

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

RECEIVED

NOV 20 2018

SC Court of Appeals

ORIGINAL

THE STATE,

RESPONDENT,

V.

CARLON EUGENE WEATHERS, JR.

APPELLANT

APPELLATE CASE NO 2018-000470

ANDERS BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in allowing the in-court identification of appellant by the witness when the out of court identification was tainted by the officer providing to the witness the physical description of the defendant before the witness saw the photo lineup; therefore, the witness was expecting to find the defendant in the lineup?

STATEMENT OF THE CASE

On August 18, 2017, the Spartanburg County Grand Jury indicted Carlon Weathers on the charge of breach of trust more than \$2000 but less than \$10,000. On March 13-14, 2018, Appellant Weathers proceeded to trial before the Honorable J. Derham Cole and a jury. Appellant Weathers was represented by Michael David Morin, and the state was represented by Elizabeth Holland McFarland. R. 1. The jury found Weathers guilty as indicted. R. 130, ll. 1 – 21. The trial judge sentenced Appellant Weathers to ten years and recommended that restitution in the amount of \$4600 be required as a condition of any parole or early release. R. 134, ll. 1 – 10. Appellant Weathers appealed his conviction and sentence. 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 allowing the in-court identification of appellant by the witness when the out of court identification was tainted by the officer providing to the witness the physical description of the defendant before the witness saw the photo lineup; therefore, the witness was expecting to find the defendant in the lineup.

Relevant Facts

On January 17, 2017, Marcus Jones and his wife called the police and reported that a man named Gator had stolen their trailer. Jones explained that he had bought a vehicle from the man who told Jones that he needed work. Jones had visited the man at the man's house twice during that purchase. The man gave Jones his phone number, and Jones later called him to do some work for him. R. 25, ll. 1 – R. 26, ll. 25; R. 34, ll. 1 – 24.

Jones testified that he and his wife owned a business together called K.R.S. Enterprises. The business produced much trash, so Jones needed someone to haul the trash away. R. 62, ll. 6 – R. 63, ll. 10; R. 55, ll. 1 – 23. At the time for the work in January 2017, Jones had already loaded the trailer and Weathers was supposed to take it to the landfill. The trailer was switched to the vehicle Weathers had. Weathers brought a person named Danny with him to help. Jones gave Weathers one hundred dollars before they left with the trailer. R. 55, ll. 1 – R. 61, ll. 19. Jones never saw the trailer again. R. 55, ll. 17 – 23.

Jones had purchased the trailer from a friend for \$4600 but the trailer needed a lot of work. Jones spent about another \$2000 refurbishing the trailer. R. 69, ll. 3 – R. 70, ll. 1; R. 56, ll. 1 – 10. Jones made numerous calls to Weathers trying to find his trailer. R. 56, ll. 11 – R. 57, ll. 16.

Investigator Thomas Heyde received the report of Jones' missing trailer. He called the Joneses who gave him a phone number. Then the investigator proceeded to find Weathers. The only name

he had was the nickname Gator. R. 26, ll. 1-25; R. 29, ll. 9 – 21. The investigator called the number the Joneses gave him for Gator and found Reggie Eugene Weathers who was the brother of Carlon Weathers. The brother told Investigator Heyde that his brother had the nickname Gator but his real name was Carlon Weathers. The brother provided the contact information for Carlon. Investigator Heyde visited Appellant Weathers at his home and asked Weathers about the case. R. 26, ll. 1 – R. 27, ll. 4. Weathers told the investigator that he knew nothing about the trailer. R. 78, ll. 1 – R. 79, ll. 15.

After meeting with Weathers, Investigator Heyde contacted the Joneses and gave them a description of the suspect. R. 29, ll. 9 – R. 30, ll. 17. On January 23, 2017, the Joneses went to the Sheriff's Department to view the photo lineup, as Investigator Heyde had told them he had a suspect and had described the suspect to the Joneses. Ms. Jones did not select anyone, but Marcus Jones selected the photo of Carlon Weathers as the man Gator who took Jones' trailer. R. 27, ll. 7 – 12; R. 30, ll. 1 – R. 31, ll. 12.

Weathers was arrested and charged with breach of trust. R. 9, ll. 11 – R. 10, ll. 17. On March 13 – 14, 208, Appellant Weathers proceeded to trial. In a pretrial motion, defense counsel told the court that a hearing pursuant to Neal v. Biggers, 409 U.S. 188 (1972), needed to be held because counsel believed that there was an out-of-court identification that was “unnecessarily suggestive.” R. 24, ll. 1 – 25. Investigator Heyde and Marcus Jones testified during the pretrial Biggers hearing. R. 24, ll. 19 – R. 36, ll. 20.

Following the hearing, defense counsel argued that the identification was tainted because law enforcement called the Joneses before the photo lineup, and described the physical characteristics of Weathers who was a suspect. This told the Joneses that law enforcement had a suspect before they viewed the lineup. Then law enforcement called the Joneses to come view the photo lineup and pick

the suspect which overrode the Jones' affidavit and tainted the identification. R. 36, ll. 22 – R. 37, ll. 20.

The state argued that Weathers' due process rights were protected because the lineup was not suggestive. The court interrupted the solicitor and explained that defense counsel was not objecting to the lineup. Counsel was objecting to the "suggestiveness of the officer describing a potential suspect to the victim be put in a lineup." The judge stated that instead of asking the victim what the suspect looked like, the officer told the victims what the person looked like for the victims to either confirm or reject the identity. R. 37, ll. 21 – R. 38, ll. 11.

Then the judge ruled that he did not find the lineup suggestive. The judge continued to state that even though the description the officer gave to the Joneses did taint the identity somewhat, the judge found that Jones based his identification of Weathers on Jones' own contact with Weathers and his observation of Weathers. The judge declined to suppress the in-court identification of Weathers by Jones. R. 40, ll. 1 – 17.

When Jones provided an in-court identification of Weathers during Jones' testimony, defense counsel did not object. R. 67, ll. 13 – 24. During the testimony of Investigator Heyde, the photo lineup was discussed. Defense counsel objected based on his previous motion. The judge overruled it. R. 79, ll. 6 – 25. Later during the investigator's testimony, when the photo lineup was admitted as State's Exhibit no. 1, defense counsel objected as previously stated. However, when Investigator Heyde made an in-court identification of Weathers, defense counsel did not object. R. 81, ll. 1 – R. 82, ll. 4.

The jury returned a verdict of guilty as indicted. R. 130, ll. 1 – 24. The judge sentenced Weathers to ten years' incarceration and recommended that restitution in the amount of \$4600 be required as a condition of parole or early release. R. 134, ll. 1 – 9.

Discussion

In Neil v. Biggers, 409 U.S. 188 (1972), the United States Supreme Court named a two prong process to determine if an out-of-court identification was admissible: (1) if the identification process was unduly suggestive and (2) if the identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Neil v. Biggers, *id.*; State v. Lewis, 354 S.C. 222, 580 S.E.2d 149 (2004); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000); State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (2003).

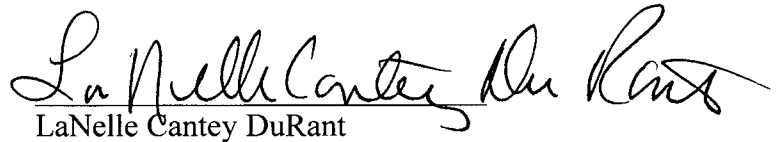
An in-court identification of an accused is inadmissible if an out-of court identification was so unduly suggestive that it created a very substantial likelihood of irreparable misidentification. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). Neil v. Biggers cites five factors to determine reliability: (1) opportunity of witness to view criminal at time of crime (2) witness' degree of attention (3) accuracy of witness's prior description of criminal (4) level of certainty by witness at time of confrontation (5) length of time between crime and confrontation. Neil v. Biggers, *supra*.

In State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007), the South Carolina Supreme Court held that a criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification.

Appellant Weathers' due process rights were violated because the out-of-court identification was tainted by the suggestiveness of the officer in providing the description of Weathers to the joneses before the photo lineup.

CONCLUSION

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


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of November, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

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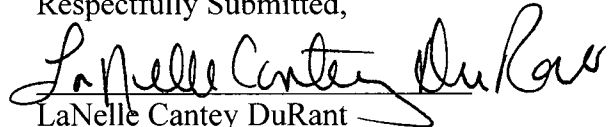
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Carlon Eugene Weathers 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 J. Derham Cole, which was held on March 13 - 14, 2018, 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 Carlon Eugene Weathers.

Respectfully Submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of November, 2018.

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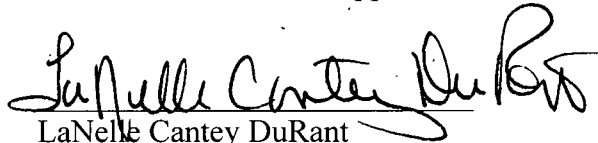
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s):
- (2) Sentencing Sheet
- (3) Trial Transcript March 13-14, 2018
- (4) State's Exhibit 1: Affidavit
- (5) State's Exhibit 2: Bill of Sale
- (6) State's Exhibit 3: Pre-interrogation waiver and statement
- (7) Defense Exhibit 1: Voluntary Statement
- (8) Defense Exhibit 2: Bill of Sale
- (9) Court's Exhibits 1 & 2: Jury Questions

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

November 20, 2018


LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense

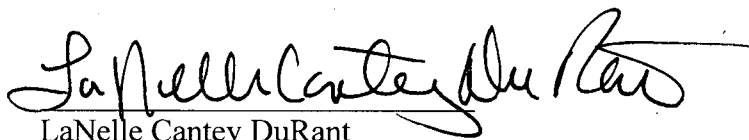
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ATTORNEY FOR APPELLANT

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."

November 20, 2018.



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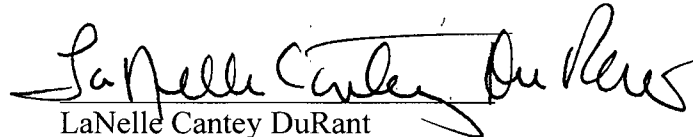
V.

CARLON EUGENE WEATHERS, JR.

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, 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 have been served on Carlon Eugene Weathers, 298915, at Livesay Pre-Release Center, P.O. Box 580, Una, SC 29378, this 20th day of November, 2018.



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of November, 2018.



(L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.