

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-02137-COA

FILED

BILLY JOE ANDERSON

SEP 22 2008

APPELLANT

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS
VERSUS

STATE OF MISSISSIPPI

APPELLEE

**APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF THE
2ND JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI**

REPLY BRIEF BY APPELLANT

**OFFICE OF THE PUBLIC DEFENDER,
HINDS COUNTY, MISSISSIPPI**

William R. LaBarre, MSB No. [REDACTED]

PUBLIC DEFENDER

Virginia L. Watkins, MSB. No. [REDACTED]

Assistant Public Defender

Post Office Box 23029

Jackson, Mississippi 39225

Telephone: 601-948-2683

Facsimile: 601-948-2687

Billy Joe Anderson v. State of Mississippi

2007-KA-02137-COA

Table of Contents

Table of Contents	i
Table of Authorities	ii
Reply	1
Conclusion	7
Certificate of Service	8

Billy Joe Anderson v. State of Mississippi

2007-KA-02137-COA

Table of Authorities

<u>Cases</u>	<u>Page</u>
<i>Foster v. State</i> , 493 So.2d 1304 (Miss. 1986)	5
<i>Jones v. State</i> , 504 So.2d 1197 (Miss. 1987)	5
<i>United States v. Wade</i> , 388 U.S. 218 (1967)	5
<i>York v. State</i> , 413 So.2d 1372 (Miss. 1983)	5
 <u>Constitutions, Rules, Statutes and other Authorities</u>	
MISSISSIPPI RULE OF APPELLATE PROCEDURE 31	1
<i>Time</i> , April 2, 1973 © 1973, TIME, INC.	5; 6
<i>Could This Happen to Your Spouse or Child?</i> , Merritt, Jeralyn E., © Lawyers.com/MARTINDALE-HUBBELL	6
<i>Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification</i> , Woocher, Fredric J. © 1977 STANFORD LAW REVIEW.	6

REPLY BY APPELLANT

Comes now BILLY JOE ANDERSON, Appellant herein and makes this his Reply in rebuttal to the arguments of the State, pursuant to MISSISSIPPI RULE OF APPELLATE PROCEDURE 31. In so doing, Mr. Anderson again brings forth all assigned errors and legal authority cited in *Brief of the Appellant on the Merits*, incorporated herein by reference.

I. The trial court abused its discretion when it failed to suppress the in-court identification of Mr. Anderson, as the initial out-of-court identification was tainted by an earlier display of a photograph. The trial court further abused its discretion by admitting into evidence Exhibit No. 4, as its authenticity could not be conclusively established, inuring to the fatal prejudice of Mr. Anderson and depriving him of a fundamentally fair trial under both state and federal constitutions.

The simple problem with introduction of Exhibit 4, a copy of the photograph line-up purportedly used to identify Mr. Anderson, was that prosecutors could not authenticate the copies offered at trial. The trial court sustained Mr. Anderson's objections on that basis during direct examination of Bryan Hales. T.220.

Nevertheless, although the trial court finally admitted the array during the direct examination of Lynda Stephens, the judge had a chance to correct his mistake and exclude the exhibit when Stephens later acknowledged under cross examination that she could not truthfully affirm Exhibit 4 was of the set of photographs or copies from which she identified Mr. Anderson.

T. 242; 251; RE 16

BY MR. DOLEAC: [Continuing]

Q. Tell the jury and the Court what you do remember about them, please, sir.

A. I remember they were like Xeroxed copies of pictures on plain paper. That's basically all I remember about them.

BY MR. DOLEAC: Your Honor, at this time I would ask that Exhibit 4 for I.D. be admitted for all purposes.

BY THE COURT: Any additional objections?

BY MR. LABARRE: Yes, sir, Your Honor. Authentication.

BY THE COURT: Sustained.

Although the trial court overruled Mr. Anderson's objection on the basis of authentication during direct examination of Ms. Stephens and admitted Exhibit 4, the trial judge had the opportunity to correct his mistake.

[BY MR. LABARRE:]

Q. And were you there when Hattie Washington got there?

A. I don't remember.

Q. You don't remember?

A. I don't remember her coming in that day, no.

Q. Okay. Do you remember her coming in shortly after the robbery?

A. She was a customer. She was in, yeah.

Q. While she came in after -- and I mean after the robbery.

A. Yes.

Q. Okay.

A. She did come in after the robbery.

Q. Did you talk with her about --

A. -- we all talked to her, I mean, you know.

A. Well, not this. I mean, yes, it was set up – I mean it was the pictures like this, yes.

Q. Okay. But as far as these actual pictures you didn't see like this? Like this?

A. I don't know if it was this three pages or not, but it was pictures like these.

Are you asking me were these six pages or what?

Q. There's four pages in Exhibit 4.

A. Well, four pages.

Q. I mean were these the pictures that you saw that day?

A. They were like this. I cannot say if this is the exact same paper I put my finger on and said this is the one. [emphasis added] T. 248-251; RE 17.

Counsel for Mr. Anderson thereupon renewed his objection to admission of Exhibit 4 based on Stephens' inability to authenticate the pictures. The originals were never found T.172. Officer Shinnie did not have either Hales or Stephens signify in writing their identification of Mr. Anderson on the actual photographic array from which identification was ostensibly made. T. 138; 148; 154; 250. During the suppression hearing, Officer Shinnie initially could not recall whether he showed Hales and Stephens black and white photographs, photocopies, color photographs or a mixture of the two; Shinnie could not recall the size of the photographs used in the array or whether the pictures were similarly sized. Utica Police Chief Myles, who assisted Shinnie with the case, testified during the suppression hearing he did not know the origin of the photograph of Mr. Anderson used in Exhibit 4.

The fact is, Hales admitted during the suppression hearing that he thought he remembered Mrs. Washington bringing in a picture, although he could not say for sure. T. 139. Stephens also acknowledged Mrs. Washington showed her a picture of her son and as seen above, Mrs.

defendant was virtually the only evidence; in only *two* of those cases was the witness able to correctly identify the accused on trial. See *Time*, April 2, 1973; p. 59; see also *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, Woocher, Fredric J. © 1977 STANFORD LAW REVIEW.

“Research shows that viewing photographs prior to making identification can taint the identification and lead to false identification. This is known as “photo-based identification.” *Could This Happen to Your Spouse or Child? Wrongful convictions and Eyewitness Testimony*, Merrit, Jeralyn E., © Lawyers.Com/Martindale-Hubbell.

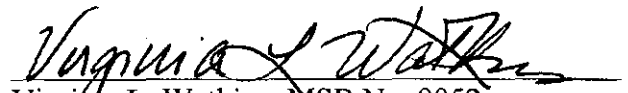
Mr. Anderson submits that photo-based identification, due to display of his photograph to Hales and Stephens by Mrs. Washington the day of the robbery, irredeemably tainted their later identification of Mr. Anderson from the missing-in-action photographic array Officer Shinnie said he used and which could not be found at the time of trial.

Based on the facts of this case, applicable law and the often faulty nature of eyewitness identifications, Mr. Anderson asks the Court to reverse his conviction and remand for a trial consistent with the state court rules and prevailing constitutional principles.

CONCLUSION

Mr. Anderson therefore humbly contends the trial court's demonstrated abuse of discretion in admission of Exhibit 4, which the state never authenticated as required by the Mississippi Rules of Evidence and our case law, plus the tainted, photo-based identification of Mr. Anderson, require reverse and remand of this cause.

Respectfully submitted,


Virginia L. Watkins, MSB No. 9052
Assistant Public Defender

William R. LaBarre, MSB No. [REDACTED]
PUBLIC DEFENDER
Virginia L. Watkins, MSB No. [REDACTED]
Assistant Public Defender
Post Office Box 23029
Jackson, Mississippi 39225
Telephone: 601-948-2683
Facsimile: 601-948-2687

Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to the following:

Honorable Robert Shuler Smith,
DISTRICT ATTORNEY
Hinds County Courthouse
Jackson, Mississippi 39201


Office of Bobby B. DeLaughter
CIRCUIT JUDGE
Hinds County Courthouse
Jackson, Mississippi 39201

And by United States Mail, postage prepaid, to

Honorable James Hood III
ATTORNEY GENERAL
Charles W. Maris Jr.
Assistant Attorney General
Walter Sillers State Office Building
Post Office Box 220
Jackson, Mississippi 39205-0220

Billy Joe Anderson
MDOC No. W1079
SMCI, SMCI No. 2
Post Office Box 1419
Leakesville, Mississippi 39451

So certified, this the 22nd day of September, 2008.


Virginia L. Watkins, MSB No. [REDACTED]
Certifying Attorney