

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

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SC COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ALBERT J. CAVE,

APPELLANT

Appellate Case No. 2011-198190

ANDERS BRIEF OF APPELLANT

BREEN RICHARD STEVENS
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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by qualifying a forensic investigator as an expert witness “to give opinion testimony as to fingerprints involved in this case” where the investigator’s training was limited to a 40 hour class in basic fingerprinting and 5 to 10 annual conferences, and where the investigator was not a certified latent print examiner?

STATEMENT OF THE CASE

Appellant Albert Cave, Jr., was indicted on July 14, 2011, by the Aiken County grand jury for first degree burglary and grand larceny in amount between \$2000 and \$10,000. R. 42, lines 10-17; R. 257 (Indictments). His case proceeded to trial before the Honorable Doyet A. Early and a jury on August 22, 2011. R. 36; R. 42, lines 8-16. David Hayes and Wallis Alves (collectively, "Counsel") represented Appellant, while David Miller and Kevin Maloney represented the State. R. 36.

The jury found Appellant not guilty of grand larceny, but guilty of petit larceny, and first degree burglary. R. 241, line 11—R. 242, line 5. The trial court imposed a sentence of 25 years incarceration for first degree burglary, and 30 days for petit larceny. R. 251, lines 15-23; R. 261 (Sentence sheets).

ARGUMENT

The trial court reversibly erred by qualifying a forensic investigator as an expert witness “to give opinion testimony as to fingerprints involved in this case” where the investigator’s training was limited to a 40 hour class in basic fingerprinting and 5 to 10 annual conferences, and where the investigator was not a certified latent print examiner.

As acknowledged by the State in its opening statement and closing argument, the case against Petitioner was based upon the presence of his fingerprints on two pieces of paper located inside the home of Mr. Ronnie Smiley (Mr. Smiley) and Mrs. Delaney Smiley (Mrs. Smiley) on May 2, 2011. R. 48, line 7—R. 49, line 17; R. 55, lines 14-21; R. 208, line 17—R. 212, line 4; R. 56, line 18—R. 216, line 12. To prove this critical aspect of its case, the State produced two forensic investigators to testify, including forensic investigator Chris Johnson (Johnson) of the Aiken County sheriff’s office. R. 109, lines 3-16.

On direct examination of Johnson, the State sought to elicit opinion testimony regarding the results of a comparison between a 10 print fingerprint card of Appellant’s fingerprints, and the latent print recovered from Mrs. Smiley’s papers. However, the trial court sustained Counsel’s objection on the basis that Johnson “has not been qualified as an expert.” R. 118, line 13—R. 119, line 9.

As a result, the State later attempted to qualify Johnson as an expert in the field of fingerprint analysis. In so doing, the State attempted to lay the following foundation to show Johnson’s qualifications in that field: (1) a 40 hour basic fingerprinting class of the South Carolina Criminal Justice Academy; (2) six months of on-the-job training in Greenville, South Carolina; and (3) an article “published in the South Carolina IAI E-News letter; ” and (4) attendance at annual State conferences. R. 131, line 21—R. 133, line 9. However, cross examination of Johnson regarding his qualifications revealed that he only

attended 5 to 10 conferences, and that he was never certified as a latent print examiner. Furthermore, it is notable that Johnson himself indicated that the requirements for certification as a latent print examiner required the following:

You have to take, you have to read, there is I believe three books you have to read. You have to take a written test and you also have to take and match a certain number of fingerprints as part of the test.

R. 135, lines 20-25. Johnson also admitted that he was not currently in any one of this process steps. R. 136, lines 1-2. Accordingly, Counsel objected to Johnson being qualified as an expert regarding latent print examination because (1) Johnson was not yet certified in that field, and (2) Johnson only attended a limited number of classes and seminars regarding fingerprints. R. 136, lines 8-11.

Over Counsel's objections, the trial court qualified Johnson as an expert and allowed him "to give opinion testimony as to fingerprints involved in this case." R. 136, lines 23-25. As a result, the State subsequently elicited testimony from Johnson regarding a 10 print fingerprint card of Appellant that he retrieved from the Aiken County sheriff's office server, a thumbprint on which he stated matched the latent print recovered from Mrs. Smiley's papers. R. 136, line 7—R. 139, line 8. Additionally, the State was also then able to introduce a photocopy of the worksheet Johnson used when entering a retrieving data from the Automated Fingerprint Identification System (AFIS). R. 114, line 24—R. 115, line 2; R. 140, lines 5-11; R. 254 (State's Exhibit # 5, C. Johnson Report). Notably, the trial court previously indicated this item would only be admissible if Johnson was first qualified as an expert witness. R. 123, lines 4-12; R. 125, line 13—R. 126, line 4.

Appellant asserts that the trial court abused its discretion,¹ and erred in qualifying Johnson as an expert witness and allowing him “to give opinion testimony as to fingerprints involved in this case.” R. 136, lines 23-25. Generally speaking, if State desires to enter opinion evidence based on the specialized knowledge of witnesses, then it is required to qualify them as expert witnesses. See Rule 702, SCRE (“If scientific, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”).² Additionally, expert testimony specifically “receives additional scrutiny relative to other evidentiary

¹ When reviewing the decision on the admissibility of testimony from an expert witness, the decision will be left to the sound discretion of the trial judge. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). As such, the qualification of a witness as an expert and the admissibility of his or her testimony are matters left to the discretion of the trial judge, whose decision will be reversed on appeal where there is an abuse of discretion and prejudice to the opposing party. State v. Jamison, 372 S.C. 649, 643 S.E.2d 700 (Ct. App. 2007). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Sims, 377 S.C. 598, 604, 661 S.E.2d 122, 125 (2008).

² Conversely, if a witness is not qualified as an expert, then he or she may not give opinion testimony based on special knowledge, skill, experience, or training. Rule 701 of the South Carolina Rules of Evidence governs opinion testimony by lay witnesses, and provides as follows:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, *and* (c) *do not require special knowledge, skill, experience or training.*

Rule 701, SCRE (emphasis added). Therefore, if a person is not qualified as an expert witness, her testimony regarding opinions or inferences is sharply limited: such lay witness testimony must meet the three conjunctive requirements established by the Rule, or it is beyond the scope of lay witness testimony.

decisions.” Watson v. Ford, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (listing the three mandatory preliminary findings a court must make prior to permitting expert opinion testimony). As such, the trial court, in its role as gatekeeper, “must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony,” which include the following: (1) that subject matter is beyond the ordinary knowledge of the jury; (2) that the “proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter;” and (3) that the substance of the testimony is reliable. Id.

In the present case, Counsel specifically objected to the second requirement; namely, that Johnson was not qualified to testify as an expert in latent fingerprint examination. R. 136, lines 8-11. “To be competent to testify as an expert witness, ‘a witness must have acquired by reason of study or experience or both such knowledge or skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.’” Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (quoting O’Tuel v. Villani, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995)). Moreover, although defects in an expert witness’ education and experience go to weight rather than admissibility, the witness must nonetheless have “indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter.” Watson, 389 S.C. at 446, 699 S.E.2d at 175.

Here, although Johnson’s training and experience likely qualified him as an expert in basic fingerprinting, he was not properly qualified to testify as an expert in the field of latent fingerprint identification. On direct, Johnson specifically indicated he had a 40 hour course in basic fingerprinting. This limited knowledge was augmented by only one-half year of on-

the-job training, and five to ten annual seminars. R. 131, line 21—R. 133, line 9. Importantly, Johnson himself admitted on cross-examination that he was neither certified as a latent fingerprint examiner, nor even in the process of becoming certified in that field. R. 135, line 20—R. 136, line 2. Therefore, the only training and experience Johnson possessed was in basic fingerprinting, not latent fingerprint examination. Accordingly, the trial court erred by qualifying Johnson as an expert witness “to give opinion testimony as to fingerprints involved in this case,” especially where the fingerprints lifted and analyzed were specifically latent fingerprints from Mrs. Smiley’s papers located inside her house. R. 136, lines 23-25.

Appellant was also prejudiced by the trial court’s error. Through Johnson, the State not only elicited testimony from Johnson regarding a 10 print fingerprint card of Appellant that he retrieved from the Aiken County sheriff’s office server, but also that a thumbprint on the card matched the latent print recovered from Mrs. Smiley’s papers. R. 136, line 7—R. 139, line 8. Moreover, the State introduced a photocopy of the worksheet Johnson used when entering a retrieving data from AFIS. R. 114, line 24—R. 115, line 2; R. 140, lines 5-11; R. 254 (State’s Exhibit # 5, C. Johnson Report). Notably, the trial court previously indicated this item would only be admissible if Johnson was first qualified as an expert witness. R. 123, lines 4-12; R. 125, line 13—R. 126, line 4. This information was critical to the State’s case, which was premised entirely on the purported presence of Appellant’s latent fingerprints on Mrs. Smiley’s papers. R. 48, line 7—R. 49, line 17; R. 207, lines 14-21; R. 208, line 17—R. 212, line 4; R. 215, line 18—R. 216, line 12. In short, the trial court permitted the State to utilize a person unqualified as an expert in latent fingerprint examination to put critical evidence regarding Appellant’s alleged latent fingerprints before

the jury. Accordingly, the trial court's error was not harmless, as it reasonably could have affected the outcome of the trial. See, e.g., State v. Davis, 371 S.C. 170, 181-82, 638 S.E.2d 57, 63 (2006) ("Error is only harmless 'when it could not reasonably have affected the result of the trial.'") (quoting State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests reversal of his convictions and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen R. Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of January, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALBERT J. CAVE,

APPELLANT

Appellate Case No. 2011-198190

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Albert J. Cave states:

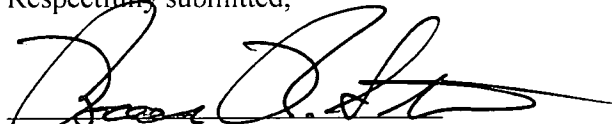
1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Doyet A. Early, III, which was held on August 23, 2011, 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 Albert J. Cave.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of January, 2013.

STATE OF SOUTH CAROLINA

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Doyet A. Early, III, Circuit Court Judge

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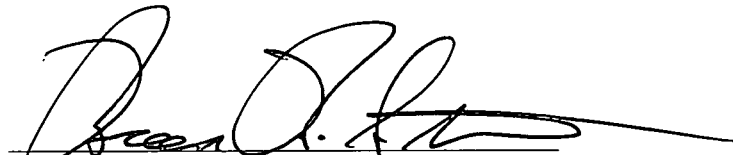
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments;
- (2) Trial transcript (jury voir dire and selection), pp. 1-35;
- (3) Trial transcript (trial), pp. 1-219;
- (4) State's Exhibit # 5 (C. Johnson Report);
- (5) Sentence Sheets.

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

January 8th, 2013



Breen Richard Stevens
Appellate Defender

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Attorney for Appellant

STATE OF SOUTH CAROLINA
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Appellate Case No. 2011-198190

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Albert J. Cave, #189002 at Kirkland Correctional Institution 4344 Broad River Road, Columbia, SC, this 8th day of January, 2013.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of January, 2013.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022 .