

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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SC Court of Appeals

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Appeal from York County

J. Mark Hayes, II, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

LATROY LAMAR WHERRY,

APPELLANT

APPELLATE CASE NO. 2013-002509  
\_\_\_\_\_

ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

BENJAMIN JOHN TRIPP  
Appellate Defender

South Carolina Commission on Indigent Defense  
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ATTORNEY FOR APPELLANT

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### **STATEMENT OF ISSUE ON APPEAL**

Whether the evidence in the record supports the trial court's finding that an out-of-court identification was not unduly suggestive or unreliable where the identifying witness observed a flash of the suspect's face in an unknown and dark apartment at 11:30 p.m. after a high speed car chase and an extended chase on foot throughout a series of unknown apartment buildings and where the witness was then shown one photograph featuring only Appellant's face.

### **STATEMENT OF THE CASE**

On June 13, 2013, the York County Grand Jury indicted Appellant Latroy Lamar Wherry for failure to stop for a blue light. R. 159-160. On November 18, 2013, Appellant proceeded to trial before The Honorable J. Mark Hayes, II and a jury. Melissa Inzernillo represented Appellant and Christopher Epting represented the State. R. 1. The jury found Appellant guilty, and the trial judge sentenced him to thirty months' imprisonment. R. 147, line 6; R. 157, lines 10-16.

## ARGUMENT

### **NO EVIDENCE IN THE RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT OFFICER BRENNEN'S IDENTIFICATION WAS NOT UNNECESSARILY SUGGESTIVE OR UNRELIABLE.**

#### STATEMENT OF FACTS

In a pretrial hearing pursuant to *Neil v. Biggers*, 409 U.S. 188 (1992), the State presented evidence of an out-of-court identification of Appellant by Officer Anthony Breeden with the Rock Hill Police Department. R. 7, line 20—R. 8, line 14. Officer Breeden testified that around 11:30 p.m. on February 6, 2013, he clocked a vehicle travelling at fifty-two miles per hour in a forty miles per hour zone. He followed the vehicle and activated his blue lights and siren. He claimed the vehicle then sped up and continued into an apartment complex, where the driver parked the vehicle and ran into the complex of buildings. R. 8, line 22—R. 9, line 16; R. 15, lines 18-22.

[W]e ran a pretty considerable distance in the apartment complex. We probably—we ran the distance of what would be five or six of the buildings, and essentially we circled one building completely, ran up around another two buildings, ran the length of those two buildings, around a third building and back up the sidewalk.

R. 10, lines 15-20. Eventually, Officer Breeden chased the suspect into an apartment unit, where he claimed the suspect momentarily looked back at him before running out of a back door in the kitchen. R. 10, line 23—R. 12, line 5. He said he had encountered Petitioner before and remembered the face. R. 14, lines 20-22. Officer Breeden admitted the kitchen light was not on and the room was dark: “[I]t wasn’t pitch black. . . . I don’t recall . . . whether there was a stove light.” R. 12, lines 21-23. When Officer Breeden exited the back door in pursuit, because of the darkness he could not see the suspect and lost him. R. 12, lines 5-11. Officer Breeden said that a few minutes later, the owner of the vehicle arrived at

the complex and told him that Appellant, her boyfriend, was driving the vehicle. Officer Breeden checked Appellant's name with a photographic record of Petitioner, and he claimed Petitioner was the suspect he had been chasing. R. 14, lines 3-9.

Petitioner moved to exclude testimony of Officer Breeden's identification of Appellant at the apartment complex on grounds that it was unacceptably suggestive and unreliable. R. 30, line 22—R. 35, line 2. The trial judge denied the motion. R. 39, lines 1-16.

### DISCUSSION

No evidence in the record supports the trial court's finding that Officer Brennen's identification was not unnecessarily suggestive or unreliable. In *Neil v. Biggers*, 409 U.S. 188 (1992), the United States Supreme Court created a two-prong inquiry to determine the admissibility of out-of-court identifications. First, the trial court must ascertain whether the identification process was unduly suggestive. Next, the trial court must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.* at 198. If a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, the in-court identification is not admissible. *Manson v. Brathwaite*, 432 U.S. 98 (1977); *State v. Moore*, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). The central issue is whether the identification was reliable even though the confrontation procedure was suggestive under the totality of the circumstances. *Neil v. Biggers* at 198. The following factors should be considered when evaluating the totality of the circumstances: (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

demonstration by the witness; and (5) the length of time between the crime and the confrontation. *Id.* at 199; *see also State v. Stewart*, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

In this case, no evidence supports the finding that the identification was not unduly suggestive. Officer Breeden was shown one photograph featuring one person. Thus, he had only one person with whom to compare his recollection of the suspect. Additionally, the person showing him the photograph was Appellant's girlfriend who represented that the Appellant was the suspect Officer Breeden saw. This manner of presenting the photo was indisputably biased towards Appellant and caused Officer Breeden to reach a conclusion based on factors overriding his recollection of the suspect and his perception of the photo of Appellant.

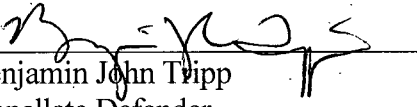
Furthermore, the circumstances in the record show Officer Breeden's identification was unreliable. Specifically, his capacities to reliably observe identifying features the suspect during the chase and accurately recall them were greatly diminished. The chase occurred in the dark around 11:30 p.m. He first pursued the suspect in a stress-inducing high speed car chase. After the car chase, the suspect immediately fled on foot throughout a series of unknown buildings in an unknown environment with little to no lighting. Officer Breeden admitted the foot race was long. Only after Officer Breeden ran up flights of stairs and into an unknown apartment did he claim to see a flash of the suspect's face in the dark with no particular source of light that he could recall. At the time, his attention was focused equally if not more on the unfamiliar and potentially dangerous surroundings. When Officer Breeden exited the back door in pursuit, because of the darkness he could not see the suspect and lost him. These circumstances were physically and mentally exhausting. To conclude

that Officer Breeden had the mental energy to focus on and reliably observe identifying features of the suspect's face in the final instant strains reasonability. Accordingly, the record does not support a finding that the identification was reliable.

**CONCLUSION**

For the foregoing reasons, Appellant requests that this Court reverse the decision of the trial court and remand for a new trial.

Respectfully submitted,

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR APPELLANT

This 5<sup>th</sup> day of November, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from York County

J. Mark Hayes, II, Circuit Court Judge

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THE STATE,

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LATROY LAMAR WHERRY,

APPELLANT

APPELLATE CASE NO. 2013-002509

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PETITION TO BE RELIEVED AS COUNSEL

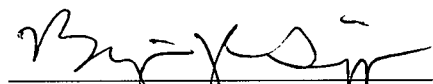
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Counsel for Latroy Lamar Wherry states:

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 J. Mark Hayes, II, which was held on November 19, 2013, 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 Latroy Lamar Wherry.

Respectfully submitted,

  
Benjamin John Tripp

Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of November, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

J. Mark Hayes, II, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LATROY LAMAR WHERRY,

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APPELLATE CASE NO. 2013-002509

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

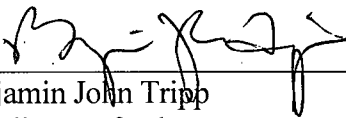
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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Transcript of November 18, 2013.

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

November 5th, 2014

  
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Benjamin John Tripp  
Appellate Defender

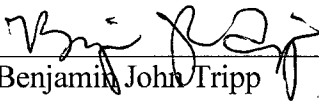
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(803) 734-1343

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."

November 5, 2014



Benjamin John Tripp  
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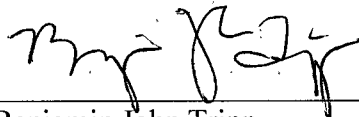
LATROY LAMAR WHERRY,

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APPELLATE CASE NO. 2013-002509  
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CERTIFICATE OF SERVICE  
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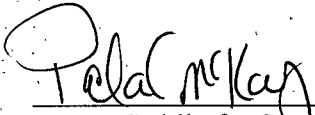
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Latroy Lamar Wherry, #311530 at Wateree River Correctional Institution, this 5th day of November, 2014.

  
\_\_\_\_\_  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me

this 5th day of November, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022