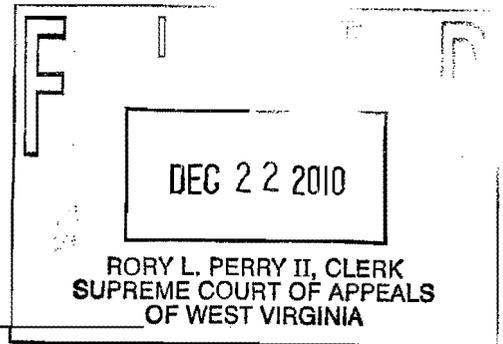
DOCKET NO. 35685

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee,

V.)

Appeal from a final order
of the Circuit Court of Marion
County (06-F-74)

SALADINE RICHARDSON,
Defendant Below, Appellant.



Petitioner's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ASSIGNMENT OF ERROR 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 1

ARGUMENT 2

CONCLUSION 9

CERTIFICATE OF SERVICE..... 10

TABLE OF AUTHORITIES

FEDERAL

Neil v. Biggers, 409 U.S. 188 (1972)1, 4, 8

STATE

State v. Casdorph, 159 W.Va. 909, 230 S.E.2d 476 (1976)1, 2, 4, 5

OTHER AUTHORITIES

W. Va. Code §62-1E-1.....6

ASSIGNMENT OF ERROR

THE CIRCUIT COURT ABUSED ITS DISCRETION IN RULING THAT THE PHOTOARRAY CONTAINING THE DEFENDANT'S PHOTOGRAPH WAS ADMISSIBLE AT TRIAL

STATEMENT OF THE CASE

Your Petitioner, Saladine Richardson, respectfully represents unto the Court that he is the defendant in a criminal case in which he was indicted by the June 2006 Term of the Grand Jury of Marion County, West Virginia, in Case No. 06-F-74, and that following a trial on the 21st and 22nd days of January, 2009, on one count of a ten-count indictment (Malicious Assault, in violation of West Virginia Code §61-2-9) he is prejudiced and aggrieved by the final judgments rendered against him in said Circuit Court by final orders entered on January 26, 2009 (Trial Order), and October 29, 2009 (Sentencing Order). Defendant, by counsel, filed his petition for appeal which was accepted by this Honorable Court as relates to Assignment of Error Number 2.

SUMMARY OF ARGUMENT

The Circuit Court of Marion County clearly abused its discretion in ruling that the photo array incorporating defendant's likeness was admissible at trial, allowing the State's witnesses to testify about indentifying the Defendant from the photo array, and then allowing the witnesses to make in-court identifications of Defendant, all in derogation of this Court's ruling in State v. Casdorff and against the teachings of Neil v. Biggers.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principle issues in this case have been authoritatively decided in the Court's decision in State v. Casdorff, *infra*, oral argument under Rev. R.A.P. 18(a) is

not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

THE CIRCUIT COURT ABUSED ITS DISCRETION IN RULING THAT THE PHOTO ARRAY CONTAINING THE DEFENDANT'S PHOTOGRAPH WAS ADMISSIBLE AT TRIAL

Regarding out-of-court identifications, this Honorable Court has held,

"In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification [or testimony as to the out-of-court identification itself] a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.'

Syllabus Point 3, as amended, State v. Casdorph, 159 W. Va. 909, 230 S.E.2d 476 (1976).

Thus, a deciding court must determine, on the record, whether the witness had the opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description, the level of certainty demonstrated, and the length of time between the crime and the confrontation.

From the record, it can be determined that this was a crime which occurred on or about March 6 or 7, 2006, witnesses were interviewed shortly after the event and then

not heard from again until the time of trial in January 2009 (an interval of nearly 3 years).

Prior to the trial of this matter, several suppression hearings were held pursuant to the filing of Defendant's motions. One of the matters addressed was a Motion to Suppress the photo array developed by police as a result of Defendant's illegal arrest. During testimony by Officer Yost on July 6, 2007, Officer Yost admitted he had no probable cause to arrest the Defendant following his procuring a search warrant to enter a private dwelling in Carolina, West Virginia, to search for someone who may have been the perpetrator of the crime. (See Transcript of Pre-Trial Motions Hearing, July 6, 2007, hereafter Hearing Transcript or HT.)

Officers interviewed Carol Davison, Aston Davison, Mara Davison, Eva Gowers, and Houston Lee and had transcripts of their interviews prepared. The transcripts of the interviews with Carol Davison and Aston Davison were submitted to the Court for its review to determine admissibility of the identifications. (HT, pp. 13-14). When questioned about Carol Davison's description of the defendant, Officer Yost stated Mrs. Davison said the shooter was "kind of a light-skinned, black male... with braids." (HT, p. 6). He further testified that Aston Davison identified the shooter as "...a black guy, maybe light brown skin, 5-4 or 5-5, dressed in a red jacket" (HT, p.9), and "his hair looked like it was braided." (HT, pp. 9-10). Yost testified that Carol Davison's second statement says that the shooter is "black, probably light brown, he has dreads and ... red jacket." (HT, p. 12). Eva Gower and Houston Lee were also interviewed by the police and transcripts of their interviews were made, too. At no time, however, did the State ever produce any of these witnesses to testify at the pre-trial suppression hearings. Thus, although this hearing on the Motion to Suppress occurred, the Court was not

provided the opportunity to hear from the State's key witnesses: Carol Davison, Houston Lee and Eva Gower until the trial of this matter. Mara Davison and Aston Davison were "unavailable" for trial.

The Defendant in the instant case is a black man whose hair at the time of the alleged offense was both bushy and dreadlocked. Upon viewing the original of the photo array (e.g., State's Exhibit No. 3), one may discern many differences between the Defendant and the remaining subjects. All of the individuals in the photo array were black but none had the same style hair as the Defendant: two of the individuals in the photo array had shaved heads; two had "corn-row" styled hair; and one had bushy hair pulled back into a pony-tail. Aside from the hair style and facial hair differences, the photograph of the Defendant is brighter and stands out more than other photographs in the array. Alarming, the Defendant's picture is the only one in the array in which the profile photo is on the left and the facing forward photo is on the right. Finally, the Defendant's photograph is the only with a police department ID board visible in the photograph.

The Trial Court, in its evidentiary ruling, determined the photo array to be admissible and that the witnesses would be able to identify the Defendant at trial, clearly an abuse of its discretion and in contrast to the propositions laid out in State v. Casdorff, 159 W.Va. 909, 230 S.E.2d 476 (1976) and Neil v. Biggers, 409 U.S. 188 (1972).

In Casdorff, the defendant was charged with robbery of the driver of a taxicab. During a line-up/show-up at the State Police barracks, the victim identified the defendant as the person who robbed him. The Court, in adopting the totality of the

circumstances test for determining the admissibility of out-of-court identifications, found that,

The record reveals that at the time of the offense, the victim was able to get a close look at the defendant, his features, and his build, and noted that the defendant limped. The victim testified that his recollection of the defendant was vivid; that he had ample opportunity to get a good look at the defendant's features because the dome light of the cab was on; and, that after the defendant assaulted him the defendant got into the front seat of the cab and sat next to him during their wild ride down the Interstate. Consequently the victim could make a positive in-court identification based upon his extensive observation of the defendant at the time of the crime.

State v. Casdorff, (*supra*). In the instant matter, none of the actual witnesses were ever presented by the State during any of the suppression hearings. Other than the Court hearing from the investigators, no witness appeared to testify about his or her opportunity to view the Defendant or to establish his or her ability to make in-court identifications. None of the witnesses appeared pre-trial to testify about their opportunity to view the criminal at the time of the crime, to testify about their degree of attention, or to clarify the reasons for the inaccuracies in their original identifications and their in-court descriptions and identifications; all contrary to the facts and rulings in Casdorph.

Additionally, Officer Yost testified that he had no probable cause to arrest the Defendant and that his probable cause was only established after he forcibly removed the Defendant from his cousin's home, took him to the police department, took his photo and showed it to Carol Davison, Aston Davison and Houston Lee. Telling in the instant case is the Search Warrant application completed by Detective Yost (following his interview of witnesses) in which he advised the Court that the officers were looking

for someone who fit a very basic description, “a black male with light to medium complexion, braided hair.” (Affidavit for search warrant, Item 6 – State’s Exhibit 2 at Suppression Hearing, Document 5 in Court File.) Testimony at trial clearly indicated the Defendant had dreadlocks, although Carol Davison tried to blur the distinction between braids and dreadlocks.

At trial, Detective Murray indicated he spoke to Houston Lee closest in time to the occurrence of the incident and Lee’s only description of the person who did this to him was “black male, medium build, 20’s, wearing a red coat.” (TT, page 29). Officer Murray, who completed the police report for the incident, indicated that his report was blank as it related to the the suspect’s age, height, weight, and hair color. (TT, p. 32).

Eva Gowers testified at trial that the Defendant had dreadlocks which are like matted hair and that she has never heard of anyone with dreads as having braids. (TT, p. 35). Gowers did testify that the person she knew as the Defendant was in the Courtroom and she pointed to him. (TT, p. 34). However, at no time did she ever identify the Defendant as the person who shot Houston Lee.

Regarding presenting the photo array to witnesses, Officer Bennington testified that he “would just tell them to take their time, take a look at the individuals in the photographs, he may or may not be in there. I also usually tell people to keep in mind that people do change their appearances and things like that, but if they would happen to identify anyone in the picture, go ahead and identify them.” (TT, p. 71-72). Photo arrays were admitted shortly afterwards over defendant’s objection. Officer Bennington’s statements to witnesses viewing photo arrays are just another example of why the West Virginia Legislature created W. Va. Code §62-1E-1, et seq., the Eyewitness Identification Act.

Bennington also testified that when Houston Lee was presented with the photo array, he was “asked basically the same thing, can you identify anyone in this photo array?” (TT, p. 73). With as suggestive as the photo array is, it is inconceivable that Lee would pick anyone else.

Carol Davison, during her testimony at trial, indicated several things of note: she was outside her house at the time of the incident, as were Houston Lee and her daughter, Aston, and the “black man she had just met that day.” (TT, pp. 94-95). Davison was unsure where her daughter was at the time of the shooting, but she said the “other gentleman fired two shots, then fired down over the hill three or four times. (TT, p. 99). At the time of the shooting, Davison stated she was “focused on where Mr. Lee’s at,” and that she’s “not seeing anything else.” (*Ibid.*)

When questioned at trial about her description of the shooter, she admitted that she told police that he was “a black guy with light brown skin, and he was about 5-4 or 5-5.” (TT, p. 114). However, when asked about his hair being braided (as she told officers the night of the incident), she stated, “well, dreadlocks, bushy, yes.” Confronted with the obvious discrepancy, Davison agreed that she said braided then added, “they’re just twisted braids, that’s what dreadlocks are, yes.” (TT, p. 115). When asked, “aren’t braids more matted and rolled, a bunch of hair...,” Davison again changed her description by saying “Well, they were dreadlocks, I’ll say then today. They’re dreadlocks.” (*Ibid.*) Davison admitted there were some things she was not going to remember, “that night was a big shocker, the whole night.” (TT, p. 116). When questioned in detail about the photo array, she agreed that the defendant’s picture was very clear, that it stands out, that the other males don’t have big hair, and that some don’t have facial hair. (TT, p. 131).

When Houston Lee, the victim, testified he stated he did not know the individual who shot him but that if he could see a picture of him he'd be able to identify him. (TT, p. 143). Lee was allowed to identify the defendant in the courtroom after having been shown his photo array identification and having the prosecutor point out that that the individual in the picture has longer hair. (TT, p. 145). Lee testified, in contradiction to his statement to police, that he had seen only two individuals outside that night, Ronnie White and the shooter; that he could not say the shooter had on a red coat, and that the shooter did have braids (again, in contrast to the suspect's photo and the testimony. (TT, pp. 154-159). Lee had even testified that he was focusing on the defendant's face yet could not say whether the defendant had facial hair and never provided any additional information such as eye color, facial shape, scars or any other identifying marks.

If ever there were a case in which a conviction should be overturned on the basis of faulty eyewitness identifications and faulty procedures associated with using photo arrays, this is the case. The State failed during the pre-trial hearings to present the witnesses to allow them to testify regarding their observations, descriptions, opportunity to observe, and then during trial none of the witnesses could clearly state the defendant matched the descriptions they gave – he just happened to be the only black man in the room sitting in the defendant's chair.

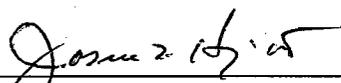
In the instant case, police did not have probable cause for the arrest of any individual in the house and there were no exigent circumstances justifying a warrantless entry of the residence. But at trial, the photograph of the defendant, the suggestive photo array and in-court identifications all led to the defendant's conviction. This is not the same kind of case as Biggers, as the victim in that case had plenty of time to observe the criminal and she was able to give a very accurate description of the individual. This

incident involved a short period of time, the witnesses did not know the defendant, one witness said that several people were present, one said only the shooter and another male were present, one witness (Gowers) didn't see anything happen – she just heard things and had the chance to know the defendant.

Notably, no other witnesses corroborated the witnesses' identification; the witnesses did not give similar descriptions (at least not descriptions that matched the defendant); and the length of time between the incident and trial was significant (nearly three years). It cannot be said in this case that sufficient independent reliability was shown regarding the out-of-court or in-court identifications under these circumstances.

CONCLUSION

The Circuit Court's Order sustaining the admissibility of the photo array at trial and the Court's ruling allowing in-court identifications of the Defendant during trial should be reversed, and this matter should be remanded for a new trial disallowing the use of the illegally-obtained photograph and photo array and prohibiting in-court identifications of the Defendant.

Signed: 

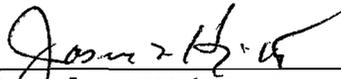
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2010, true and accurate copies of the foregoing "Petitioner's Brief" were deposited in the U. S. Mail contained in a postage paid envelope addressed to counsel for all other parties in this appeal as follows:

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Signed: 

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