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SEP 17 2018

Appellant Brief SC Court of Appeals

In the Court of Appeals
State of South Carolina

FRANK GREEN JR. #116977
Appellant, pro se
vs.

STATE OF SOUTH CAROLINA
Defendant

2016-CP-02-07833

I.
THE CASE BEFORE THIS COURT PRESENTS SEVERAL CLEAR ERRORS OF LAW, IT IS REVIEWABLE, BECAUSE THE ISSUES HAVE BEEN PER PRESENTED IN THE LOWER COURT OF COMMON PLEAS. A RETURN TO DISMISS AND A CONDITIONAL ORDER UPON POST CONVICTION RELIEF.

II

1. CLEAR ERROR OF LAW

SUPPORTING FACTS AND ARGUMENT.

THE COURT OF COMMON PLEAS ABUSED ITS DISCRETION WHEN IT RULED THAT APPELLANT WAS NOT ENTITLED TO ANY JUDICIAL RELIEF BASED ON MISIDENTIFICATION OF A WITNESS.

2. CLEAR ERROR OF LAW

SUPPORTING FACTS AND ARGUMENT

THE LOWER COURT ABUSED ITS DISCRETION WHEN IT RULED THAT THE ISSUE OF SUBJECT MATTER JURISDICTION MUST BE RAISED WITHIN A 365 PERIOD AFTER.

Trial and could not be raised anytime and granted a hearing or relief.

3. CLEAR ERROR OF LAW

SUPPORTING FACTS AND ARGUMENT.

THE LOWER COURT ABUSED ITS DISCRETION WHEN IT RULED THAT COUNSEL WAS NOT INEFFECTIVE IN HIS REPRESENTATION AT TRIAL.

4. CLEAR ERROR OF LAW

SUPPORTING FACTS AND ARGUMENT.

THE LOWER COURT ABUSED ITS DISCRETION WHEN IT RULED THAT THE COURT DID NOT COMMIT FRAUD ON THE COURT BY AMENDING APPELLANT'S INDICTMENT AT TRIAL.

5. CLEAR ERROR OF LAW

SUPPORTING FACTS AND ARGUMENT

THE LOWER COURT ABUSED ITS DISCRETION WHEN IT RULED THAT NO DUE PROCESS VIOLATION TOOK PLACE WHICH WOULD ENTITLE APPELLANT TO RELIEF.

6. CLEAR ERROR OF LAW

SUPPORTING FACTS AND ARGUMENT.

THE LOWER COURT ABUSED ITS DISCRETION WHEN IT CHARGED APPELLANT WITH A WEAPON WHEN THE BUN CHARGE WAS FULLY PROCESSED.

7. CLEAR ERROR OF LAW -
SUPPORTING FACTS AND ARGUMENT.

THE LOWER COURT ABUSED ITS DISCRETION WHEN IT RULED THAT APPELLANT/APPLICANT WAS NOT ENTITLED TO JUDICIAL RELIEF DUE TO THE FACT THAT HIS POST CONVICTION RELIEF APPLICATION WAS SUCCESSIVE IN NATURE

III

MISIDENTIFICATION OF A WITNESS

STATE V. SINGLETON

COURT OF APPEALS OF SOUTH CAROLINA

SEPTEMBER 7, 2011

395 S.C.L. 716 S.E.2d 332

S.C. "AN IN-COURT IDENTIFICATION OF AN ACCUSED IS INADMISSIBLE IF A SUGGESTIVE OUT-OF-COURT IDENTIFICATION PROCEDURE CREATED A VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION." SIMMONS, 384 S.C. 1116, 682 S.E.2d 1130 INTERNAL QUATION *14 MARKS AND CITATION OMITTED. "THE UNITED STATES SUPREME COURT HAS DEVELOPED A TWO-PRONGED INQUIRY TO DETERMINE THE ADMISSIBILITY OF AN OUT-OF-COURT IDENTIFICATION." STATE V. MOORE 343 S.C. 782, 789, 540 S.E.2d 445, 447 (2000) (CITING NEIL V. BIGGERS 409 U.S. 188, 198-99, 93 S.Ct. 315, 34 L.Ed. 2d 401 (1972)). FIRST, A COURT MUST ASCERTAIN WHETHER THE IDENTIFICATION PROCESS WAS UNDULY SUGGESTIVE. SECOND, THE COURT MUST DECIDE WHETHER THE OUT-OF-COURT IDENTIFICATION WAS NEVERTHELESS SO RELIABLE THAT NO SUBSTANTIAL

likelihood of misidentification existed. Id.

7. "The inquiry must focus upon whether under the totality of the circumstances there was a substantial likelihood of misidentification." STATE V. TURNER, 313 S.C. 121, 127 S.E.2d 613 (2005).

When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the following factors.

(1) The witness opportunity to view the perpetrator at the time of the crime. (2) The witness's degree of attention. (3) The accuracy of the witness's prior description of the perpetrator. (4) The level of the witness's certainty demonstrated by the witness at the confrontation. AND (5) The length of time between the crime and the confrontation.

8. Regardless, any error was harmless in light of the overwhelming evidence of guilt presented at trial. See STATE V. SIMS, 387 S.C. 559, 564 S.E.2d 9, 14-15 (2010).

(Finding error in admission of hearsay statement harmless in view of the overwhelming evidence of guilt presented at trial), 15 FIELD 5363 S.C. at 26 609 S.E.2d at 509 (noting that to warrant reversal based on the admission of evidence, an appellant must demonstrate both error and prejudice).

Error and prejudice in this case does warrant a reversal no test or hearing was given concerning appellants misidentification concerns. The record clearly shows such yet no inquiry caused the appellant to receive a sentence by plea which could have been avoided completely by a simple but neglected inquiry see

EXHIBITS HEREIN ENCLOSED 182 WHICH ARE A PART OF THE RECORD.

STATE OF SOUTH CAROLINA
STATUTES

§16-11-330 A. ROBBERY AND ATTEMPTED ROBBERY WHILE ARMED WITH DEADLY WEAPON.

A PERSON WHO COMMITS ROBBERY WHILE ARMED WITH A PISTOL, DICK SLING SHOT, METAL KNUCKLES, RAZOR OR OTHER DEADLY WEAPON, OR WHILE ALLEGING EITHER BY ACTION OR WORD, HE WAS ARMED WHILE USING A REPRESENTATION OF A DEADLY WEAPON OR ANY OBJECT WHICH A PERSON PRESENT DURING THE COMMISSION OF THE ROBBERY REASONABLY BELIEVED TO BE A DEADLY WEAPON, IS GUILTY OF A FELONY AND UPON CONVICTION, MUST BE IMPRISONED FOR A MANDATORY MINIMUM TERM OF NOT LESS THAN TEN YEARS OR MORE THAN THIRTY YEARS, NO PART OF WHICH MAY BE SUSPENDED OR PROBATION GRANTED. A PERSON CONVICTED UNDER THIS SUBSECTION IS NOT ELIGIBLE FOR PAROLE UNTIL THE PERSON HAS SERVED AT LEAST SEVEN YEARS OF THE SENTENCE.

(B)

A PERSON WHO COMMITS ATTEMPTED ROBBERY WHILE ARMED WITH A PISTOL, DICK SLING SHOT, METAL KNUCKLES, RAZOR, OR OTHER DEADLY WEAPON, OR WHILE ALLEGING, EITHER BY ACTION OR WORDS, HE WAS ARMED WHILE USING A REPRESENTATION OF A DEADLY WEAPON OR ANY OBJECT, WHILE A PERSON PRESENT DURING THE COMMISSION OF THE ROBBERY REASONABLY BELIEVE TO BE A DEADLY WEAPON, IS GUILTY OF A FELONY AND UPON CONVICTION, MUST BE IMPRISONED NOT MORE THAN TWENTY YEARS.

ADDITIONAL PUNISHMENT FOR POSSESSION OF FIRE ARM OR KNIFE DURING COMMISSION OF, OR ATTEMPT TO COMMIT, VIOLENT CRIME. 16-23-490

STATE V. GUTHRIE
COURT OF APPEALS OF SOUTH CAROLINA
OCTOBER 28, 2002
352 S.C. 103, 512 S.E.2d 309

III. AMENDMENT OF INDICTMENT

SOUTH CAROLINA CODE ANN SECTION 17-19-100 (1985) STATES IN PERTINENT PART:

*109 (1) (a) THERE BE ANY DEFECT IN FORM IN ANY INDICTMENT OR (b) ON THE TRIAL OF ANY ~~CRIME~~ CASE THERE SHALL APPEAR TO BE ANY VARIANCE BETWEEN THE ALLEGATIONS OF THE INDICTMENT AND THE EVIDENCE OFFERED IN PROOF THEREOF, THE COURT BEFORE WHICH THE TRIAL SHALL BE HELD MAY AMEND THE INDICTMENT (ACCORDING TO THE PROOF, IF THE AMENDMENT BE BECAUSE OF A VARIANCE) IF SUCH AMENDMENT DOES NOT CHANGE THE NATURE OF THE OFFENSE CHARGED.
13, 14, 15.

AN INDICTMENT MAY BE AMENDED PROVIDED SUCH AMENDMENT DOES NOT CHANGE THE NATURE OF THE OFFENSE CHARGED. STATE V. LYNCH 344 S.C. 635, 545 S.E.2d 511 (2001) SEE ALSO GRANGER V. STATE 333 S.C. 2, 501 S.E.2d 322 (1998) (FINDING THAT UNDER § 17-19-100 AN INDICTMENT MAY BE AMENDED AT TRIAL ONLY IF AMENDMENT DOES NOT CHANGE NATURE OF THE OFFENSE CHARGED). FOR EXAMPLE, AN AMENDMENT WHICH CHANGES AN OFFENSE TO ONE

WHICH INCREASED PUNISHMENT DEPRIVES THE CIRCUIT COURT OF SUBJECT MATTER JURISDICTION. LYNCH, 344 S.C. AT 369, 545 S.E.2D AT 513 * 313 HOPKINS V. STATE, 317 S.C. AT 457, 513 S.E.2D 389 (1994); STATE V. RIDDLE 301 S.C. 211, 391 S.E.2D 253 (1990). HOWEVER, AN AMENDMENT MAY DEPRIVE THE CIRCUIT COURT OF JURISDICTION EVEN IF IT DOES NOT CHANGE THE PENALTY. SEE LYNCH, 344 S.C. AT 369, 545 S.E.2D AT 514; WEINHAUER V. STATE, 334 S.C. 327, 513 S.E.2D 840 (1999).

16.

AMENDMENTS TO AN INDICTMENT ARE PERMISSIBLE IF (1) THEY DO NOT CHANGE THE NATURE OF THE OFFENSE (2) THE CHARGE IS A LESSER INCLUDED OFFENSE OF THE CRIME CHARGED ON THE INDICTMENT; OR (3) THE DEFENDANT WAIVES PRESENTMENT TO THE GRAND JURY AND PLEADS GUILTY. STATE V. MYERS, 313 S.C. 391, 438 S.E.2D 236 (1993).

THE ERROR PLUS PREJUDICE IS SHOWN IN THE PLEA AGREEMENT AT TRIAL WHEN APPELLANT PLEADED GUILTY TO ARMED ROBBERY AS OPPOSED TO AN INDICTMENT OF ATTEMPTED ARMED ROBBERY, THE AMOUNT OF FINE INCREASED AND THE COURT HAD NO LEGAL JURISDICTION AT THAT TIME.

INEFFECTIVE ASSISTANCE OF COUNSEL
STRICKLAND V. WASHINGTON
SUPREME COURT OF THE UNITED STATES

MAY 14, 1984

466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

7.8.9 REPRESENTATION OF A CRIMINAL DEFENDANT ENTAILS CERTAIN BASIC DUTIES. COUNSEL'S FUNCTION IS TO ASSIST THE DEFENDANT AND

Hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler v. Sullivan* supra, 446 U.S. at 346, 90 S. Ct. at 1717. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See *Powell v. Alabama*, 392 U.S. at 68-69, 53 S. Ct. at 63-64. Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence and it is all too easy for a court examining counsel's defense after it has proved unsuccessful to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac*, 456 U.S. 107, 133-134, 107 S. Ct. 1558, 1574, 71 L. Ed. 2d 783 (1982). A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from perspective at the time. Because of the difficulties inherent in making the evaluation a court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. That is the defendant must overcome the presumption that under the

circumstances the "challenged action" might be considered sound trial strategy." see *Michael v. Louisiana* supra 350 U.S. 91, 101, 16 S. Ct. 416. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See *Cobb v. Moore* Good PASTER, THE TRIAL FOR LIFE: EFFECTIVE ASSISTANCE OF COUNSEL IN DEATH PENALTY CASE 58 N.Y.U.L. REV. 299, 343 (1983).

15.

AN ERROR by counsel even if professionally unreasonable does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *Johnson v. United States v. Morrison*, 449 U.S. 361, 364-365, 101 S. Ct. 665, 667-668, 66 L. Ed. 2d 564 (1981).

THE PURPOSE OF THE SIXTH AMENDMENT, GUARANTEE OF COUNSEL IS TO ENSURE *692 THAT THE DEFENDANT HAS THE ASSISTANCE NECESSARY TO JUSTIFY RELIANCE ON THE OUTCOME OF THE PROCEEDING. ACCORDINGLY, ANY DEFICIENCIES IN COUNSEL'S PERFORMANCE MUST BE PREJUDICIAL TO THE DEFENSE IN ORDER TO CONSTITUTE INEFFECTIVE ASSISTANCE UNDER THE CONSTITUTION.

21.

THE GOVERNING LEGAL STANDARD PLAYS A CRITICAL ROLE IN DEFINING THE QUESTION TO BE ASKED IN ASSESSING THE PREJUDICE FROM COUNSEL'S ERROR. WHEN A DEFENDANT CHALLENGES A CONVICTION THE QUESTION IS WHETHER THERE IS A REASONABLE PROBABILITY THAT ABSENT THE ERRORS THE FACT FINDER WOULD HAVE HAD A * * * 2064 REASONABLE DOUBT RESPECTING GUILT.

ERROR plus prejudice can be shown on the fact that a appellant was identified as Fred Green, no photo line-up was conducted and no standing line-up.

The fact that counsel never attacked this issue shows that his performance fell way below the prevailing social norms of reasonableness and the results would have been different absent such errors. This case warrants that the judgment be set aside.

Appellant has satisfied the Strickland two prong test
• However is not fully plead

Cheung v. Ford Motor Co. (S.C. 2003) 354 S.C. 77, 579 S.E. 2d 605 (There is no statute of limitation when a party seeks to set aside a judgment due to fraud upon the court).

Due process

See: Marshall v. Teesco Inc., 446 U.S. 738, 64 L. Ed. 2d 187, 110 S. Ct. 1610 (1980)

Leont Green

Sworn Before Me

This 17th Day of August 2018

Tamara Conwell
Notary Public

My Commission Expires September 25, 2023

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AIKEN DEPARTMENT OF PUBLIC SAFETY
PO Box 1177 / 251 Laurens St NW
Aiken, SC 29801
(803) 642-7620

SC Court of Appeals

Investigative Officer's Report and Case File Index

Approval:

Supervisor	Date	Time

Solicitor's Office Materials:

<input type="checkbox"/>	Solicitor's Photos Delivered	Date Delivered:	
<input type="checkbox"/>	Solicitor's Video Delivered	Date Delivered:	
<input type="checkbox"/>	Solicitor's Audio Delivered	Date Delivered:	

Court Schedules:

Preliminary Hearing Date:	Time:
Grand Jury Indictment Date:	Time:
General Sessions Court Date:	Time:

Detailed Statement of Investigation:

On March 26, 2010 I was sent to the Kents Korner at 1065 Pine Log Road, in the City and County of Aiken to an Armed Robbery. Upon my arrival, I was briefed that a black male and a black female had entered the store together. The black female went to the cooler and got a drink out and walked to the counter. While the female was at the counter, the black male walked up to the counter and pointed a silver revolver at the clerk and told the clerks "Give me the money and don't fucking play around." The clerk gave the male an amount of money from the register and both the male and the female ran out of the store together. PSO Nesmith also told me that while she was securing the scene that other witnesses (Johnston family) came up and told her that they saw a black male and a black female running from the back of Kents Korner. They saw the couple run into the Travinia's parking lot and get into a silver sedan, with a paper tag and a spoiler on the back of the car. The vehicle left the parking lot and headed north on Silver Bluff Road. PSO Nesmith put out this information over the radio to other officers and surrounding agencies. Officer Hugh Ray, with the N.E.P.D. located a vehicle that matched this description and also the vehicle was occupied by a black male and a black female. Ray activated his blue lights near the intersection of Sanders Avenue and Green Street. The black female was driving the car. The car pulled over at the above intersection. The driver, female, stayed in the car and the passenger, black male, jumped from the vehicle and ran into nearby woods. The driver was secured and a perimeter was set up and the bloodhounds were called to track the black male. The driver was found to be Lashanda Sims. Detective Royster and Sgt. Dewdy responded to

Exhibit 1

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SC Court of Appeals

AGENCY I.D.
SC0020100

AIKEN DEPARTMENT OF PUBLIC SAFETY
INCIDENT REPORT

CASE NUMBER

NCIC

2010-00033790

EVENT	INCIDENT TYPE		ATTEMPTED COMMITTED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
	1.						
	2.						
VICTIM NO. 1	INCIDENT LOCATION		DISPATCH DATE & TIMES		DISPATCH DATE	DISPATCH TIME	ARRIVAL TIME
	INCIDENT DATE	TO DATE	DISPATCH DATE	DISPATCH TIME	ARRIVAL TIME	DEPART TIME	LOCATION #
	COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT	1	2	3	4
SUBJECT NO. 1	ADDRESS		CITY		STATE	ZIP	LOCATION #
	ADDRESS		CITY		STATE	ZIP	LOCATION #
	ADDRESS		CITY		STATE	ZIP	LOCATION #
NARRATIVE	SUBJECT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT	1	2	3	4
	SUBJECT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT	1	2	3	4
	SUBJECT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT	1	2	3	4
PROPERTY	ADDRESS		CITY		STATE	ZIP	LOCATION #
	ADDRESS		CITY		STATE	ZIP	LOCATION #
	ADDRESS		CITY		STATE	ZIP	LOCATION #
ADMINISTRATION	SUBJECT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT	1	2	3	4
	SUBJECT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT	1	2	3	4
	SUBJECT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT	1	2	3	4

I responded to New Ellenton to the intersection of Sanders Street at Green Street. N.E.P.D. had stopped a car that matched the description of a car used as a get away car in an armed robbery in Aiken. The male passenger ran from the scene and the female driver was detained at the scene. The female (Sims) was wanting to speak to me so she was mirandized and waived her rights. She told me that a male named Fred Green was riding with her when they stopped at 1065 Pine Log Road at the Kents Corner to get a drink. When they went to the register, Green pulled out a gun and robbed the clerk. They then left the area in the car. I looked into the car and saw a silver revolver under the passenger seat. Detective Royster took possession of the gun and photographed it and the car. The car was towed by M&M Automotive. The A.C.S.O. located Mr. Green near the scene and took him into custody. Both were taken to ADPS. Mr. Green was searched incident to arrest and \$179.00 in cash was taken out of his pockets. Recovered was four- twenty dollar bills, three - ten dollar bills, seven - five dollar bills, and thirty four - one dollar bills. Mr. Green's phone was returned to him and removed from the evidence sheet. The cash was placed into evidence pending further investigation.

Exhibit 2

Form ADPS MS 20070621

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SC Court of Appeals

IN THE COURT OF APPEALS
STATE OF SOUTH CAROLINA

FRANK GREEN, JR. #116977
appellant pro se
vs

STATE OF SOUTH CAROLINA
Defendant

PROOF OF SERVICE

2016-CP-07-07833

I, FRANK GREEN, JR. #116977, DO HEREBY CERTIFY THAT I HAVE SERVED UPON ALL PARTIES A PROOF OF SERVICE FOR A TIMELY FILED APPELLANT BRIEF ON BEHALF OF MYSELF, THE APPELLANT, BY MAILING A COPY OF THE SAME BY UNITED STATES POSTAL SERVICE IN PELZER, SC. 29669 WITH PROPER POSTAGE AFFIXED TO THE FOLLOWING ADDRESS:
OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 11549
COLUMBIA, SC. 29811-1549

S/ Frank Green
pro se appellant
1430 OAKLAWN RD.
PELZER, SC. 29669

DATED: 9/7/2018

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SEP 07 2018

P.C.I. MAILROOM

Tamara Conwell 9/7/18

My Commission Expires
September 25, 2023