STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
The Honorable Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2015-001662

STATE OF SOUTH CAROLINA,

RESPONDENT.

v.

DEAN NELSON SEAGERS,

APPELLANT.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE ISSUES ON APPEAL

I.

The Trial Court erred in permitting the State to introduce the voice identification testimony of Detective Grill where the State failed to present a sufficient foundation for the testimony in question.

II.

The Trial Court erred in permitting the State to introduce the voice identification testimony of Detective Grill where the witness had not been qualified as an expert in voice identification and the jury was likely, on the narrow facts of this case, to view his testimony as deriving from his qualification as an expert.

III.

The Trial Court erred, and thereby violated Appellant's right to due process of law, by instructing Appellant's jury on the law as it relates to accomplice liability where there was no evidence adduced at trial which tended to establish that Appellant acted in concert with anyone in the crime charged.

STATEMENT OF THE CASE

Appellant, Dean Seagers, was indicted by the Charleston County grand jury during the November 2012 term for Distribution of Cocaine Base (2012-GS-10-06779). He was represented in the trial court by Cameron L. Marshall, Esquire. The Appellant proceeded to trial by jury on July 6-9, 2015 before the Honorable Kristi Lea Harrington. The State was represented at trial by J. Whit Sowards, Assistant Solicitor, and Lauren L. Mulkey, Assistant Solicitor. At the conclusion of this trial, the Appellant was found guilty as charged and was subsequently sentenced on July 9, 2015 to Life without Parole for Distribution of Cocaine Base.

The Appellant served and filed a timely Notice of Appeal from his judgment and sentence. This appeal follows.

ARGUMENT

STATEMENT OF FACTS

Appellant was alleged to have sold a confidential informant crack cocaine on June 20, 2012. The confidential informant, who was subsequently identified as Robert Drayton, was working with Detective Mike Burke. According to Burke's trial testimony, Drayton was being paid to conduct undercover drug buys. Burke ultimately admitted, however, that Drayton had himself been the target of a drug investigation and that his office had ultimately recruited him as a paid CI after determining that he would be more valuable to them as a resource. His testimony clearly establishes that there were charges that would have been brought against Drayton had it not been for his agreement to work with the police. Tr. p. 281, l. 4 – p. 284, l. 12. Burke admitted that at the time he made the decision to offer Drayton money to make buys as a confidential informant he was aware that this individual had a prior conviction for providing false information to law-enforcement. ROA p. 267, ll. 11-16.

According to Burke's trial testimony Drayton used his own telephone to set up a purchase from Appellant. The drug deal that supposedly followed was monitored with audio surveillance and Drayton was outfitted with a camera on his clothing. ROA p. 234, l.8 – 236, l. 10. There was no live video feed being monitored by law-enforcement contemporaneous with this alleged drug transaction. Detective Burke testified *in camera* that when the video surveillance feed was subsequently downloaded it did not show Appellant and, in fact, did not show who had lowered the small quantity of crack cocaine to Drayton from a second-story window. ROA p. 30, l. 20 – p. 32, l. 14.

Prior to jury selection, Appellant made a motion to suppress his identification by Drayton during a pretrial identification procedure and during the trial. ROA p. 4A, ll. 16-22. When Drayton was called as a witness for the State during the *in camera* proceeding on that motion, Drayton invoked his Fifth Amendment rights and declined to answer questions concerning the events of June 20, 2012. He did however acknowledge having known Appellant for a couple years and indicated that he knew him through his family. He further testified that he knew Appellant by the nickname Baby Dean. ROA p. 12, l. 13 – p. 13, l. 2. Drayton did acknowledge having been shown one photograph by Burke which Drayton acknowledged identifying as Baby Dean. ROA p. 14, l. 24 - p. 15, l. 7.

As previously noted, during the *in camera* proceeding Drayton denied seeing Appellant at all on the date this drug sale allegedly took place and expressly denied buying drugs from Appellant that day. When Drayton subsequently testified before the jury, however, he claimed that the statement he had given to Burke immediately after the transaction was truthful. That statement was introduced into evidence as State's Exhibit No. 2. ROA p. 10, ll. 19-24 (marked for ID) and ROA. p. 190, ll. 12-20 (introduced). Drayton claimed he had not testified truthfully in the *in camera* proceeding because he had received a threatening phone call from someone that morning before the trial began. He did not claim the call was made by Appellant. He likewise did not testify that the call was made by anyone he knew to be affiliated with Appellant. ROA p. 229, l. 8 – p. 230, l. 21.

In his trial testimony, however, Drayton claimed that he did not see the person who lowered the drugs down to him, in a cup on a string, from a second floor window. He did claim that he got a quick glimpse of Appellant through a window after the drugs were delivered to him in the cup. He subsequently admitted, however, that he only saw the person he identified as Appellant for a split second and that he could have been mistaken about the

individual being Appellant. ROA p. 191, l. 12 - p. 193, l. 18. There were other things about the account given by Drayton that were questionable. For example, both law enforcement officers who testified about this operation, Grill and Burke, testified that Drayton was thoroughly searched prior to being sent out to make this purchase. Grill testified that when he arrived on the scene, Burke was in the process of searching Drayton. He described in detail how thoroughly a CI was always searched before an operation. ROA p. 169, l. 8 - 170, l. 11. Burke's testimony described a very thorough search of Drayton's person before the undercover buy. While Drayton confirmed that he was searched by Burke, he vehemently denied that the police searched the crack in his buttocks. ROA p. 199, l. 5 – p. 200, l. 24.

The drugs ultimately attributed to this drug transaction were eventually identified by State witness, Renee Hilton, a forensic chemist, as testing positive as crack cocaine, not powder cocaine as Burke had supposedly made arrangements to buy from Appellant. The drugs in question were said to have weighed only 2.03 grams. ROA p. 334, l. 25 – p. 340, l. 25. Thus, the amount of drugs allegedly purchased from Appellant was extremely small and could easily have been concealed on Drayton's body in intimate areas not searched by Burke prior to the sting operation.

Burke admitted in his *in camera* testimony that he never even printed out his report on Drayton's debriefing and that as of the date of the trial that report was on the hard drive in his police vehicle in his new position in Indianapolis. ROA p. 24, l. 21- p. 25, l. 13. In another interesting twist, Burke ultimately admitted that when Drayton was searched and sent out Appellant was not the individual Drayton was supposed to be buying drugs from on that date. Burke indicated that the intended buy fell apart for some reason and that Drayton then called Appellant and arranged a different deal. ROA p. 232, l. 3- p. 234, l. 3. Burke's testimony indicated that he talked to Drayton twice by phone after he left him. ROA p. 284, l.13- p.

285, l. 18. Drayton on the other hand, denied speaking to Burke at all after he was searched and before he returned to where Burke was waiting for him. ROA p. 204, ll. 18-21. Drayton did acknowledge that he talked on the telephone while riding the bicycle to the buy location and indicated that the person he was talking to was his girlfriend. ROA p. 203, l. 20 - p. 204, l. 2. Although Drayton was equipped with a camera hidden on the front of his shirt, and a live feed audio device, there were multiple blackouts in the recordings in question resulting in a significant amount of time when it was impossible to know exactly what Drayton was doing. The transcript of Appellant's trial reveals that neither Burke nor Drayton revealed where the *original* buy was to have taken place or what caused that buy to fall through. In fact, while Burke testified that Appellant was not the original target that day, Drayton never acknowledged that there was a change in the plan and that he supposedly called Appellant to set up a buy as a fall back plan when the deal he was supposed to be making fell apart.

At trial the State introduced testimony from Detective Charles Jacob Grill. He was not the case agent in this case; however, according to his testimony, he had some involvement in this case. He was in fact the first witness to be called by the State after the jury was sworn. After a lengthy discussion of his law enforcement experience, he was qualified as an expert in narcotics investigations without objection by the defense. ROA p. 107, ll. 10-14. Grill was permitted, without objection by the defense, to testify at length concerning how many of the facts in this case were typical of the actions of a drug dealer. ROA p. 108, l. 5 - p. 128, l. 13. He went on to testify that on the date in question he observed a gray Dodge Charger down the street from the target location and recognized it to be a vehicle that law-enforcement knew Appellant to drive. Grill resisted numerous attempts by the defense to get him to answer questions concerning whether he had ever personally seen Appellant driving or riding in the car in question. ROA p. 139, ll. 1 – p. 143, l. 17.

Ultimately he admitted that he did not take pictures of the automobile or record its tag number. He acknowledged that his testimony that Appellant was "known to" use that vehicle was based on "Intel", that he had no idea the source of. He even testified that he "wanted to say" the car had tags from North Carolina or Virginia which lead him to believe it was a rental car. ROA p. 166, l. 9 – p. 167, l. 22. Grill next stated that someone might have told them that was a car Appellant had been seen in. ROA p. 174, l. 12 – p. 176, l. 15. Burke on the other hand, eventually admitted that he did check out the ownership of the gray car in question, but claimed he did not document his findings because the car did not "come back" as registered to Appellant and he attributed no significance to the fact that the vehicle would be registered to someone other than Appellant, opining that the fact that the car that was not registered in his name was not significant. ROA p. 279, l. 8 – 281, l. 3.

Grill offered testimony that he recognized Appellant's voice on the audio recording of the transaction. Trial Counsel objected to this testimony on two grounds. First, Appellant argued that Grill was not an expert in voice identification and secondly, Appellant noted that no proper foundation had been laid for his voice identification testimony. ROA p. 132, l. 23 – p. 135, l. 8. The Court overruled Appellant's objection to this line of testimony indicating that it disagreed with Trial Counsel's analysis, but not indicating a ruling on the two separate grounds upon which the objection was raised. The Court did however note that Appellant's objections were preserved for the record. ROA p. 135, ll. 9-20. Only *after* the Court's ruling did the prosecution ask Grill questions designed to lay a foundation for his voice identification testimony. ROA p. 136, l.14 - p. 138, l. 10. In this testimony, he claimed to have spoken with Appellant on several occasions prior to the date of the alleged buy. He also testified that he was present when Appellant was arrested at the same location where the buy was alleged to have occurred and had spoken with him after his arrest. Based upon that

exposure, he claimed to be certain that the voice on the audio recording was that of Appellant.

On cross-examination Grill acknowledged that his law enforcement training had taught him to document matters that were significant in his police reports. Notwithstanding that training, he asserted that he didn't document the fact that he supposedly recognized Appellant's voice in this case, noting that he "just didn't write it down". ROA p. 139, l. 24 - p. 141, l. 15.

With regard to his previous opportunity to observe Appellant's voice, on cross-examination Grill admitted that on the two occasions when he had previously spoken with Appellant, ***"I believe it was just kind of a hey, how are you doing – type deal as we were on the street working either doing – – executing warrants in this area or just – – just an encounter."*** ROA p. 157, 1-6. He asserted, however, that after Appellant was arrested ***"we did have a long conversation with the defendant. Yes, sir, I did."*** ROA p. 157, ll. 6-9. When asked if he could remember when these two brief encounters with Appellant before his arrest took place, Grill indicated that he did not remember when they occurred, but that he just knew that he had spoken to Appellant in the past. When Trial Counsel asked him if these encounters were ***"said hello on the street?"***, Grill repeated ***"Yes sir, just an encounter."*** ROA p. 157, ll. 10-16.

DISCUSSION

Issues I and II

The Trial Court erred in permitting the State to introduce the voice identification testimony of Detective Grill where the State failed to present a sufficient foundation for the testimony in question.

The Trial Court erred in permitting the State to introduce the voice identification testimony of Detective Grill where the witness had not been qualified as an expert in voice identification and the jury was likely, on the narrow facts of this case, to view his testimony as deriving from his qualification as an expert.

As noted by the South Carolina Court of Appeals in *State v. Smith*, 3 S.C. 376, 425 S.E.2d 409 (Ct. App. 1993), voice identification testimony from a person having heard someone's voice has long been regarded as legitimate and competent evidence to establish the identity in criminal cases. *See also, State v. Plyer*, 275 S.C. 291, 270 S.E.2d 126 (1980). The facts in this case are however readily distinguishable from those in *Plyler* and *Smith.* In *Smith, supra*, a dispatch operator received a call from an anonymous caller relating to that homicide case. The dispatcher described the caller's voice as that of a white male around 40 years old with a ***"very country and rugged, scratchy like voice."*** She specifically noted that the voice stuck out in her mind due to the fact that it ***"was so country [and] kind of had a ring to it."*** Id, 306 SC at 386, 415 SE 2d at 415. In *Smith*, the dispatcher testified that less than 24 hours after receiving the anonymous call, Smith came to the sheriff's office and told the dispatcher he was there to talk to detectives. The dispatcher testified that she immediately turned to her partner and informed him that she recognized the man's voice. She next told the detectives that Smith was there to see them and informed them promptly that Smith sounded like the man she had talked with the day before. The facts in Appellant's case are far different from those in *Smith.* Here Grill did not document having recognized Appellant's voice as he listened to the audio recording on the live feed from the crime scene.

To the contrary, Grill did not apparently report his claim that he recognized Appellant's voice until after, according to his own testimony, he had prolonged exposure to Appellant's voice during his arrest and the lengthy conversation which followed. He did not document recognizing Appellant's voice at any stage prior to this trial. Appellant would respectfully submit that his prolonged exposure to Appellant's voice, as someone who was under arrest for this offense, had the strong potential to taint Grill's identification based on prior extremely brief encounters at some unknown point in the past.

The facts in *Plyler, supra*, are even more dissimilar to those in Appellant's case. In *Plyler* the defendant's ex-wife had been at her mother's home visiting with her sister who had arrived driving her own car. The sister left earlier than the ex-wife. The ex-wife was subsequently on the phone with her sister when she excused herself to answer a knock at her door. The sister placed the phone on the couch and the ex-wife then heard a conversation followed by several gun shots. The ex-wife was still at her mother's home at the time of the call and immediately turned and exclaimed that her ex-husband, Harry Plyler, had just shot her sister, Linda. She then rushed to her sister's residence. Thus, the witness in *Plyler* had intimate knowledge of the defendant's voice and immediately reported recognizing the voice she heard on the phone as that of her ex-husband. There, as here, the State sought to introduce her testimony to place *Plyler* at the scene of the shooting. In that case our Supreme Court noted that voice identification testimony is regarded as legitimate and competent to establish identity in criminal and civil cases. However, unlike in the present case, the witness in *Plyler* had extensive familiarity with the voice in question and, as in *Smith, supra*, she immediately reported her recognition of that voice. Here, Grill admitted he had only a fleeting exposure to Appellant's in the past and he could not recall how long ago that exposure had taken place. In addition, his identification of Appellant's voice was no doubt

tainted by the fact that his more lengthy, and more recent, exposure to Appellant's voice which took place in the context of conversations held between him, Burke and Appellant after he was already in custody on these same charges. In addition, in this case we have the additional factor that there is no evidence that Grill ever reported his alleged recognition of Appellant's voice until this trial nearly three (3) years after Appellant's arrest. We know for certain that he did not document it.

Appellant would submit that there is one additional problem with the admission of the voice identification testimony of Detective Grill. As noted in the statement of facts above, Detective Grill was offered by the State as an expert *in narcotics investigations.* Trial Counsel objected to his voice identification testimony on the ground that he *was not* an expert in voice identification and, additionally, that a proper foundation had not been laid for this testimony. While Appellant does not dispute the fact that lay witnesses may offer voice identification testimony, the facts are not nearly so simple in Appellant's case. This officer had already been qualified as an expert *in narcotics investigations.* This jury would ultimately receive special jury instructions concerning the testimony of expert witnesses. In that charge, the jury was expressly told that expert witnesses, unlike lay witnesses, were allowed to testify as to their opinions and conclusions. ROA p. 467, l. 9 - p. 468, l. 3. Furthermore, Appellant's jury heard Trial Counsel object to this testimony on the ground that this witness was not a voice identification expert. That objection was overruled and the witness, in the presence of the jury, was told he could continue. Although the prosecution stated that they were not attempting to admit Grill as an expert, that statement did not cure the prejudice to Appellant where the jury had already heard Grill qualified as an expert witness. ROA p. 133, ll.1-16. When Trial Counsel renewed his objection just moments later, the jury was excused from the courtroom. It was then that the trial court stated that it

disagreed with Trial Counsel's analysis, "but it's preserved for the record." ROA p. 134, l. 8 - p. 135, l. 20. When the jury was subsequently returned to the court room, this line of testimony concerning Grill's ability to identify Appellant's voice continued and Grill was allowed to testify to his conclusion that the voice on the video was the voice he recognized as Appellant. ROA p. 136, l. 4 - p. 137, l. 10.

In this case, Drayton admitted that he could be mistaken about his identification of Appellant as someone he saw at the scene. In light of that testimony, which easily could have created reasonable doubt in the minds of the jury, the claim by Grill that he was able to positively identify Appellant's voice was highly prejudicial. The admission of eyewitness identification testimony which is tainted by suggestive pre-trial identification procedures violates due process. *Neil v. Biggers*, 409 U.S. 188(1972). Appellant asserts that tainted voice identification does the same damage. In the case before this Honorable Court, Grill had very little prior exposure to Appellant's voice before the date of the alleged drug transaction. He himself described his prior exposure to Appellant's voice as ***"Hey, how are you doing"*** conversations. On the facts of this case, the trial court erred in admitting Grill's voice identification testimony. As correctly argued by Appellant at trial, the State had not laid a sufficient foundation to establish a reliable basis for Grill's ability to identify Appellant's voice. Furthermore, due to the way this issue developed at trial, there was a very real danger that Appellant's jury would evaluate the credibility of this witness testimony on this crucial issue through the prism of expert authority.

Issue III

The trial court erred, and thereby violated Appellant's right to due process of law, by instructing Appellant's jury on the law as it relates to accomplice liability where there was no evidence adduced at trial which tended to establish that Appellant acted in concert with anyone in the crime charged.

During the charge conference held before jury instructions were issued, the trial judge asked Trial Counsel if he objected to "hand of one charge." Trial Counsel noted his objection to a charge on the law of accomplice liability at that time. ROA p. 418, ll. 4-9. The trial judge then stated that she would be "charging hand of one based upon the testimony that was presented." ROA p. 418, ll. 7-8. Appellant now respectfully submits that the trial court erred in issuing a jury instruction on the law of accomplice liability where there was no evidence presented at trial which established that Appellant was acting in concert with anyone.

Indictment as a principal does not in itself preclude a finding of guilt on an alternative theory of accomplice liability. *State v. Mattison*, 388 S.C. 469, 697 S.E.2d 578 (2010). "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *Id.* at 479, 697 S.E.2d at 584.

However, an instruction on the alternative theory of accomplice liability must be supported by the evidence. *State v. Dickman*, 341 S.C. 293, 534 S.E.2d 268 (2000) (accomplice liability charge was proper when there was evidence that the defendant and a second person planned the murder and the second person was the shooter). "Like a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Barber v. State*, 393 S.C. 232,

236, 712 S.E.2d 436, 439 (2011) (citing *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976) (lesser-included offense charge properly refused where no evidence supported it), and *Dickman, supra*). *See also, Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005); *State v. Foxworth,* 269 S.C. 496, 238 S.E.2d 172 (1977); *State v. Fields*, 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003).

In the case before the Court, there simply was no evidence that Appellant acted in concert with anyone else. Drayton did testify that there were three people in the apartment at the time of the deal. ROA p. 185, l. 9. He did not explain how he knew that fact since he was claiming that he had not gone inside at the crime scene, but rather had conducted this deal with someone who lowered the drugs out the second story window. He expressly testified that he did not see the person who lowered the drugs out the window in a cup on a string. ROA p. 184, l. 25 – p. 185, l. 7. There was no testimony concerning who rented the apartment or who lived there. There was no testimony from the confidential informant, Drayton, that Appellant was known to sell drugs with others from that location. Simply put, there was no evidence that Appellant was acting with partners in a mutually agreed upon plan to sell drugs. For that reason, it was error for the Court to issue a jury instruction on the law in this state concerning accomplice liability. Where Drayton admitted that he may have been mistaken about having seen Appellant at all at the scene of this drug deal, this error violated Appellant's right to due process of law. This error was highly prejudicial to Appellant and requires reversal of his conviction and sentence and the remand of his case for a new trial.

CONCLUSION

Based upon all the foregoing arguments and authorities, the Appellant's convictions and sentences should be reversed and his case remanded to the Court of General Sessions for a new trial.

Respectfully submitted,

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This 15th day of September, 2016.

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CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that certificate that this Final Brief of Appellant complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief is in compliance with the August 13, 2007 Order of the Supreme Court of South Carolina relating to the inclusion of personal data identifiers and other sensitive information in documents.

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This 15th day of September, 2016.