

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
General Sessions Court

SEP 24 2015
SC Court of Appeals

Honorable Judge John C. Hayes, III, General Sessions Court Judge

2013-GS-46-04422

The State,

Respondent

v.

Darnell Keri Slaton,

Appellant

APPELLANTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the court err in conducting a *Neil v. Biggers* hearing to determine the admissibility of the law enforcement's video, which depicts the confidential informant identify Appellant from an *unduly suggestive* photographic lineup?
2. Did the court err in denying Appellant's motion for directed verdict based on the State's failure to present sufficient evidence to overcome Appellant's presumption of innocence?

STATEMENT OF THE CASE

On April 21, 2015, a jury found Appellant guilty of distribution of marijuana before Honorable Judge John C. Hayes, III. In the fall of 2012, Jacob Ballard initiated an arrangement with police in which Ballard traded the supposed identities of drug dealers for the dismissal of charges he was arrested for just a few months before in July 2012. (Trial Tr., p. 91). Ballard's charges included a second offense for both possession of marijuana and driving with a suspended license, and his previous criminal record included convictions of crimes of dishonesty in 2009, such as two counts of breaking and entering a vehicle, one count of criminal conspiracy and two counts of petty larceny. (Trial Tr., p. 88). Ballard was facing over a year of imprisonment for his crimes in 2012 when he decided to become a confidential informant for police. (Trial Tr., p. 112).

Appellant was one of the supposed drug dealers Ballard offered police on October 19, 2012. (Trial Tr., p. 113). Appellant and Ballard were mere acquaintances, only meeting intermittently over the past year. No records of texts, or phone calls were ever discovered or presented between Ballard and Appellant that would demonstrate an anticipated offer and exchange of marijuana. (Trial Tr., p. 114). On October 19, 2012, Ballard had dropped by Appellant's apartment unannounced. At trial, both Ballard and Sergeant John Rainer testified that Sergeant Rainier was the only law enforcement officer conducting the controlled buy and had searched Ballard beforehand for extraneous drugs or money. (Trial Tr., p. 115). Although Sergeant Rainier testified that the search lasted one minute in total, the search was "*thorough*" and that no drugs were found on Ballard. (Trial Tr., p. 115, 144). The search took place in a parking lot of another apartment complex than where Appellant lived and the location of the attempted controlled buy.

(Trial Tr., p. 125). At trial, Ballard repeatedly testified that he did not want to go to prison (Trial Tr., p. 116), and with that motivation along with two cameras equipped with audio hidden on his person (Trial Tr., p. 126), Ballard alone traveled from the police vehicle to Appellant's apartment. (Trial Tr., p. 128). However, the video failed to show the existence of any marijuana, or an exchange of marijuana or money. Appellant persists that there was no exchange of drugs or money during Ballard's unexpected visit and he and Ballard are heard exchanging casual conversation, briefly talking about the taste of icy fruit pops. Ballard shortly after left the apartment and walked alone to the other apartment complex wherein Sergeant Rainer was waiting. (Trial Tr., p. 129). Despite the fact that no marijuana was shown on the video, Ballard handed Sergeant Rainer 2.5 grams of marijuana, .5 grams more than he testified he supposedly negotiated for. (Trial Tr., p. 114). Inside Sergeant Rainer's police vehicle, Ballard identified Appellant from a photographic lineup of six African American males. (Trial Tr., p. 107). Appellant was later arrested and charged with distribution of marijuana.

STANDARD OF REVIEW

The appellate court is to review errors of law when reviewing criminal convictions. *State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006). The appellate court's task is to determine whether the trial court abused its discretion. *State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998). An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support. *State v. Pagan*, 369 S.C.201, 208, 631 S.E.2d 262, 265 (2006). This standard equally applies to preliminary factual findings in determining the admissibility of evidence in criminal cases. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). An appellate court will not reverse the ruling of the admissibility of the evidence absent an abuse of discretion or legal error that prejudices the defendant. *State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005).

In reviewing the denial of a motion for directed verdict, the appellate court is to view the evidence in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the defendant, the case was properly submitted to the jury. *State v. Rowell*, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997).

ARGUMENT

I. THE TRIAL COURT ERRED IN CONDUCTING A NEIL V. BIGGERS HEARING TO DETERMINE THE ADMISSABILITY OF THE VIDEO DEPICTING THE PHOTOGRAPHIC LINEUP IN WHICH THE CONFIDENTIAL INFORMANT IDENTIFIED APPELLANT.

A *Neil v. Biggers* hearing was an inappropriate vehicle for determining the admissibility of the photographic lineup because the hearing focuses on the witness' perspective and actions in evaluating suggestibility of the identification, rather than the creation and substance of the photographic lineup itself. In *Neil v. Biggers*, the Supreme Court held that determining whether identification procedures are so impermissibly suggestive and conducive to irreparable mistaken identification in violation of due process requires evaluation of the totality of the circumstances of the identification. *Neil*, at 199-200, 382. The Court set forth factors to consider such as the opportunity of the witness to view the defendant at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the defendant, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation. *Id.*

In the present case, the violation of Appellant's due process resulting from Ballard's identification was not based on Ballard's chance to get a good look at Appellant, nor was it based on any of the other factors in *Neil* that would affect Ballard's level of certainty in identifying Appellant. On the contrary, the impermissible suggestiveness of the identification and its contrary nature to due process was extrinsic of Ballard because it was suggestive and defective in its creation. Law enforcement uses such photographic lineups to determine perpetrators' identities from the witness' recollection of the perpetrator's features. It is common and expected practice for law

enforcement to pick other people for the lineup with the same age, sex and race as the suspect, as well as choose people with comparable features such as build, hair and facial hair. The purpose of this practice is to prevent erroneously suggesting to the identifier to choose the perpetrator based on an outlying feature not shared with the others.

In the present case, Sergeant Rainer created the lineup shown to Ballard before ever laying eyes on Appellant himself, and only selected other African American males supposed to resemble Appellant using only a general description from Department of Motor Vehicle (DMV) records. Sergeant Rainer's reliance on only the DMV's stored photograph and description in creating the lineup resulted in an overly suggestive identification procedure because Appellant was the only light-skinned African American. Therefore, Ballard did not have six men to choose from in order to identify Appellant, which negated the purpose of creating and presenting a lineup at all. Furthermore, because Ballard knew that Appellant was a light-skinned African American, he was impermissibly inclined to pick Appellant who was starkly distinguishable from the other men.

Because the lineup was created from insufficient procedures, the result was essentially a spotlight on Appellant's photograph, suggesting Ballard to choose Appellant. The defective creation and the substance of the lineup has no applicability to the factors evaluated in a *Neil v. Biggers* hearing because the factors focus on what the witness saw or could have seen and the witness's level of certainty. By conducting an inappropriate test for admissibility of the lineup, the trial court never actually approached the determination of the lineup's admissibility. Therefore, the trial court erred in its admission and allowing Ballard to testify regarding his identification. Accordingly, a

reversal of the Appellant's conviction is warranted and a new trial granted so that the admissibility of photographic lineup can be accurately determined.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT BECAUSE THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TENDING TO PROVE THE GUILT OF APPELLANT.

Appellant's conviction for distribution of marijuana cannot stand because the State presented insufficient evidence that distribution of any marijuana took place. At trial, both Ballard and Sergeant Rainer testified that Sergeant Rainer searched Ballard before the controlled buy and found no drugs on his person. The search's purpose was to ensure that Ballard could not hide his own marijuana in case the buy was unsuccessful, and then offer that marijuana to police so that he could still reap the benefit of cooperation in the dismissal of his charges. However, Ballard and Sergeant Rainer testified that the search only took one minute and was not a strip search. However, the light nature of the search and such meager duration is hardly sufficient to scour an individual with a background of theft and dishonesty, who testified that he really did not want to go back to jail, and had arranged controlled buys with police for that very purpose. Ballard's criminal background and persistence to stay out of jail warranted a more thorough and extensive search because the desperation to avoid prison renders a person's very private areas as opportunities for hiding places.

Furthermore, Sergeant Rainer searched Ballard in the parking lot of a different apartment complex than where Appellant lived. Therefore, Ballard had to walk for a few minutes to reach Appellant's apartment. Sergeant Rainer testified that he lost sight of Ballard on his way to Appellant's apartment. Thus, there was no way to ensure that Ballard could not have picked up marijuana he previously hid along the way. Moreover, the video cameras hidden on Ballard's person were placed in such a way that they fail to

show that Ballard did not take advantage of the opportunity to grab marijuana he previously placed along the way to Appellant's home.

Moreover, the cameras and microphones were placed on Ballard to catch an exchange of marijuana from Appellant to Ballard, but the video and audio fail to show that such an exchange occurred. The video does not show marijuana, or that a drug deal occurred. Likewise, the audio does not serve as evidence of an exchange of marijuana because "marijuana" or "drugs", or any words connoting price, purchasing or selling was ever spoken by Appellant or Ballard. Instead, the State erroneously interpreted their conversation talking about juice ice pops to be discussing the taste or fragrance of marijuana in that the audio depicts Appellant saying, "it tastes like fruit" and "it tastes like water." The State persisted during closing arguments that the conversation must be talking about marijuana exchanged between the two and that Appellant was using "drug slang." However, the State presented no evidence, let alone presented an expert to opine on the matter, that the conversation was about marijuana, or the quality of marijuana. The Supreme Court of South Carolina has held that a solicitor's argument must be confined to evidence on the record or reasonable inferences therefrom. *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996); *State v. Cannon*, 229 S.C. 614, 93 S.E.2d 889 (1956). Accordingly, the State should not have expressed the belief that the comments were about marijuana as the video fails to show any presence of marijuana, and therefore it was an unreasonable inference that the random conversation was about the exchange of drugs. Moreover, the State cannot comment on such belief by impermissibly stepping into the shoes of a witness and comment so definitely that a drug deal occurred when the video from the event does not show a drug deal. Furthermore, the solicitor is not any expert

who can opine on drug slang, and the only experience the solicitor would have in regard to distribution of marijuana or such slang would be from prosecuting such crimes. Thus, his opinion stems from a greatly biased source of knowledge, bias which has no place at trial.

The State's persistence that the conversation was "drug slang" was bolstered by the fact that Ballard allegedly left Sergeant Rainer's squad car with law enforcement provided cash to purchase drugs and without marijuana hidden on his person, and returned to the squad car with marijuana and without any such cash. However, the State's faulty process of elimination of other alternatives is invalidated by Sergeant Rainer's search of Ballard that was insufficient to overcome Ballard's persistence to stay out of prison, as previously discussed. The State's erroneous assertion that a drug deal must have occurred also fails to consider that even if Ballard left the squad car without marijuana hidden on his person, he had two opportunities to frame Appellant in order for his own criminal charges to be dismissed. Ballard's trip to and from Appellant's apartment was outside the eyes of Sergeant Rainer and the video's view. Accordingly, Ballard had two opportunities, each lasting a few minutes, to pick up previously placed marijuana and hide it on his person and dispose of the money Sergeant Rainer gave him in order to fabricate a drug deal. Moreover, Ballard nor the State could produce texts or calls demonstrating the alleged negotiation between Appellant and Ballard for the marijuana purchase including the time, place and amount. Furthermore, Ballard testified that the alleged negotiation was for 2.0 grams of marijuana in exchange of \$40.00, however Sergeant Rainer testified that Ballard returned with 2.5 grams. The unlikelihood that a drug dealer would give drugs away for free and in excess of what was negotiated

for further contributes to the conclusion that no exchange ever occurred and Ballard instead brought his own marijuana to Appellant's home.

Therefore, the trial court erred in denying Appellant's motion for directed verdict because the video does not show any marijuana, let alone the passing of marijuana from Appellant to Ballard. Additionally, the State's presumption and opinion that the conversation captured in by the audio was referring to marijuana was an unreasonable inference and impermissibly based in opinion and bias, and therefore not reasonably tending to prove Appellant's guilt. Moreover, Ballard's offer of marijuana to Sergeant Rainer cannot reasonably tend to prove Appellant's guilt because the search of Ballard's person was insufficient, and Ballard had too much of an opportunity and motive to fabricate a drug deal.

CONCLUSION

The trial court erred in admitting the video from Ballard's hidden cameras and his testimony regarding such because a *Neil v. Biggers* hearing was the inappropriate vehicle to determine the admissibility of the lineup and testimony. Thus, the trial court never actually ruled on its admissibility, and therefore its admissibility was void. Additionally, the trial court erred in denying Appellant's motion for directed verdict because the State presented insufficient evidence reasonably tending to prove Appellant's guilt. First, there was not any presence of marijuana or distribution of such captured by Ballard's video. Furthermore, the State erroneously made a biased presumption not supported by evidence that the audio was evidence of a drug deal. Additionally, law enforcement took insufficient measures to thwart Ballard's efforts to plant marijuana for his charges' dismissal because he was not supervised to and from Appellant's apartment. Finally, the marijuana Ballard produced to law enforcement is inconclusive of marijuana distribution because of insufficient search procedures that failed to overcome Ballard's desperate motives.

RESPECTFULLY SUBMITTED THIS 21st day of September 2015.

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CERTIFICATE OF COUNCIL

I, William G. Yarborough, III, certify that on this date, September 21, 2015, I served an INITIAL Brief in this action upon: (1) Jennie Abbott Kitchings, Clerk of Court, Court of Appeals of South Carolina; and (2) Mr. Alan McCrory Wilson at the S.C. Attorney General's Office by mailing it to the Government Agents at their work addresses; depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

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William G. Yarborough, III

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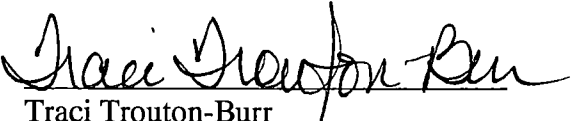
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I, Traci Trouton-Burr, certify on this date September 21, 2015 , I served an Initial Brief and Designation of Matter in this action, dated September 21, 2015 by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

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Respectfully submitted,



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