

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

RECEIVED

MAY 19 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TRACY MARSHELA ALSTON,

APPELLANT

APPELLATE CASE NO. 2015-002430

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 the video from the Dollar General Store which allegedly showed Appellant Alston shoplifting by stuffing a bra under her shirt when the video was hearsay admitted to prove the truth of the matter asserted?

STATEMENT OF THE CASE

On March 20, 2014, the Horry County Grand Jury indicted Tracy Alston on the charge of shoplifting 3rd or subsequent. On September 18, 2014, Appellant Alston was tried in her absence before the Honorable Benjamin H. Culbertson and a jury. Appellant Alston was represented by James Galmore, and the state was represented by Lauree Richardson. R. 1. The jury found Alston guilty as indicted. Judge Culbertson sealed the sentence, and issued a bench warrant for Alston. R. 107, ll. 22 – R. 108, ll. 10. On November 12, 2015, Alston appeared before the Honorable Roger E. Henderson for sentencing. R. 108, ll. 17 – 19. Judge Henderson unsealed the sentence ordered by Judge Culbertson. Based on Alston's two prior convictions for shoplifting, Judge Henderson sentenced her to the seven years ordered by Judge Culbertson. R. 107, ll. 14 – R. 111, ll. 19. This appeal follows.

ARGUMENT

The trial court erred in admitting the video from the Dollar General Store which allegedly showed Appellant Alston shoplifting by stuffing a bra under her shirt when the video was hearsay admitted to prove the truth of the matter asserted.

John Sellers was the manager of the Dollar General Store in Horry County. On November 18, 2013, he was working at the store, and saw Tracy Alston as she left the store without buying anything. He noticed that she was wearing a boot on her foot as for an injury. R. 44, ll. 6 – 24; R. 50, ll. 8 – R. 51, ll. 19.

When Sellers returned to work on November 19, 2013, he reviewed the tape from the security cameras or DVR in the store to check for shoplifting and any other problems as was his usual practice. R. 45, ll. 5 – R. 46, ll. 14. He saw Alston on the tape from November 18. He saw her allegedly put a bra and pack of shirts inside her shirt that she did not attempt to purchase. The value of the items was twelve dollars. R. 46, ll. 19 – R. 49, ll. 1. He did not call the police that day because he had no identifying information on Alston. R. 49, ll. 2 – 8.

The next day, November 20, 2013, Appellant Alston returned to the Dollar General. Sellers noticed her by the “way she carried herself through the store” and that she did not purchase anything. Sellers noticed that she was still wearing the “big black boot.” At that point, he called the police. R. 49, ll. 9 – R. 51, ll. 17.

Officer Jason Eden, with the Conway Police Department, responded to the manager’s call regarding a shoplifter, and went to the Dollar General. He talked to Alston who was with two other women. R. 60, ll. 10 – R. 61, ll. 2. Officer Eden detained her and obtained her name and other information, but did not arrest her at that time. The officer also said he did not take her to jail that

day because he wanted to verify the information she gave him, and because she had not committed the crime that day. R. 61, ll. 4 – R. 64, ll. 5.

When he reviewed the video from the store, he said he recognized Alston as the woman on the video. Alston still was wearing the boot on November 20 when Officer Eden saw her in the store. He was positive that Alston was the woman on the tape, and was seen “concealing merchandise within her person.” He then told Alston that she was the woman on the video and that a warrant would be issued. He allowed her to leave until he could confirm her information. R. 61, ll. 15 – R. 63, ll. 11.

Detective Tyres Nesmith testified that he obtained the arrest warrant on behalf of Officer Eden for Alston for shoplifting. R. 68, ll. 13 – R. 69, ll. 6. Appellant Alston voluntarily turned herself into the police by entering the office on November 22, 2013. She was fingerprinted and had a bond hearing. Detective Nesmith knew her because he had contact with her previously. R. 69, ll. 7 – 22.

Trial was held on September 18, 2014, but Alston did not appear. Defense counsel asked for a continuance which the trial judge denied. The state had argued that Alston received notice of her trial and that the trial would proceed in her absence. The solicitor said she sent a subpoena to Alston on September 5, 2014, and that she did appear. However, her attorney was at a conference. The solicitor told Alston that her case was on the trial roster for this week. In addition, according to the solicitor, her bond paperwork said the trial would proceed in her absence. R. 24, ll. 17 - R. 25, ll. 10.

During the trial, when the state moved to admit the videotape from the store into evidence, defense counsel objected because a proper foundation had not been laid. He argued that the witness, Sellers, did not make the videotape himself. He did not see the actual shoplifting when it

occurred. The judge overruled the objection and admitted the videotape without further argument or testimony. R. 47, ll. 1 – 17; R. 53, ll. 14 – 25.

When the state then moved to publish the videotape to the jury, defense counsel objected because the tape was hearsay and was being offered for the truth of the matter asserted. The judge said that he had already admitted the videotape into evidence “over defendant’s objections.” R. 47, ll. 15 – R. 48, ll. 8.

Sellers, the manager, then testified that he did not see the actual shoplifting incident occur. There were actually ten cameras in the store but he only brought two to the trial. He did not know the name of the security equipment. He had two weeks of management training part of which was training on how to use the security equipment. R. 51, ll. 21 – R. 54, ll. 18.

At the close of the state’s case, defense counsel moved for a directed verdict on the basis that the videotape was insufficient evidence to submit the case to the jury. No independent person saw Alston commit the shoplifting. R. 72, ll. 1 – 13. The judge denied the motion. R. 74, ll. 25.

South Carolina Evidence Rule 801 (c), SCRE, defines “hearsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Hearsay evidence is not admissible except as provided by the Rules of Evidence. Evidence Rule 802, SCRE; State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001).

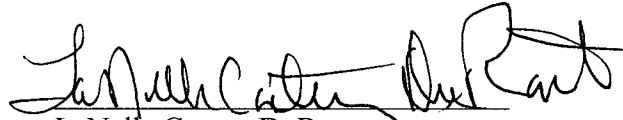
The trial court erred in admitting this videotape because it was a statement offered by the manager, Sellers, during his testimony at trial and was offered for the truth of the matter asserted. The trial judge did not allow argument on the issue and gave no basis for his ruling. He did not invite the state to present a counter argument. The videotape was prejudicial to Alston because it

was the only evidence against her. No evidence was presented to its reliability or as to why it was not hearsay pursuant to an exception to the hearsay rule.

CONCLUSION

Based on the above, the conviction and sentence should be vacated, and the case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of May, 2016.

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IN THE COURT OF APPEALS

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

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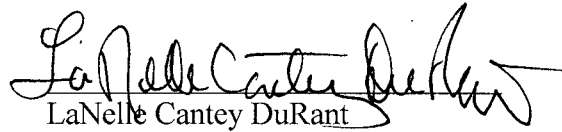
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tracy Alston 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 Benjamin H. Culbertson, which was held on November 12, 2015, 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 Tracy Alston.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of May, 2016.

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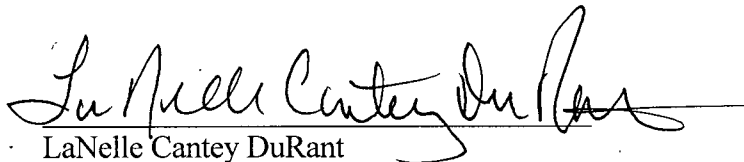
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Sentencing sheet
- (3) Entire Trial Transcript

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

May 19th, 2016



LaNelle Cantey DuRant
Appellate Defender

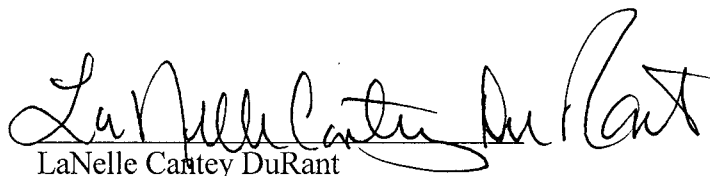
South Carolina Commission on Indigent Defense
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PO Box 11589
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Attorney for Appellant

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."

May 19, 2016


LaNelle Cartey DuRant
Appellate Defender

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Columbia, South Carolina 29211-1589

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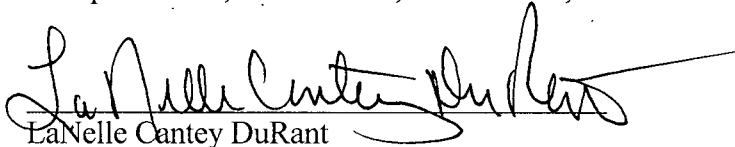
TRACY ALSTON,

APPELLANT

APPELLATE CASE NO. 2015-002430


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 J. Benjamin Aplin, 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 Tracy Alston, #254384 at Leath, Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 19th day of May, 2016.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of May, 2016.

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