

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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**ORIGINAL**

Appeal from Sumter County

Honorable George M. McFaddin, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

LEVANCE DUNHAM,

APPELLANT

APPELLATE CASE NO. 2018-001438

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FINAL BRIEF OF APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err in admitting in evidence a wanted poster of Appellant when the probative value of the poster was substantially outweighed by the danger of unfair prejudice?

### **STATEMENT OF THE CASE**

In February of 2018, the Sumter County Grand Jury indicted Appellant, Levance Dunham, for possession of cocaine base, indictment #18-GS-43-0077. On July 26, 2018, Appellant proceeded to jury trial before the Honorable George M. McFaddin, Jr. Jason E. Bridges represented Appellant at trial. Lisa N. Beharry and Tyler B. Brown prosecuted the case. The jury returned with a verdict of guilty and Judge McFaddin sentenced Appellant to five (5) years in prison. A timely notice of intent to appeal was served on July 30, 2018. This appeal follows.

### **STANDARD OF REVIEW**

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

## ARGUMENT

**The trial judge erred in admitting in evidence a wanted poster of Appellant when the probative value of the poster was substantially outweighed by the danger of unfair prejudice.**

The jury found Appellant guilty of possession of cocaine base. On August 25, 2017, at approximately 2:30 in the morning Appellant was a passenger in a car that was stopped for a tint violation. (R. p. 14, lines 1-25). The officer's body camera recorded the stop. The officer testified that he arrested Appellant for an outstanding forgery warrant. (R. p. 58, lines 6-23). According to the officer, during a search incident to arrest he found a substance that tested positive for crack cocaine in Appellant's pocket. (R. pp. 59-61). The officer additionally found crack cocaine in the driver's purse. (R. p. 69, lines 16-23).

During pre-trial hearings Appellant challenged the initial traffic stop and also moved to suppress statements made by Appellant during the traffic stop. (R. pp. 3-35). The judge ruled that the traffic stop was proper and admitted the statements. (R. p. 10, line 24 – p. 11, lines 1-3). During the pre-trial hearing the State asked an officer with the Sumter Police Department about a wanted flyer for Appellant, marked as State's Exhibit #2. (R. p. 16, lines 8-18). The officer testified, "The second one is a warrant flyer that we received at rotation of shift of Mr. Dunham for the warrant poster, forgery." (R. p. 16, lines 9-11). The officer testified that during the traffic stop he recognized Appellant from the wanted poster for forgery. (R. p. 18, lines 1-15). The prosecution played the video recording of the traffic stop during the pre-trial hearing and noted that the wanted poster was partially visible in the video. (R. p. 18, line 21 – p. 19, lines 1-11). The outstanding forgery warrant is referenced by the officer in the video. Appellant objected to the admission of portions of the video that referenced the outstanding warrant. (R. p.

28, lines 8-12). The video was admitted, subject to objection, as State's Exhibit #1. (R. p. 65, lines 12-15).

Appellant additionally objected to the admission of the wanted poster for forgery stating, "I object to that poster in full. I think the officer is gonna testify as to the warrant, why is that, I think that's kind of superlative. That is kind of superfluous just showing, oh, yes, he's a bad guy." (R. p. 33, lines 17-21). The State admitted that portions of the wanted poster needed to be redacted but argued, "Because Your Honor, the officer said right from the start, well, I know who you are, I know you're Levance Dunham. The reason he knew that is because he had this poster. He had this picture that he had looked at just that day, and that he had in his car so that's good evidence right there." (R. p. 32, line 25 – p. 33, lines 1-15; p. 34, lines 6-12). The judge then asked, "Why can't he just tell the jury that he was notified at their meeting that night about an open warrant on Mr. Dunham ---" (R. p. 34, lines 13-15). The prosecutor answered, "Your Honor, just simply because his picture is on that, that is how he identified Levance Dunham. That way we don't have to get into the fact he had numerous other arrests or anything like that. That's how he knew right there and then." (R. p. 34, line 21 – p. 35, line 1). The judge ruled, "All right, I'll allow that, but I want the rest of it blocked out." (R. p. 35, lines 2-3).

At trial the officer testified about the outstanding forgery warrant. (R. p. 53, lines 14-22; p. 58, lines 5-23). In addition, the State offered in evidence the redacted wanted poster as State's Exhibit #3. (R. p. 54, lines 5-13). Appellant noted the prior objection and stated that the wanted poster was prejudicial. (R. p. 54, lines 14-19). The judge overruled the objection and the redacted wanted poster was admitted in evidence. (R. p. 54, lines 20-25). The redacted wanted poster includes what appears to be a mug shot of Appellant. (R. p. 150). The wanted poster states that the photo is from SLRDC, January 6, 2017. (R. p. 150). The jail in Sumter is called

the Sumter-Lee Regional Detention Center. The poster states that it is for law enforcement use only. (R. p. 150). The word "WANTED" is in large letters followed beneath with "by the Sumter Police Department." (R. p. 150). The wanted poster lists Appellant's name, race, gender, age, date of birth, height, weight, hair and eye color and lists a last known address. (R. p. 150).

At the close of the State's case Appellant renewed the previous motions. (R. p. 116, lines 2-3). The judge again denied the motions. (R. p. 116, lines 4-5). The judge instructed the jury:

During the course of this trial you have heard reference to Mr. Dunham being arrested for the offense of forgery. I charge you that when you deliberate in regard to defendant's charge of possession of cocaine base you shall not consider the fact that he was arrested for the offense of forgery in determining if the defendant is guilty of this charge. To do so would be improper. It is incumbent on you to only consider whether defendant did possess cocaine base either actually or constructively in determining if Mr. Dunham is guilty of the charge before you. His arrest for forgery is simply an explanation of why the defendant was searched.

(R. p. 134, lines 8-21). The jury instruction provided guidance as to how the jury should consider the **testimony** about the forgery arrest. The instruction, however, did not cure the highly prejudicial nature of the admission of the wanted poster. The trial judge abused his discretion in admitting the wanted poster.

The wanted poster is even more prejudicial than mug shots alone discussed in other cases. In State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004), the South Carolina Supreme Court wrote, "The introduction of a "mug-shot" of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication. State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986); State v. Robinson, 274 S.C. 198, 262 S.E.2d 729 (1980); State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977)." In the present case the State did not have a

demonstrable need to introduce the wanted poster. The officer's testimony and limited reference in the video provided context for the arrest. The wanted poster indicated that Appellant had a prior criminal record. The wanted poster contained what appears to be a mug shot from the detention center with all of the information one would expect to find on a mug shot. The wanted poster clearly originated from the Sumter Police Department and indicated that Appellant was a fugitive from justice. The trial judge abused his discretion in failing to consider the prerequisites discussed in Traylor and failing to find that the wanted poster did not meet the prerequisites of admission. The admission in evidence of the wanted poster was reversible error.

In Traylor the Court found that admission of mug shots was error but found the error harmless because the mug shot was taken upon the arrest for the offense for which the defendant stood trial. The Court strongly admonished the State against the use of mugshots and wrote, "Further, we fervently caution trial court judges against utilization of mug shot photos unless absolutely necessary. Under the precise facts of this case, however, we find the suggestive procedure did not irreparably taint the victims' identifications, and admission of the mug shot photo was not prejudicial to Traylor." State v. Traylor, 360 S.C. 74, 85, 600 S.E.2d 523, 528 (2004). The wanted poster in the present case is distinguished from the mug shot in Traylor because it was issued for a prior forgery and not in connection with the offense for which Appellant stood trial. Admission of the wanted poster in the present case was prejudicial.

In Tate the Court found that admission of defendant's mug shot was prejudicial error and reversed writing:

The first two prerequisites are not met in this case. The victim positively identified appellant in court, and there was testimony by Detective Parris that she had picked appellant out of a photographic lineup. Given this competent evidence proving identity, we fail to see the demonstrable need to introduce the "mug shot." Additionally, the markings on the photographs, particularly the date, which

was almost one year prior to the trial of this case, would clearly infer to the jury that appellant had a prior criminal record. The prejudicial effect of these photographs outweighs their probative value and the prejudice was neither cured nor rendered harmless by other events which occurred at trial.

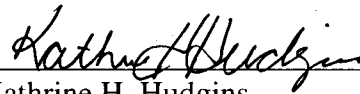
State v. Tate, 288 S.C. 104, 106, 341 S.E.2d 380, 381 (1986). Like in Tate, in the present case the State did not have a demonstrable need to introduce the wanted poster because the officer's testimony and limited reference in the video provided context for the arrest. The information on the wanted poster clearly inferred Appellant had a prior criminal record. Additionally, in the present case the third prerequisite of admission was not met because the wanted poster clearly originated from the Sumter Police Department and indicated that Appellant was a fugitive from justice. The prejudicial effect of the wanted poster outweighs its probative value and the prejudice was neither cured by the instruction nor rendered harmless by other events which occurred at trial. At trial Appellant argued that whatever was found in his pocket was mingled on the trunk of the car with the crack found in the driver's purse. (R. p 122, line 17 – p. 123, 124, lines 1-25). The error was not harmless.

In Robinson and Denson the Court found that each of the three prerequisites had been met prior to the admission of the mug shot type photographs. In Robinson the photograph consisted of three different poses, a full frontal, a profile and a frontal of the head and shoulders. All written material was blackened out of the mug shot like photograph. In Denson the photograph only consisted of a frontal of the head and shoulders. The subjects had placards hanging from their necks and on one photo the words "Richland County" were partially visible. In both cases the Court found that the State had a demonstrable need to introduce the mug shots and the photos were introduced in such a way that did not imply that the defendant had a prior criminal record. In both Robinson and Denson, like in Traylor, the Court found that the jury could have inferred that the mug shots were from the arrest for the charge upon which the

defendants stood trial. The wanted poster is for a forgery offense and consists of what appears to be a mug shot, with the photo originating from the detention center. The wanted poster improperly indicated Appellant had a prior record. The State did not have a demonstrable need to introduce the wanted poster. The wanted poster clearly originated from the Sumter Police Department and indicated that Appellant was a fugitive from justice. The trial judge abused his discretion in failing to consider the prerequisites to admission of a mug shot. The wanted poster did not meet the prerequisites of admission. Admission constituted reversible error.

**CONCLUSION**

Based on the above argument, this Court should reverse Appellant's conviction and sentence and remand for a new trial.

  
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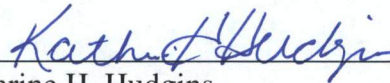
ATTORNEY FOR APPELLANT

This 26<sup>th</sup> day of August, 2019.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."

Respectfully Submitted,



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This 26<sup>th</sup> day of August, 2019.

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