

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

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AUG 19 2015

S.C. Supreme Court

REGINALD MONTGOMERY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001288

SUPPLEMENTAL APPENDIX

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South Carolina Commission on Indigent
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Division of Appellate Defense
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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)
 REGINALD MONTGOMERY,)
)
 Petitioner,)
)
 v.)
)
 THE STATE,)
)
 Respondent.)
)
 _____)

Case # 2010-CP-38-9929

A F F I D A V I T

On February 23, 2010, Mr. Montgomery filed a PCR action against trial counsel and the undersigned appellate counsel. The record is being held open by Judge Diane S. Goodstein pending the undersigned's responses to Mr. Montgomery's allegations. The allegations and answers are listed below.

1. Allegation: Appellate counsel failed to brief Brady v. Maryland in regards to Latangela Bellamy's statement not being disclosed to the defense.

Answer: I did not brief the discovery issue of whether Latangela Bellamy's statements were disclosed to the defense because it appeared from the record that all of her statements **were** disclosed, but nonetheless, there was no merit to this issue on appeal.

2. Allegation: Appellate counsel failed to raise the issue of an error where he (Mr. Montgomery) was not present during a particular in-chambers meeting that included the trial judge, the solicitor, and trial counsel.

Answer: There was no merit to the issue of whether petitioner should have been present during an in-chambers session involving the trial judge and the attorneys because it did not appear **from the record** that such a meeting ever occurred; and if it happened, there was no objection on the record regarding this. The **record** did not indicate that Mr. Montgomery was missing from any critical stages of his trial.

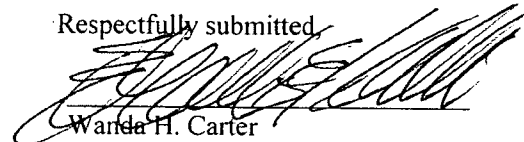
3. Allegation: Appellate counsel failed to brief the issue of an illegal show-up identification made before April Johnson in the case.

Answer: Appellate counsel raised and briefed the show-up identification issue on appeal.

4. Allegation: Appellate counsel failed to raise the issue of prosecutorial misconduct, judicial bias, and the denial of his (Mr. Montgomery's) opportunity to attend critical stages of his trial.

Answer: There was no indication **from the record** that prosecutorial misconduct or judicial bias occurred at trial, and there was no indication from the record that Mr. Montgomery was not present at all stages of his trial.

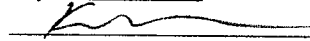
Respectfully submitted,



Wanda H. Carter

Deputy Chief Appellate Defender

SWORN TO before me this 1st
day of October 1, 2012.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 2, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

REGINALD MONTGOMERY,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

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

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in allowing show-up identification evidence into the case.

STATEMENT OF THE CASE

Appellant Reginald Montgomery was convicted of armed robbery via jury trial during the April 2007 term of the Orangeburg County General Sessions Court before the Honorable J.C. Nicholson, Judge. Appellant was sentenced to imprisonment for a period of twenty-two years.

Appellant appealed. This brief follows.

ARGUMENT

The trial judge erred in allowing show-up identification evidence into the case.

At trial, Shawon Johnson testified that he had a gun with him on the night of September 6, 2006, while he was at a night club with James Green and appellant. Johnson testified that he, Green, and appellant left the club and went to Green's house. After engaging in a discussion about making money, Johnson stated that he went to sleep, but before doing so he gave his gun to Green, and that Green and appellant went out and robbed a store. R. p. 90, l. 21 – p. 104, l. 10. James Green testified that they were talking about robbing a store on that night, and that Johnson could not do it, but that he (Green) took the gun and went with appellant to rob the store. R. 115, l. 15 – p. 132, l. 12. The store that was robbed was a Shell Station located at 5458 Vance Road in Orangeburg and Nicholas Herrington was the cashier employed at the store at that time. Herrington stated that two men with masks came in at that time, and that one pointed a gun and said this is a robbery. Herrington stated that he recognized one of the robbers who had the gun as a school classmate, but that he could not remember his name, but later determined that it was James Green. R. p. 149, line 1 – p. 156, line 10. Herrington later identified Green from a photo layout presented to him by police. R. 159, lines 16 – 21.

Shawon Johnson's sister April Johnson testified that on that morning of September 17, 2006, James Green came to her house asking for a ride to his (Green's) house, and that she gave Green and another male, (later identified as appellant) who was with him a ride to his (Green's) house. R. p. 174, line 1 – p. 177, line 4. On cross-examination, April Johnson stated that she did not recognize appellant as the other male with Green until the solicitor brought one photo (photo of appellant) to her and in effect identified the male and asked if

this was the male with Green on that morning in question; wherein after Johnson stated she responded in the affirmative. Note that prior to being shown the photograph, April Johnson did not recognize the other male who accompanied Green on that night. R. 179, line 1 – p. 187, line 12. Counsel objected to the one man photo show-up identification because this information was not made known to him prior to trial so that he could have objected and moved to suppress the identification. R. p. 190, line 16 – p. 200, line 25.

Due process is violated when the identification procedure is so unnecessarily suggestive that it would result in an irreparable identification, which in turn would render the in-court identification inadmissible, especially in the case of a prior show-up identification. See State v. Govan, 372 S.C. 552, 643 S.E.2d 92 (2007). Here, victim Herrington could identify Green, but could not identify the other perpetrator. Also, Shawon Johnson's and James Green's testimony fingering appellant as the perpetrator constituted incredible testimony given in order to gain the state's favor in their cases. Therefore, April Johnson's testimony was damaging as she was the only other witness who could have been seen as a reliable witness who could identify appellant as a perpetrator and help to make the state's case. However, her identification of appellant was clearly unreliable. This is why it was prejudicial error to allow the show-up identification evidence into the case.

Furthermore, note that the show-up was not made at the crime scene because she (Johnson) was not the victim. Additionally, the show-up identification was made a week prior to trial when the incident occurred seven months beforehand. Also, the photo shown was a booking photo that was also seven months old. See State v. Govan, supra. Also, the

remaining identify factors were not met.¹ For example, April Johnson was not a witness to the crime so she did not view the criminal and could not give a description therein. Appellant was prejudiced by this identification. The trial judge erred in allowing show-up identification evidence in the case in violation of the due process clause of the fourteenth amendment to the United States Constitution and article 1 § 3 of the South Carolina State Constitution.

¹ To determine whether an **identification** is reliable, it is necessary to consider the following 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 amount of time between the crime and confrontation. State v. Govan, supra.

CONCLUSION

Based on the foregoing argument, appellant's conviction should be reversed and his case remanded to the Orangeburg County General Sessions Court for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Wanda H. Carter", is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

May 13, 2008

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
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THE STATE,

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V.

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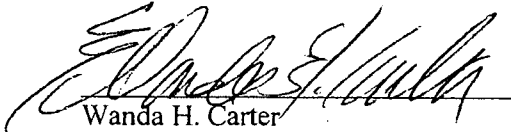
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Reginald Montgomery states:

1. She is Deputy Chief 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 J. C. Buddy Nicholson, Jr., which was held on April 4, 2007, 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 Reginald Montgomery.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

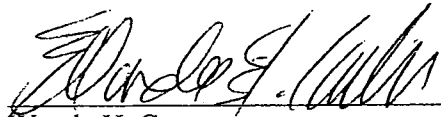
ATTORNEY FOR APPELLANT

May 13, 2008

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

May 13, 2008



Wanda H. Carter
Deputy Chief Appellate Defender

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

Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

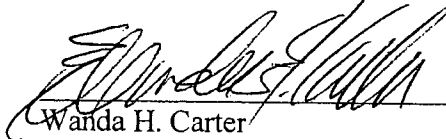
V.

REGINALD MONTGOMERY,

APPELLANT

CERTIFICATE OF SERVICE

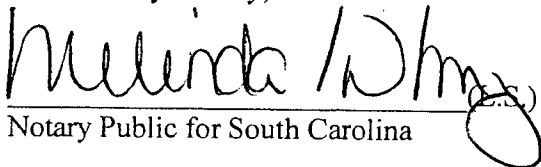
The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, Assistant Deputy Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201; and the Final Anders Brief and Record on Appeal have been served upon Reginald Montgomery, #257290 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 13th day of May, 2008.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of May, 2008.



Notary Public for South Carolina

My Commission Expires: November 16, 2008