

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

MAR 25 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BENJAMIN LAVON SMALLS,

APPELLANT

APPELLATE CASE NO. 2014-001539

ANDERS BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting State's Exhibit 6 which is a photo of the stairwell where Appellant Smalls was seen when arrested showing a laundry basket near him and State's Exhibit 8 which is a photo of the laundry basket containing a handgun both of which are prejudicial because they were the only evidence connecting Appellant Smalls to the gun?

STATEMENT OF THE CASE

On September 12, 2011, the Charleston County Grand Jury indicted Benjamin Lavon Smalls on the charges of armed robbery (AR) and possession of a firearm during the commission of a violent crime. On July 7, 2014, Smalls proceeded to trial before the Honorable Deadra L. Jefferson and a jury. Smalls was represented by Robert L. Gaillard, and the state was represented by David Osborne and Greg Voigt. R. 1. The jury returned verdicts of guilty on both charges as indicted. R. 324, ll. 18 – R. 325, ll. 20. Judge Jefferson sentenced Smalls to five years on the gun charge and twelve years on the AR. The sentences were to run concurrent with each other. R. 337, ll. 11 – 24. Smalls' attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in admitting State's Exhibit 6 which is a photo of the stairwell where Appellant Smalls was seen when arrested showing a laundry basket near him and State's Exhibit 8 which is a photo of the laundry basket containing a handgun both of which are prejudicial because they were the only evidence connecting Appellant Smalls to the gun.

Ronzell Olds, who was an eighteen year old young man, lived with his mother, two sisters, and niece in Charleston. On May 25, 2011, when his mother left for work, she gave him the rent money of \$600 to pay the landlord when he came that day to collect. Ronzell was also to watch his younger sisters. When his older sister came, Ronzell left to meet his friend, Brandon Nelson. He took the \$600 rent money with him because the landlord did not come. R. 93, ll. 1 – R. 94, ll. 23.

Ronzell and Brandon went to the home of another friend, Montez Dozier, where they played cards and video games. They were gambling with Ronzell's thirty dollars. He did not gamble with the \$600. Montez's sister, Ashley, came out and learned they were playing cards and had money. R. 94, ll. 22 – R. 96, ll. 22.

Ronzell and Brandon began walking around to the front to leave, and they met Smalls and David Capers known as T.A. Capers called Brandon a snitch and Brandon ran. Smalls then grabbed Ronzell's arm, and both Smalls and Capers pulled guns and stuck them to Ronzell's head. They wanted everything in Ronzell's pockets. Ronzell gave them \$200 at first but then gave them all of the \$600 rent money. Smalls and Capers then jumped in Ashley's car, as she was parked in front yard preparing to leave, and they left. R. 97, ll. 1 – R. 103, ll. 25.

Olds talked to the police that night but only because his mother told him he had to or leave. At first, he told them he did not know the men that robbed him. After his mother told him he had to tell the truth, he cooperated with the police, and told them he knew the robbers as they did not wear masks. He knew Smalls and Capers from the neighborhood, and told the police they were the men who robbed him. He confirmed this through a photo lineup identification. R. 104, ll. 1 – R. 108, ll. 8.

Appellant Smalls was arrested May 31, 2011 on Applebee Way in West Ashley. Later that evening after the arrest, the gun was recovered from Applebee Way. In an effort to link Smalls to the gun, Sergeant George Bradley of the Charleston Police Department obtained a search warrant to collect a buccal swab of DNA from Smalls at the detention center. He collected the DNA sample from Smalls as soon as he obtained the warrant. R. 185, ll. 10 – R. 188, ll. 20.

Sergeant Bradley also listened to the jail tapes of phone calls Smalls made from the jail which the police had obtained. Sergeant Bradley admitted there was no mention of a gun in the taped calls. Smalls had made a call and talked about getting an item out of the house but did not say gun. R. 189, ll. 8 – R. 190, ll. 23.

Officer Sarah Gladwell of the Charleston Police, went to Applebee Way on June 1, 2011 and recovered the gun. She explained that it was found in a laundry basket on the second story landing. She took a photograph of the gun in the basket prior to collecting it. It was marked Exhibit 8 for the state. She also took a photo from the first floor looking up to the second floor landing where the laundry basket and gun were located. This was State's Exhibit 6. These were admitted into evidence.¹ R. 205, ll. 7 – R. 209, ll. 11.

¹ These were admitted without objection by defense counsel.

In a pretrial hearing, the state moved to admit State's Exhibits 6 and 8. State's 6 was a photograph of the stairwell that Smalls was seen coming down when he was arrested. At the top of the stairwell was a laundry basket with a firearm inside. Exhibit 8 was a photo of the laundry basket with the firearm inside. Defense counsel said he had to question those because they had nothing to do with his client. The judge said she would deal with those after the appropriate foundation was laid with regard to relevance. R. 58, ll. 1 – R. 62, ll. 3.

DNA was taken from the gun recovered. The analysis showed it was a mixture of at least two people. However, the DNA sample did not have enough DNA to make a conclusive statement in comparing it to anyone. The scientist could not conclude that Smalls was a contributor to the DNA on the gun. R. 229, ll. 13 – R. 235, ll. 8.

The gun was tested for fingerprints, but no fingerprints were recovered from the gun. R. 236, ll. 5 – R. 237, ll. 21.

In the closing argument to the jury, the solicitor argued that although there was no matching DNA on the gun and not fingerprints, the basket with the gun was at the top of the stairs. He argued that in his first call from the jail, Smalls told the person to get the item from the basket. R. 299, ll. 1 – 25.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

The Court of Appeals held in State v. Gore, 408 S.C. 237, 758 S.E.2d 717 (Ct. App. 2014), citing State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999), that the relevance, materiality and admissibility of photographs are matters within the sound discretion of the circuit court and a ruling will be disturbed only upon a showing of an abuse of discretion.

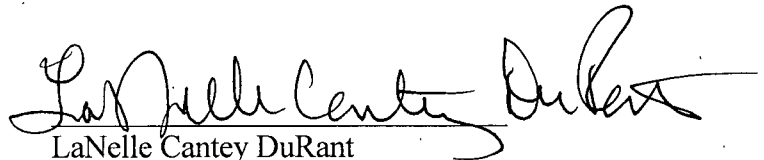
Even if the evidence was improperly admitted, the admission must be prejudicial to warrant reversal.

The trial court erred in admitting the photographs of the stairwell and the laundry basket because they were prejudicial to Smalls. These photographs were the only evidence linking Smalls to the gun. There was no DNA nor fingerprints on the gun. The gun was recovered hours after Smalls was arrested and removed from the house. Anyone could have put the gun in the basket during that time.

CONCLUSION

Based on the above, the convictions and sentences 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 over a horizontal line.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of March, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Deadra L. Jefferson, Circuit Court Judge

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RESPONDENT,

V.

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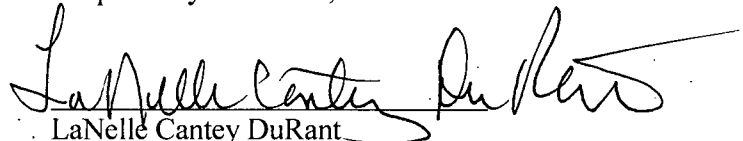
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Benjamin Lavon Smalls 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 Deadra L. Jefferson, which was held on July 9, 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 Benjamin Lavon Smalls.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of March, 2015.

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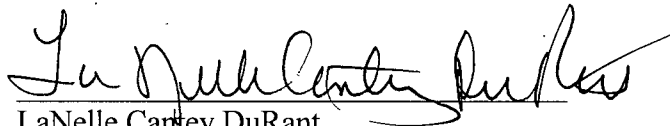
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Sentence Sheets
- (3) Trial Transcript July 7, 2014

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

March 25th, 2015



LaNelle Cartey DuRant
Appellate Defender

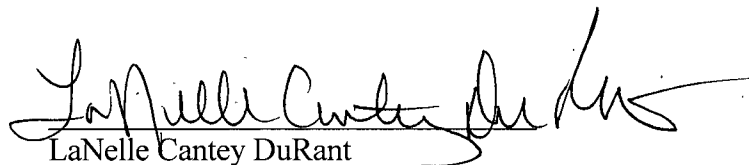
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Columbia, SC 29211-1589
(803) 734-1343

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."

March 25th, 2015



LaNelle Cantey DuRant
Appellate Defender

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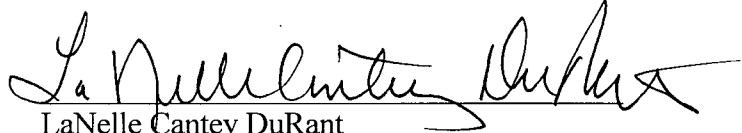
V.

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CERTIFICATE OF SERVICE

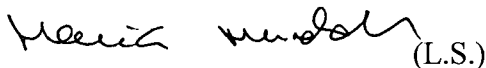
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Mr. Benjamin Lavon Smalls, #337071 at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 25th day of March, 2015.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of March, 2015.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.