IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CURTIS LEE WILLIAMS — APPELLANT

V. — NO. 2007-KA-0143-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Curtis Lee Williams, Appellant
3. Honorable John W. Champion, District Attorney
4. Honorable Robert P. Chamberlin, Jr., Circuit Court Judge

This the 15th day of August, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: W. Daniel Hinchcliff

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STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JURY'S VERDICT OF GUILTY TO THE CHARGE OF GRAND LARCENY.

ISSUE NO. 2: WHETHER THE PHOTO LINE-UP BY WHICH APPELLANT WAS ORIGINALLY IDENTIFIED WAS OVERLY SUGGESTIVE SO AS TO TAINT THE IN COURT IDENTIFICATION.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of DeSoto County, Mississippi and a judgement of conviction for the crimes of burglary of a building and grand larceny, as a n habitual offender, against Curtis Lee Williams and a resulting sentence of seven years for the crime of burglary and five years to run consecutively for the crime of grand larceny, following a jury trial, Robert P. Chamberlin, Circuit Judge, presiding. Curtis Lee Williams is presently incarcerated with the Mississippi Department of Corrections.

FACTS

The State began its proofs with Tiffany Tennis, who awoke to find the storage shed attached to her carport being burglarized. She went out to confront two men, one of whom she came face to face with, as he carried tools from her storage shed. The man threw the tools in the trunk of the car and the two men fled. Tennis called the police, giving a description of the men and the car. She also memorized the license plate number. She was able to pick Curtis Lee Williams ["Williams"] out in a photographic line-up. At trial she identified Williams as the man she saw with the tools. (T. 11-120)

On cross examination she acknowledged that the photographic line-up occurred "some weeks later." (T. 131) Her in court identification, based on a ten second viewing at the time of the crime, was made almost seven years later. (T. 96)

Her husband, Ralph Robert Tennis, testified he kept tools in the shed and what tools he believed were missing. Tennis valued the tools at over $500 dollars.(T. 145) It was not shown that his valuation was the current market value of the tools, but instead it was admitted on cross examination that the valuation was calculated on replacement cost. (T. 151-152)

After the testimony of John Grandberry, of the Memphis police, that Williams was arrested near Horn Lake, Mississippi, while stripping the car Tiffany Tennis had reported on the same date as the burglary, the State rested. (T. 156-162, 165) The Defense then rested and the State finally rested. (T. 174) The defense submitted a motion for a directed verdict which was denied and after the trial made a Motion for a J.N.O.V and/or New Trial. (C.P. 84), both of which were denied.

SUMMARY OF THE ARGUMENT

The evidence of the value of property purportedly stolen was insufficient to sustain a verdict of grand larceny. The only testimony concerning the value of the property was testimony of

replacement value, not the current true market value.

The photographic line-up in which Williams was identified was impermissibly suggestive and should have been suppressed, including any subsequent identification of Williams, especially in light of the fact that the trial commenced over six years from the date of the crime.

ARGUMENT

ISSUE NO. 1: WHETHER THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JURY'S VERDICT OF GUILTY TO THE CHARGE OF GRAND LARCENY.

The jury's verdict of guilty of the crime of grand larceny was simply not supported by the evidence. The crime of grand larceny requires proof that the property taken had a fair market value greater than two hundred and fifty dollars. [1] The proofs adduced at trial, as set forth below, were not sufficient for a reasonable jury to find that the fair market value of the subject property. In fact it was admitted that the property valuation:

> Q. What's the approximate value of everything that was taken ?
>
> A. Over $500 I know. I couldn't tell you exactly. $550 or something I think is what I added up. (T. 145-146)
>
> *****
>
> Q. And how did you go about determining the value?
>
> A. Well, basically, you know , knowing what the tools, you know, had cost me.
>
> Q. So is it your testimony that the value is based on what it would have cost you to replace those tools ?
>
> A. Yeah. Yes, sir. (T. 150-151)

[1] The date of the purported larceny was January 14, 200, before the 2004 amendment to the grand larceny statute, Miss. Code Ann. § 97-17-41.

The testimony is unequivocal; the value of the tools is solely based on replacement value. It is well settled that a property valuation must be based on what the property would sell for on the open market, not what it cost originally.

> This Court held that the proof was insufficient to prove grand larceny. The Court held that the proper measure of the value of property is the market value of the property at the time and place of the larceny, not the original purchase price.

Ellis v. State, 469 So.2d 1256, 1259 (Miss.,1985) (citing *Barry v. State*, 406 So. 2d 45 (Miss. 1981)

Ralph Tennis admitted that it would have been possible to purchase the tools for "substantially less" , if he bought them used on the open market. (T. 153) This is the proper way to value the tools.

> In 50 Am.Jur.2d Larceny s 45 (1970), this language is found:
>
> "Thus, in the case of common articles having a market value, the courts have usually rejected the original cost and any special value to the owner personally as standards of value for purposes of graduation of the offense, and have declared the proper criterion to be the price which the subject of the larceny would bring in open market-its 'market value' or its 'reasonable selling price,' at the time and place of the theft, and in the condition in which it was when the thief commenced the acts culminating in the larceny."
>
> 50 Am.Jur.2d at page 209-10. (Emphasis added).
>
> 3 Wharton's Criminal Law s 357 (14th Ed. 1980), has this to say about proving value of stolen property:
>
> "When the grade of larceny depends upon the value of the property taken, such value must be proved as a fact and be determined by the jury.
>
> "In the ordinary case, the proper yardstick is the market value of the property at the time and place of the larceny; the original cost of the property or any special value to the owner personally is not considered." 3 Wharton's at page 309-11. (Emphasis added).

Barry, Id. at 47 (Miss., 1981). *Barry* further provides the correct disposition, that this count should be affirmed as to petite larceny only and remanded for re-sentencing.

The maxim, for the purposes of the grand larceny statute, that current market value and not purchase price is the measure of the statutory amount determination has been recently ingeminated by the Mississippi Court of Appeals in *Thompson v. State,* 910 So. 2d 60 (Miss. App. 2005) Where the State's evidence of value is premised on purchase price, the court is "compelled to hold" that the evidence of grand larceny is insufficient. *Thompson, Id.* at 63.

Thus, Williams' conviction for grand larceny must be reversed as a matter of law.

ISSUE NO. 2: WHETHER THE PHOTO LINE-UP BY WHICH APPELLANT WAS ORIGINALLY IDENTIFIED WAS OVERLY SUGGESTIVE SO AS TO TAINT THE IN COURT IDENTIFICATION.

The cornerstone case in Mississippi for suggestive pretrial procedures in making an identification of a defendant were set forth in *York v. State,* 413 So. 2d 1372 (Miss. 1982)

> A lineup or series of photographs in which the accused, when compared with the others, is conspicuously singled out in some manner from the others, either from appearance or statements by an officer, is impermissibly suggestive. Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969); Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). A showup in which the accused is brought by an officer to the eyewitness is likewise impermissibly suggestive where there is no necessity for doing so. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (impermissively suggestive); Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) (same); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) (not impermissively suggestive).
>
> An impermissibly suggestive pretrial identification does not preclude in-court identification by an eyewitness who viewed the suspect at the procedure, unless: (1) from the totality of the circumstances surrounding it FN12 (2) the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. FN13

York, Id. at 1383

Prior to trial, Williams filed a motion to suppress the photographic line-up. (C.P. 22-25, R.E 7-10). In that motion, Appellant urged that two of the pictures were eliminated as potentially of the defendant by the fact that the photographs included a linear height measure behind them, clearly indicating that the persons in those photographs were significantly taller than Williams. (T. 9) Williams had been described by the witness as 5'6" to 5'8", considerably shorter than the two six footers in the pictures. The use of a "measuring device" is something that can give rise to a suggestion of impermissibility." *Jones v. State*, 504 So. 2d 1196, 1199 (Miss. 1987). Thus the photo lineup is effectually a lineup of four not six pictures.

Of the remaining four pictures, the photograph of Williams stands out. The three pictures other than Williams have blue back grounds. Williams has a white background, a clearly more contrasting and eye-catching background. Those pictures are "headshots", showing virtually no torso. Not so the photograph of Williams, which shows approximately half of his torso, setting him apart from all five of the photographs. Williams' hair is noticeably shorter than the other photographs, particularly the blue background pictures. If the foregoing were not strong enough, Williams is photographs wearing a eye-catching red jacket. Even the fact that Williams was pictured in a jacket is suggestive as the crime occurred in January. None of the other pictures can be said to portray winter clothing. Everything about the photographic line-up draws the eye to Williams' picture.

The trial in this matter occurred some six plus years from the event. Six years prior, Tiffany Tennis, observed a burglar for admittedly ten seconds or less. (T. 122) Looking at the totality of the circumstances, the photographic lineup suggested Williams in a manner so compelling, that an in court identification is highly suspect. A review of the record shows that Tiffany only viewed the person with the tools for a brief startled moment before he ran. (T. 115, 128) She made no

affirmation in her direct examination, nor in cross examination, that she was sure of her identification. Only upon redirect where the State asked a leading question, "Are you sure?" did Ms. Tennis indicate any degree of certainty. (T. 134) She admittedly makes a connection between the defendant in court with the photographic lineup.

> Q. Did the officers come to your house at some point later and show you a photo lineup?
>
> A. Yes.
>
> Was this defendant in that?
>
> A. He was. (T. 120)

At trial, Tiffany Tennis concedes that Williams is heavier than the man she saw. " I mean it looks like he has gained a little weight." (T. 96) Perhaps most important, Ms. Tennis agrees, she could make a mistake in identifying someone.

> Q. So it is possible that you could be mistaken in identifying someone?
>
> A. Yes. (T. 133)

An in court identification must be scrutinized under the test factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972) The factors set out in Neil and utilized in *York, Id.* at 1383 are as follows:

> As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil, Id. at 199-200 . Ms. Tennis had a short startled moment to observe the man with the tools. Her degree of attention is suspect as she could not recall the tools he was carrying other than a hedge

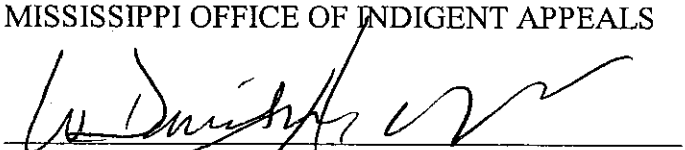
trimmer. (T. 89) Her first description was vague giving only an approximation of height, no weight, that the man was black and had a brownish plaid shirt. As set forth above, she admitted the possibility of mistake. The trial was six years later. She saw Williams in the hall outside the courtroom immediately prior to trial for the first time in six years. (T.131) Tiffany's identification of Williams, weighed under these factors, is less than the necessary standard.

Therefore, as urged in the motion to suppress, pursuant to *Wong Sun, et al v. United States,* 371 U.S. 471 (1963), the trial court erred in not suppressing the in court identification of Williams by Tiffany Tennis given the impermissibly suggestive nature of the photographic lineup.

CONCLUSION

For the reasons set forth in the argument above, Curtis Lee Williams is first entitled to have his conviction reversed and remanded for a new trial, and, if not reversed and remanded for a new trial, That his conviction for the crime of grand larceny be reversed with the cause being remanded for re-sentencing for the lesser crime of petite larceny.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Curtis Lee Williams, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 15 day of August, 2007.

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