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ANDERS

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Maite Murphy, Circuit Court Judge

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MAR 30 2016

SC Court of Appeals

NO DEFENDANT'S BRIEF
No Respondent's Brief Filed

THE STATE,

RESPONDENT,

V.

WILBERT FRANKLIN, JR

APPELLANT

APPELLATE CASE NO. 2015-002437

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying defense counsel's motion for a directed verdict on the robbery charge when the State failed to prove the identity of the suspect?

STATEMENT OF THE CASE

Appellant was convicted of strong armed robbery after a jury trial held before the Honorable Maite Murphy on November 9-12, 2015, in Sumter County. A fifteen (15) year sentence was imposed and it was ordered to be served consecutive to a sentence he was already serving. Stephen Story, Esq. was trial counsel. John Meadors, Esquire, was the solicitor.

This appeal follows.

ARGUMENT

The trial court erred in denying defense counsel's motion for a directed verdict to the charge of robbery when the State failed to prove the identity of the suspect.

Appellant was tried for the robbery of a Kangaroo gas station/convenience store in Sumter on the corner of Guinyard and Liberty. Chaunise Carter was the lead assistant manager of the store. She identified appellant as the person who came in the store and robbed it. She also identified him from video tapes taken from the store on the date of the August 16, 2014, incident. Walter Robertson identified appellant as a person who stayed at the emergency shelter he ran in Sumter. He also identified appellant from viewing the video tapes of the store. After the close of the State's case, defense counsel moved for a directed verdict. The trial court denied the motion (R. 135, ll. 4-24). That ruling was in error.

Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

[T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is “sufficient to raise a strong suspicion of the guilt of the accused” is not sufficient to constitute “any evidence from which the guilt of the accused may be fairly and logically deduced.” State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See, also, State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, “where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused’s guilt.” State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). “If the evidence is consistent with both innocence and guilt it cannot support a conviction.” United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir 1971). Guilt is only to be found when there is a “rationally supportable state of near certitude.” Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir 1994).

In every case the State is obligated to prove the identity of a suspect. State v. Lane, 406 S.C. 118, 121, 749 S.E. 2d 165, 167 (Ct. App. 2013). As the Supreme Court of the United States wrote in United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967):

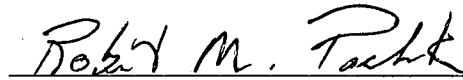
The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. 388 U.S. at 288, 87 S.Ct., at 1933.

There were no fingerprints in this case and there was no DNA. There was just eyewitness identification which was unreliable and insufficient to convict appellant.

CONCLUSION

A directed verdict should be granted to the charge of burglary

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of March, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILBERT FRANKLIN, JR

APPELLANT

APPELLATE CASE NO. 2015-002437

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Wilbert J. Franklin states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Maite Murphy, which was held on November 12, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, he asks the Court to relieve him as counsel for Wilbert J. Franklin.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of March, 2016.

STATE OF SOUTH CAROLINA

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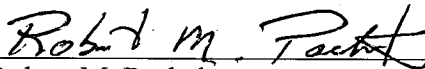
APPELLATE CASE NO. 2015-002437

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

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

- (1) Entire Trial Transcript;
- (2) True-billed indictment

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


Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
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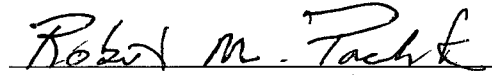
Attorney for Appellant

March 30, 2016

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 30, 2016



Robert M. Pachak
Appellate Defender

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Division of Appellate Defense
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Columbia, South Carolina 29211-1589

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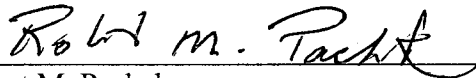
WILBERT FRANKLIN, JR

APPELLANT

APPELLATE CASE NO. 2015-002437

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter, and Record on Appeal in the above referenced case has been served upon Daniel Gourley, 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 Wilbert J. Franklin, #229450 at McCormick Correctional Institution, this 30th day of March, 2016.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of March, 2016.

Christian Ford (L.S.)

Notary Public for South Carolina

My Commission Expires: March 1, 2026.