

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARCUS ANTONIO MACK,

APPELLANT

APPELLATE CASE NO 2017-001842

ANDERS BRIEF OF APPELLANT

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT

The trial court erred in overruling Appellant Mack’s objection to the hearsay testimony of Investigator Jesse Quattlebaum that Co-defendant Johnnie Lee Dickerson, during his interview, identified Appellant Mack from the photo taken at the drug transaction with the CI’s undercover equipment which was prejudicial to Appellant because Co-defendant Dickerson had testified that he could not identify Mack from the photo because he “could not see the picture.”.....4

CONCLUSION.....9

PETITION TO BE RELIEVED AS COUNSEL10

TABLE OF AUTHORITIES

Cases

<u>Cooper Corp. v. Jeffcoat</u> , 217 S.C. 489, 61 S.E.2d 53 (1950).....	8
<u>Neil v. Biggers</u> , 409 U.S. 188 (1972)	5
<u>State v. Brockmeyer</u> , 406 S.C. 324, 751 S.E.2d 645 (2013).....	3
<u>State v. Hatcher</u> , 392 S.C. 86, 708 S.E.2d 750 (2011).....	3
<u>State v. Pagan</u> , 369 S.C. 201, 631 S.E.2d 262 (2006).....	3
<u>State v. Williams</u> , 285 S.C. 544, 331 S.E.2d 354 (Ct. App. 1985).....	7

Rules

Rule 801(c), SCRE.....	7
Rule 802, SCRE.....	7

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in overruling Appellant Mack's objection to the hearsay testimony of Investigator Jesse Quattlebaum that Co-defendant Johnnie Lee Dickerson, during his interview, identified Appellant Mack from the photo taken at the drug transaction with the CI's undercover equipment which was prejudicial to Appellant because Co-defendant Dickerson had testified that he could not identify Mack from the photo because he "could not see the picture"?

STATEMENT OF THE CASE

In October 2016, the Lexington County Grand Jury indicted Marcus A. Mack on the charge of distribution of cocaine base. On June 19-20, 2017, Appellant Mack proceeded to trial before the Honorable Eugene C. Griffith and a jury. That trial ended in a mistrial with a hung jury. R. 134, ll. 24 – R. 135, ll. 25. On August 23-24, 2017, Appellant Mack proceeded to trial the second time before the Honorable Robert E. Hood and a jury. Mack was represented by Jason Chehoski, and the state was represented by Melanie Graham and Gill Bell. R. 129. The jury returned a verdict of guilty as indicted. R. 420, ll. 1 – 24. The judge sentenced Appellant Mack to fifteen years. R. 432, ll. 1 – 11. Mack's attorney filed a notice of appeal. 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 court erred in overruling Appellant Mack's objection to the hearsay testimony of Investigator Jesse Quattlebaum that Co-defendant Johnnie Lee Dickerson, during his interview, identified Appellant Mack from the photo taken at the drug transaction with the CI's undercover equipment which was prejudicial to Appellant because Co-defendant Dickerson had testified that he could not identify Mack from the photo because he "could not see the picture."

Relevant Facts

On September 4, 2015, Investigator Scott Purdy with the Lexington County Sheriff's Office narcotics unit, was working with the West Columbia Police Department to make an arrest in a drug investigation. They met with a confidential informant (CI) and wired him with audio/video recording equipment, and sent him out to make a controlled purchase of drugs. R. 138, ll. 8 – R. 140, ll. 4.

From time to time, Franklin Hayes worked as a CI for law enforcement and made drug buys of illegal drugs for them. He usually wore video and audio equipment. He was paid about sixty dollars a drug transaction. R. 175, ll. 1 – R. 176, ll. 10.

On September 4, 2015, he made a drug buy for Agents Purdy and Merckle from Lexington and Officer Putney from West Columbia. Hayes was wired with the equipment and given instructions to go to a known drug house and buy drugs. R. 176, ll. 11 – R. 178, ll. 14.

Hayes went to the house and met the target provided by the agents who was a man Hayes knew as Beazy to buy one hundred dollars worth of crack cocaine. Beazy told him the house was "hot" which meant the police were alerted to that specific area. R. 178, ll. 15 – 24; R. 312, ll. 1 – 12. Beazy then took Hayes around the corner to a vehicle parked on the side of the road on

the corner of Brown and Ross Streets. Hayes met two men, one of whom he knew as "Sweet Pea." The other man was someone he knew as Mack whom Hayes had seen around. R. 312, ll. 16 – R. 313, ll.11.

When Hayes told them he wanted to buy one hundred dollars worth of crack, "Sweet Pea" told him that he did not have that much. Hayes got into the car momentarily in the back seat next to Mack. Hayes then got out of the car to make the purchase. "Sweet Pea" then got in the back seat and Mack handed him crack that Mack took out of his pocket and gave it to "Sweet Pea" who gave it to Hayes. Hayes then gave the one hundred dollars to "Sweet Pea" who handed it to Mack. Hayes then returned to the agents. R. 312, ll. 16 - R. 317, ll. 3.

Agent Purdy took the video back to his office and watched it. He sent an email with photos of the two men in the car to Detective Putney to identify because Putney was more familiar with the community for his working the street. Detective Putney knew the identity of the two men. "Sweet Pea" was Johnnie Lee Dickerson, and the other one known as Anthony was Marcus Antonio Mack. R. 141, ll. 2 – 17.

Hayes was then shown the photo lineup containing Mack's photo in Position One. Hayes identified Mack as the man in the back seat that provided the crack to Hayes on September 4, 2015. R. 141, ll. 18 – R. 144, ll. 15. The Lexington County Grand Jury indicted Mack on the charge of distribution of cocaine base in October 2016. On August 23-24, 2017, Mack proceeded to a jury trial. R. 129.

Pretrial, a Neil v. Biggers¹ hearing was held to determine if the identification of Appellant Mack was reliable. The trial judge found that the photo lineup was admissible and was done properly pursuant to Neil v. Biggers. R. 199, ll. 3 – 22.

¹ Neil v. Biggers, 409 U.S. 188 (1972).

Franklin Hayes testified during the trial that Mack was the man who sold crack to him on September 4, 2015. Hayes made an in-court identification of Mack. R. 331, ll. 1 – 25.

Johnnie Lee Dickerson, the co-defendant of Mack, testified at trial for the state. He admitted that he was serving a ten year sentence for this September 4, 2015 incident. He had been convicted of distribution of crack cocaine. He testified that he had met with the solicitor and an investigator before the trial. He also agreed that the solicitor had shown him the photo from the incident that was supposed to be Mack but Dickerson denied that he had ever identified the person in the photo as being Mack. He testified that he had told the solicitor and the investigator that “he couldn’t tell if the person in the photo was Mack or not because he could not really see the picture.” R. 359, ll. 20 – R. 363, ll. 20. He also could not remember who was sitting next to him in the car during this drug transaction. R. 363, ll. 1 – 20.

Jesse Quattlebaum worked for the solicitor’s office as an investigator. R. 365, ll. 1 – 24. On May 15, 2017, he attended an interview with Johnnie Lee Dickerson at Turbeville Correctional Center. He remembered Dickerson being shown a photo of Mack. The solicitor then asked the investigator if he remembered whether Dickerson was able to positively identify Mack. Defense counsel objected based on hearsay. R. 366, ll. 1 – 25.

The solicitor withdrew the question. The solicitor then asked the investigator if he recognized the photo that was shown to Dickerson at Turbeville prison to which the investigator responded yes. Then the investigator was asked if he were given the legal identity of the person seated in the back seat after Dickerson saw the photo. Defense counsel again objected to hearsay. The solicitor again withdrew the question. R. 367, ll. 1 – 19.

Then the solicitor asked the investigator if Dickerson made an identification that day to which the investigator responded that he did. Defense counsel again objected based on hearsay.

The judge overruled the objection. The solicitor continued to question the investigator about the identification. Finally the investigator testified that Dickerson “did positively identify.” R. 367, ll. 20 – R. 368, ll. 11.

The forensic chemist with the Lexington County Sheriff’s Office, Margaret Walker, testified that she tested the drugs in this case. She confirmed that the substance was cocaine with a weight of 4.32 grams. R. 356, ll.3 – 25.

The jury found Appellant Mack guilty of distribution of cocaine base. R. 420, ll. 1 – 24. The judge sentenced Mack to fifteen years incarceration. R. 432, ll. 1 – 9.

Discussion

The rule against hearsay prohibits admission of testimony, or written evidence, of a statement made out of court, offered in court to prove truth of the matter asserted, unless an exception to the rule is applicable. State v. Williams, 285 S.C. 544, 331 S.E.2d 354 (Ct. App. 1985); Rule 801 (c), SCRE; Rule 802, SCRE.

In State v. Williams, 285 S.C. 544, 331 S.E.2d 354 (Ct. App. 1985), the Court of Appeals held that the police officer's testimony as to defendant's wife's having identified pocketbook used in armed robbery was “hearsay” because it was offered to prove truth of matter asserted, to wit, that she had some knowledge of the pocketbook, notwithstanding State's contention that it was admissible to show she made an utterance.

In Williams, id., Williams was convicted of armed robbery. On appeal, he argued that the trial judge erred in allowing hearsay testimony. The Court of Appeals reversed the conviction and remanded the case for a new trial. The Court ruled that the admission of hearsay constituted reversible error if its admission was prejudicial to the accused. The Court then held that the testimony by the police officer as to Mrs. Williams' having identified the pocketbook that was

used in the armed robbery was hearsay, and Williams was prejudiced by it. The victim had testified that the robber had a pink pocketbook that he gave the victim to fill with money.

When hearsay is erroneously admitted, prejudice is presumed if the hearsay had some probative value on a material fact in the case. Cooper Corp. v. Jeffcoat, 217 S.C. 489, 61 S.E.2d 53 (1950).

The trial court erred in Appellant Mack's case by admitting the hearsay testimony of Investigator Quattlebaum that the Co-defendant Dickerson identified Appellant Mack in the photo from the store video. Quattlebaum testified after Dickerson. Dickerson had testified that he could not identify Mack because he could not see the photo clearly. The hearsay testimony was prejudicial to Mack because the only other person allegedly at the drug transaction was the CI Hayes. However, Hayes was biased as he was working for the Sheriff's Office to earn money. By identifying Mack, Hayes stood to earn money. Therefore, Dickerson's identification was essential.

CONCLUSION

Based on the above, Appellant's conviction should be reversed, and the case remanded for a new trial.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of August, 2018.

STATE OF SOUTH CAROLINA

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THE STATE,

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PETITION TO BE RELIEVED AS COUNSEL

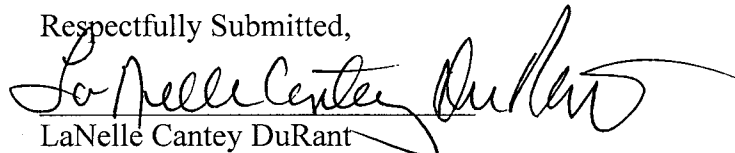
SC Court of Appeals

Counsel for Marcus A. Mack 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 Robert E. Hood, which was held on August 23-24, 2017, 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 Marcus A. Mack.

Respectfully Submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of August, 2018.

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IN THE COURT OF APPEALS

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

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SC Court of Appeals

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

- (1) True-billed indictment(s):
- (2) Sentencing Sheet
- (3) Transcript dated August 7-8, 2017
- (4) Jury selection transcript dated August 21, 2017
- (5) Trial transcript dated August 23-24, 2017

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

August 17, 2018


LaNelle Cantey DuRant
Appellate Defender

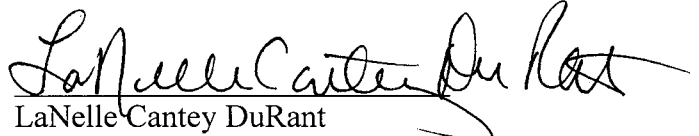
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ATTORNEY FOR APPELLANT

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."

August 17, 2018.


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