

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH MACK, JR.,

APPELLANT

APPELLATE CASE NO. 2014-000620

ANDERS BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting the out of court identification of Mack because the one-man show-up identification procedure was unnecessarily suggestive and created a substantial likelihood of misidentification?

STATEMENT OF THE CASE

On February 6, 2013, the Berkeley county Grand Jury indicted Joseph Mack, Jr on the charges of armed robbery (AR) three counts; failure to stop for a blue light (FTSBL); and possession of a weapon during a crime of violence. On March 17-18, 2014, Mack proceeded to trial before the Honorable Carmen Mullen and a jury. Mack was represented by David Schwacke and Keisha White. The state was represented by Colleen Dixon Taylor and Charles Condon. R.. 1. The jury found Mack guilty of the lesser offense of strong armed robbery for all three of the AR charges, guilty of FTSBL, and not guilty of the possession of a weapon during a crime of violence. R. 427, ll. 1 – 428, ll. 2. Judge Mullen sentenced Mack to fifteen years on each of the three strong armed robbery charges with all to run concurrent, and three years on the FTSBL to run consecutively to the fifteen years. R. 440, ll. 7 – R. 441, ll. 5. Mack's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On January 6, 2013, a man drove into a truck yard in Hanahan on late afternoon Sunday driving a green Chevy pickup truck. He approached three different truck drivers who were preparing their trucks for the trip the next day. He approached John Rhodan first. The man was friendly at first and then pulled what the victims described as a pistol and proceeded to rob him. The man then did the same thing with Jackie Meyers, another truck driver who was the girlfriend of Rhodan. He took her jewelry. He then robbed Keith Blake who was the third driver and went into his truck. R. 112, ll. 22 – R. 113, ll. 24.

Keith Blake was on his Bluetooth during this incident which was unknown to the robber. Blake had the person on the phone call the police for help, and the police arrived very quickly. A description of the man's vehicle went out, and he was spotted nearby. The police turned on their blue-light but the man did not stop. After a half mile chase during which the man threw items from the vehicle, the man's vehicle crashed into a camper at a mobile home park. The man, Joseph Mack, was apprehended, and charged with three counts of armed robbery, failure to stop for a blue light, and possession of a weapon during a crime of violence. R. 114, ll. 1 – 22; R. 220, ll. 13 – R. 223, ll. 8.

At Mack's trial, a pretrial hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972) was held to determine the reliability of the out of court identification of Mack by the victims who claimed they had never seen Mack before this incident. R. 124, ll. 1 – R. 125, ll. 3. Officer Orlando Valdez responded to the scene to transport the victims to see Mack where he was detained at the accident

scene to determine if he were the man who robbed them. Officer Valdez transported John Rhodan and Jacquelyn Meyers in his patrol car to the accident scene at the mobile home park within approximately thirty-eight minutes of the robbery. Keith Blake did not want to go as he was very distraught. R. 88, ll 11 – R. 90, ll. 23.

Officer Valdez testified that he did not say anything suggestive to the two victims but merely told them there would be a man standing next to a police car. If they were one hundred percent sure that was the man who robbed them, they should tell him. Officer Valdez stated that Mack was standing with his back to the patrol car so his handcuffs did not show. Both John Rhodan and Ms. Meyers identified Mack. They were one hundred percent certain. Officer Valdez then identified Mack in court as the man whom the victims had identified. R. 91, ll. 3- R. 93, ll. 14.

Officer Valdez admitted on cross examination that he told both victims, John Rhodan and Ms. Meyers, that the police had someone in custody who “had run from us.” R. 99, ll. 1 – 13.

John Rhodan testified at the pretrial hearing that the robber did not conceal his face as he was not wearing a mask or anything on his face. R. 57, ll. 17 – 24. Rhodan got a good look at the man’s face for about two minutes as the man got close to Rhodan when the man patted him down. It was dark as it was about seven o’clock on January 6 but the area where the man approached him was lighted. The incident lasted about eight to ten minutes. R. 49, ll. 21 – R.55, ll. 16.

The police officers told him they had apprehended someone and asked him to identify the man. They transported Rhodan and Jackie Meyers in the same police vehicle. Rhodan recognized the Chevy pickup truck first as the robber's truck. Rhodan and Jackie Meyers were in the back of the officer's patrol car. The man was in the vehicle when they first arrived but the officer took him out and had him stand by the patrol car. Rhodan could tell the man was handcuffed. When the officers shone a spotlight on the man, Rhodan identified him as the robber. He was one hundred percent sure. R. 55, ll. 17 – R. 57, ll. 13; R. 62, ll. 18 – R. 63, ll. 6.

Jackie Meyers testified that the robber was very close to her face so she got a good look at his face although it was a "little dark." The officer took her and Rhodan to identify the man they apprehended. She identified him quickly because it had only been a few minutes since the incident. She had no doubt that the man was the robber, and it was John Mack. R. 68, ll. 22 – R. 75, ll. 19.

On cross-examination, she reported that the officer told them "they had caught him" and wanted them to identify him. R. 85, ll. 1-22. The robber had done nothing to conceal his face during the entire episode. The gun was wrapped up and somewhat concealed as only the tip of it was showing. R. 80, ll. 23 – R. 81, ll. 11.

Defense counsel moved for the identification to be suppressed because it was suggestive and unreliable. Counsel argued that Mack stood out based on dress as he was the only non-law enforcement person there. The officer told Ms.

Meyers that they had the man. There was conflicting testimony as to whether the handcuffs were visible. R. 100, ll. 13 – R. 102, ll. 1.

The trial judge denied defense counsel's motion and allowed the out of court identification to be admitted. R. 102, ll. 2 – R. 103, ll. 15.

During the trial testimony of the victim, Keith Blake, the state admitted into evidence a video from the truck yard on the night of the incident. This video showed the incident of the robbery on January 6, 2013. There were at least three videos but Blake only saw one. R. 152, ll. 13 – R. 171, ll. 23.

Officer Lane Beaudoin collected the items that were thrown from the vehicle during the chase. One of the items was the gun. Officer Beaudoin testified that the gun was not real but a BB gun. R. 238, ll. 2 – 240, ll. 2.

Joseph Mack testified in his own defense during the trial. His testimony was that he sold drugs, and he had gone to the truck yard on January 6, 2013 to sell cocaine to Jackie Meyers which had been arranged through another contact. Ms. Meyers did not have enough money so she gave Mack her jewelry to hold until she could get the money. He admitted it was him on the video from the truck yard. He denied robbing anyone on January 6, 2013. R. 294, ll. 1 – R. 328, ll. 14.

The jury found Mack guilty of strong armed robbery, the lesser include offense of armed robbery. R. 427, ll. 1 – R. 428, ll. 2.

ARGUMENT

The trial court erred in admitting the out of court identification of Mack because the one-man show-up identification procedure was unnecessarily suggestive and created a substantial likelihood of misidentification.

In Neil v. Biggers, 409 U.S. 188 (1972), the United States Supreme Court set out a two prong process to determine if an out-of-court identification was admissible: (1) if the identification process was unduly suggestive and (2) if the identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Neil v. Biggers, id.; State v. Lewis, 354 S.C. 222, 580 S.E.2d 149 (2004); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000); State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (2003).

An in-court identification of an accused is inadmissible if out-of court identification was so unduly suggestive that it created a very substantial likelihood of irreparable misidentification. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). Neil v. Biggers cites five factors to determine reliability: (1) opportunity of witness to view criminal at time of crime (2) witness' degree of attention (3) accuracy of witness's prior description of criminal (4) level of certainty by witness at time of confrontation (5) length of time between crime and confrontation. Neil v. Biggers, supra

In State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007), the South Carolina Supreme Court held that a criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification.

In State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000), the Supreme Court held that single person show-ups are particularly disfavored in the law.

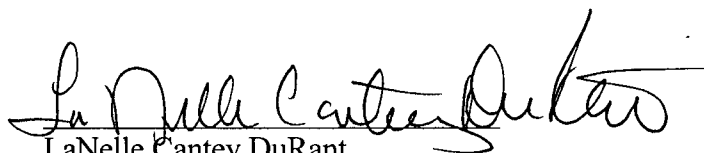
In State v. Starks, 410 S.C. 580, 765 S.E.2d 148 (Ct. App. 2014), the Court of Appeals held that the trial court erred in finding that the one-man show up identification procedure was unnecessarily suggestive but found that the identification procedure was so reliable that no substantial likelihood of misidentification existed based on the fact that the victim knew Starks before the crime.

Starks is distinguished from Mack because the victims in Mack's case had never seen him before. The trial court in Mack's case erred by admitting the out of court identification because it was a single person show up.

CONCLUSION

Based on the above, the convictions and sentences of the trial court should be reversed and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written in a cursive style.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of January, 2015.

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Carmen T. Mullen, Circuit Court Judge

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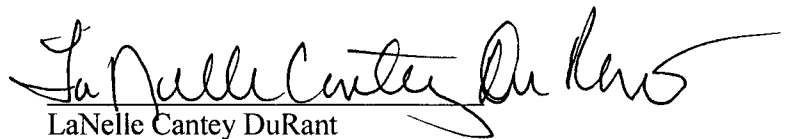
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joseph Mack Jr. states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Carmen T. Mullen, which was held on March 17-18, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, she asks the Court to relieve her as counsel for Joseph Mack Jr..

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of January, 2015.

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Carmen T. Mullen, Circuit Court Judge

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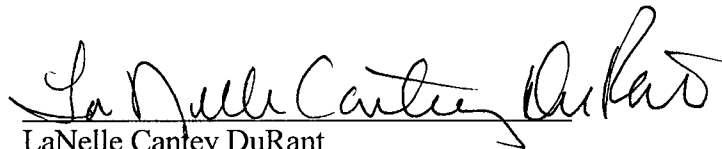
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript March 17-18, 2014
- (3) Sentencing sheets

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

January 22nd, 2015


LaNelle Cantey DuRant
Appellate Defender

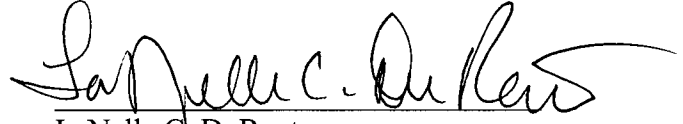
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Attorney for Appellant

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."

January 22nd, 2015

A handwritten signature in black ink, appearing to read "LaNelle C. DuRant", with a long horizontal flourish extending to the right.

LaNelle C. DuRant
Appellate Defender

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STATE OF SOUTH CAROLINA

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Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

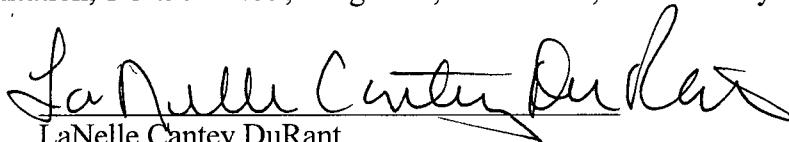
V.

JOSEPH MACK, JR.,

APPELLANT

CERTIFICATE OF SERVICE

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 Mr. Joseph Mack, Jr., #359321, Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 22nd day of January, 2015.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of January, 2015.

Naica Beardsall (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.