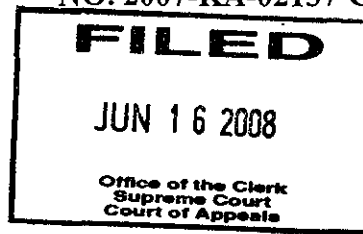


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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-02137-COA



BILLY JOE ANDERSON

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

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

BRIEF ON THE MERITS BY APPELLANT

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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 the Supreme Court and the judges of the Supreme Court may evaluate possible disqualification or recusal.

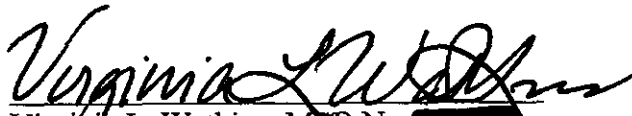
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So certified, this the 16th day of June, 2008.


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Billy Joe Anderson v. State of Mississippi

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STATEMENT OF THE ISSUE

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.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS BELOW

Billy Joe Anderson was indicted by a grand jury of the 2nd Judicial District of Hinds County, Mississippi in connection with the September 10, 2002 armed robbery of Jerry's Appliance Center in Utica, Mississippi, in violation of MISS. CODE ANN. § 97-3-79 (1972). CP 2.

Mr. Anderson was tried by a jury of his peers beginning September 4, 2007 and on September 6th, 2007, he was found guilty. CP 10-11; RE 11; T. 347. After completion of a pre-sentencing investigation, the trial court on October 22, 2007 sentenced Mr. Anderson to thirty-five (35) years incarceration in the custody of the Mississippi Department of Corrections. T. 358; CP 31-32; RE 12.

After prosecution of post-trial motions, all of which were denied, Mr. Anderson sought appeal of his conviction and sentence. CP 33-37; 40-41; RE 13-14.

B. STATEMENT OF FACTS

In the early midday of September 10, 2002, Bryan Hales and Lynda Stephens were at work at Jerry's Appliance Center in Utica. T. 114. The store was empty of other customers when two men came in the front door; Hales did not see them enter, but heard the bell on the front door. T. 115-116. One was taller, thinner and more darkly complexioned than his companion who by all accounts was heavyset. T. 116; 235; 245. Hales, sitting at his desk in the rear of the store, remembers offering them assistance. T. 118. Both Hales and Stephens, the store bookkeeper, remembered the taller individual asking if the store carried big-screen televisions, which they did not. T. 118; 235. The taller, thinner man said he would look around; Hales saw him move beyond his field of vision and became concerned because "there's nothing else back there." T. 121. Hales testified he turned around when the taller man moved to his side and then noticed the taller man now held a gun, about six feet away. T. 122; 236. While his companion

remained mute, the taller man ordered Hales to give up the money. T.122. Here, testimony is contradictory. Hales testified he got up and opened the cash register for the robbers, while Stephens testified she was standing up at the store counter by the cash register and opened it at a nod from Hales. T. 123; 125; 228; 237. Stephens testified that Hales, still seated at his desk, nodded at her to open the register, which she did, and the shorter man reached over and took the money, about \$1,000 in checks and cash. T. 126; 238-239.

The taller man then ordered Hales to give up his wallet; going around the counter, Hales gave up the brand new wallet with three \$20 bills inside, as well as identification and credit cards. T. 122; 127; 240. The taller man then told them to get down on the floor behind the store counter and told them to remain there until the front door shut, which they did. T. 128; 240. Hales testified that he stood up in time to see at least one of the pair turn right, but he could not tell which one. T. 128-129. Hales called 911 and Utica Police Department Officer Von Shinnie, the lone officer on duty, responded. T. 129; 255; 269; 293. Utica Police Chief Timothy Myles, enroute from Jackson, also responded. T. 293. There were no immediate suspects, Myles and Shinnie testified, until car wash owner Darren Howard said he had seen his cousin, Billy Joe Anderson, driving up and down Main Street and around the back of Jerry's Appliance Center earlier that day. T. 280; 282; 287. Shinnie testified that Howard gave a handwritten statement that he saw two guys go around the back of Jerry's, then walked in and robbed Jerry's and one of the two was Billy Joe Anderson, whom Howard had not seen in some time. T. 283-284. At trial, Howard testified he did not see the two go inside the store and did not see Anderson rob the store. T. 283. Howard also insisted in trial testimony that the robbers must have exited through the back of Jerry's, not the front, because he saw no one come out onto Main Street except for Yates, shouting he'd been robbed. T. 283-284.

With Anderson's name in hand, Yates (who did not testify at trial) telephoned his customer and long-time Utica resident Hattie Mae Washington, mother to Mr. Anderson. T. 302. Washington testified she told Yates Mr. Anderson was her son; she told the jury Yates asked her to come to the store, which she did with her husband. T. 302. Once there, she was asked for a picture of her son; her husband remembered one in the car glove compartment and retrieved it. T. 303. The Polaroid photograph, taken in December 2001 of her son eating cake (Exhibit 8 for identification), was passed around to Yates, Hales and Stephens, all of whom ultimately said that the man in her picture was not the robber. T. 303; 305-306.

During the lengthy suppression hearing at trial on the photographic array, Mrs. Washington testified that she was crying and that Stephens came and put her arm around her shoulders and told her to stop crying, that the man in her photograph was not the man who had robbed them earlier that day. T. 199.

Shinnie testified he came in while Mrs. Washington was in the store and while he recalls she had a picture with her, to his knowledge no identification was made from her photograph. T. 268-269. Shinnie testified that Washington was trying to show Yates and others the photograph. T. 268. Shinnie testified he called Louisiana correctional authorities for a photograph of Mr. Anderson, which Chief Myles drove to retrieve, then prepared a photographic array with the assistance of Hinds County Deputy Eddie Robinson. T. 165; 266. Robinson, however, denied at trial assisting Shinnie with preparation of a photo array. T. 195.

In the hearing on Mr. Anderson's motion to suppress any in-court identification and the photographic array (Exhibit 4), Robinson testified his assistance was limited to talking with Louisiana correctional authorities to obtain a picture of Mr. Anderson and accompanying Shinnie to Louisiana to later interview Mr. Anderson. T. 192. Robinson testified during the suppression hearing he had no recollection of the photographs used in the photo array (Exhibit 4). Of other

photographs of Mr. Anderson, Robinson identified only Exhibit 6 as a photograph sent via facsimile to Utica from Louisiana authorities. T. 190. Robinson testified he had not seen Exhibit 5 for identification (six pictures, all of Mr. Anderson), although he also testified that someone may have gone to Louisiana for more photographs. T. 190.

Chief Myles testified he drove to Washington Correctional Facility in Louisiana for the pictures, two sets of a single photograph and a line-up of mugshots of Mr. Anderson from the same photograph. T. 165; 167; Exhibit 7 for identification. During the suppression hearing, however, Myles testified he did not know the origin of the photograph of Mr. Anderson used in Exhibit 4 and further, that Exhibits 4 and 7 (for identification) differ in the clothing and the eyes of the individual depicted. T. 170-171.

Shinnie testified he took the photographic array, with six photos of different individuals, to Hales and Stephens about a week after the robbery. He testified he took each off separate from other employees and each other to review the array he had prepared. T. 154-155. Both identified Mr. Anderson as the robber.

The state was unable to produce at trial the original array from which the identifications were made. Myles testified he had searched the police evidence room in City Hall to no avail. T. 172. Shinnie, on active military duty since January 2003, also assisted in looking for the missing array, which has never been found. T. 267.

At the suppression hearing, Shinnie testified he could not remember whether he showed Hales and Stephens actual photographs or photocopies of photographs. T. 152. Initially, he could not recall whether he showed black and white photographs, photocopies, color photographs or a mixture; he could not remember the size of the photographs or if all were the similarly sized when displayed to Hales and Stephens. T. 152; 162. All of the photographs in Exhibit 4 were compiled by Louisiana correctional authorities, Shinnie testified. T. 146. Neither Hales nor

Stephens signed the array or any copies of the array to demonstrate their identification of Mr. Anderson. T. 138; 148; 154; 250.

Lynda Stephens testified she could not identify Exhibit 4 as the same format of the array from which she identified Mr. Anderson. T. 182; 187. In the presence of the jury, Stephens also testified she recalled Mrs. Washington coming to the store the day of the robbery with a picture of Mr. Anderson and that the man in the picture was not the man who robbed them. T. 248-249; Exhibit 4; Exhibit 7 for identification.

Both Hales and Stephens identified Mr. Anderson in the presence of the jury as one of their two assailants. T. 221; 243.

The entire incident lasted no more than five minutes, Hales testified. T. 229. Under cross-examination regarding his handwritten statement composed the day of the robbery, Hales acknowledged that “evidently” he was not focused on “small details” of the event. T. 233.

No information ever surfaced as to the identity of the shorter, heavier companion allegedly accompanying Mr. Anderson during the robbery, nor does the record reveal any effort to so do. Hales testified no credit card charges ever showed up after his wallet was taken during the robbery. T. 229.

SUMMARY OF THE ARGUMENT

Mr. Anderson argues that the trial court abused its discretion by permitting an in-court identification based on a tainted pre-trial identification. Both Hales and Stephens, the sole eyewitnesses, testified they had never before seen the individual who walked in their store. However, both also testified as to their recollections that Mrs. Washington brought in a photograph and both, rather grudgingly, testified that the individual depicted in her photograph was not the robber. Mr. Anderson submits that the viewing of Mrs. Washington's photograph tainted their identification from the impermissibly suggestive photographic array Shinnie brought a week later. A review of Exhibit 4 demonstrates a dramatic difference between the skin tone of Mr. Anderson and the other five individuals depicted. Coupled with the tainted view of a single photograph of Mr. Anderson the day of the robbery and the suggestive and distinctive array with which Hales and Stephens were later presented, Mr. Anderson respectfully asserts his fundamental rights to due process of law under the Fourteenth Amendment were impermissibly violated, necessitating a new trial.

In addition, Mr. Anderson also contends that the trial court abused its discretion in admitting into evidence the copy of the photographic array from which Hales and Stephens identified him because the original was never found. Stephens could not say whether Exhibit 4 was in the same format as she reviewed the week after the robbery. During the suppression hearing at trial, Shinnie's testimony is contradictory as to the format, form and source of the photos. Deputy Robinson, whom Shinnie testified assisted in preparation of the array, denied aiding in preparation. Shinnie also testified that Louisiana correctional authorities prepared the line-up. Even Chief Myles could not positively identify the form and origin of photographs of Mr. Anderson used in the investigation.

ARGUMENT

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 burden remains on the state throughout trial to prove “beyond a reasonable doubt the identity of the defendant as the one guilty of the offense charged ...” *Evans v. State*, 382 So.2d 1084, 1085 (Miss. 1980). Mere suspicion, even probability, is insufficient to base a conviction under our system of criminal justice. In *Evans*, the Mississippi Supreme Court reversed the conviction for making obscene telephone calls because the state failed to adduce evidence beyond a reasonable doubt that Johnny Lee Evans was the one who made the telephone calls. The telephone company was able to trace the connection between the complainant and the party line to which Evans had access at his mother’s home; sheriff’s deputies discovered the connection still live when they arrived at her home and upon their arrival, Evans took off into the woods. Nevertheless, these inferences were insufficient to establish beyond a reasonable doubt that it was Evans who placed the offending telephone calls. *Id.*

In the case at bar, however, there is a deeper problem with proof that Mr. Anderson committed the robbery of which he stands convicted. The problem is that the original out-of-court identification upon which his arrest was based was tainted by a view on the day of the robbery of a single photograph his mother brought to Jerry’s Appliance Center the day of the robbery. T. 139; 248-249; Furthermore, a photographic array from which the two eyewitnesses identified Mr. Anderson was impermissibly suggestive, as Mr. Anderson is by the far the darkest of the individuals there portrayed. See Exhibit 4. Even the trial court, in denying Mr. Anderson’s

motion to suppress in-court identification based on Exhibit 4, as well as admission into evidence of Exhibit 4, noted the *per se* suggestiveness of using a single photograph in identifying a suspect. T. 212; 213; 251; 274; RE 15; 17.

Nevertheless, in violation of basic federal constitutional safeguards and long-standing case law, the trial court abused its discretion in permitting in-court identification of Mr. Anderson based on identification from what he submits was an unduly suggestive photographic array the state could not produce, nor even provide agreement in testimony as to its form, format and origin. T. 152; 158-160; 162; 177; 190-191. Yet all agreed that Mr. Anderson, whom neither Hales nor Stephens had seen before September 10, 2002, was the individual in the photographic array who robbed them. T. 221; 243.

The testimony of Hattie Washington was un rebutted that Exhibit 8 for identification was shown to Hales and Stephens; indeed, Stephens told the jury under cross-examination that Exhibit 8 was not a picture of the robber. T. 248-249. Yet, a week later, Stephens and Hales both identify Mr. Anderson, the only individual of whom they have previously seen a photograph, from the array Shinnie says was provided by Louisiana correctional authorities. T. 146. Furthermore, a review of the photocopy of the array demonstrates that it is highly suggestive; Mr. Anderson is by far the darkest individual depicted; most are light-skinned, although they differ in facial hair and hair length. Exhibit 4. While the court initially noted that complexion was not an issue, it became so later in the trial when Stephens testified that the taller individual was also the darker of the pair who entered the store. T. 245.

After this testimony, the court again addressed the issue and found, perhaps paradoxically, that there was no taint because evidence that Mrs. Washington displayed her son's photograph on September 10 to Hales and Stephens was elicited *by the defense, not the state*, and therefore, the later identification from the photo array was not subject to suppression. T. 275.

This type of circular reasoning has been discounted by the U.S. Supreme Court for over forty years. In *Foster v. California*, 394 U.S. 440, 442-443 (1967), the Court rejected the identification made after the state obtained three rather desperate bites at the apple, including a one-man show-up and a line-up in which the accused towered over his fellows and was the only one in a jacket similar to that of the suspect. *Id.* Whether or not identification is impermissibly suggestive and thus violative of due process of law guaranteed under the Fourteenth Amendment is “judged by the ‘totality of the circumstances,’ in which ‘the conduct of identification procedures may be ‘so unnecessarily suggestive and conducive to irreparable mistaken identification’ as to be a denial of due process of law.” Citing *Stovall v. Denno*, 388 U.S. 293 (1967).

In this case, Mr. Anderson contends that showing of the single photograph on the day of the crime was sufficient to taint the later identification. Both Hales and Stephens, the only eyewitnesses, testified they had never seen the individual before. T. 135; 184. Stephens mentioned the darker complexion of the taller assailant in her statement. T. 245. A review of Exhibit 4, as stated above, demonstrates the vast difference between Mr. Anderson, No. 1, and the others in the array.

In *Hickson v. State*, 697 So.2d 391 (Miss. 1997), the Court reversed the sexual battery conviction of Hickson in part on the constitutionally impermissible suggestive pre-trial identification that the state deliberately withheld from Hickson’s counsel until the midst of trial. In that case, the mother and daughter witnesses picked Hickson’s picture from a photographic array but were unsure – until they were subpoenaed to attend another criminal trial in which Hickson was the defendant. The now-certain identification was never revealed to defense counsel. While the situation in the case at bar is not quite as dramatic, it supports the point that

unduly suggestive and tainted identifications violate the U.S. Constitution and the right of all citizens to due process of law.

The situation is further complicated by the fact that the Utica police could not produce the original array and testimony was at the very least, highly contradictory about its form, format and origin. Shinnie testified he prepared the array with the assistance of Hinds County Deputy Eddie Robinson, yet Robinson flatly denied assisting with preparation of the array. Shinnie also testified all the photographs in Exhibit 4, admitted in lieu of the original, were provided by Louisiana correctional authorities. T. 146.

In *Walker v. State*, 878 So.2d 913 (Miss. 2004), the Mississippi Supreme Court reversed the conviction of Freddie Walker for admission into evidence of a towel allegedly containing semen from Walker after a sexual encounter with the daughter of his fiancé. The state, however, never subjected the towel to any sort of testing to verify that the towel contained semen from Walker. *Id.*, ¶15.

In *Frierson v. State*, 606 So.2d 604, 606-607 (Miss. 1992), the Court reversed the drug possession convictions of Frierson based in part on the admission into evidence of a handwritten note recovered from the accused's apartment. The state failed to establish who wrote it, when it was written; its taint lay in the interpretation ascribed to the letter as referring to delivery of a package of cocaine – without a shred of evidence to support the contention – and the tainted inference that Frierson was a drug dealer.

Just so here. Billy Joe Anderson was convicted of robbing Jerry's Appliance Center on the basis of unauthenticated photographic array tainted by the earlier single picture (Exhibit 8) displayed on the day of the robbery by his mother, Hattie Washington who ultimately, had her testimony uncontradicted. For these reasons, Mr. Anderson respectfully seeks reversal of his

conviction and remand back to Hinds County Circuit Court for a trial held consistent with basic constitutional guarantees.

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 BRIEF OF APPELLANT ON THE MERITS 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

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So certified, this the 16th day of June, 2008.


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