

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

VERDELL STARKS,

Defendant-Appellant.

* S.C. No. 2007-1668
* On Appeal from the
* Lucas County Court
* of Appeals, Sixth Appellate
* District
* Court of Appeals
* Case No. L-07-1226
*

APPELLEE'S MEMORANDUM IN RESPONSE

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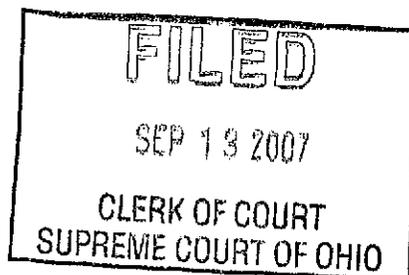


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EXPLANATION OF WHY THIS IS NEITHER A CASE OF PUBLIC OR GREAT GENERAL INTEREST, NOR INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION, AND WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED.

Appellant contends that the appellate court below erred in denying his motion to correct the record in his direct appeal in the appellate court below. However, as it relates to Appellant's Assignment of Error, Appellant has not asserted the denial of any substantial constitutional right. Rather Appellant is merely contesting factual findings made by the appellate court below. It is undisputed that at the time Appellant filed his motion with the appellate court, he was represented by appellate counsel. He has no constitutional right to hybrid representation. As such there is nothing to be gained by acceptance of jurisdiction to this Court.

Even if this Court were to accept jurisdiction of this case on the First Assignment of Error, it would involve solely a review of factual findings. Since this Court could undoubtedly make use of its limited time and judicial resources more productively, it should decline review. Moreover, review should be denied for all the reasons set forth in the memorandum below.

STATEMENT OF THE CASE

Appellant was charged in two separate indictments with the robberies of a Sky Bank, a BP gas station, a Cash Advance store, and a Sunoco gas station. The charges involving the Sky Bank case, CR05-1209, were severed from the case involving the remaining robberies (CR04-3093, CR05-1209). Both cases proceeded to a jury trial. At the trial of the Sky Bank charges, Appellant was represented by counsel. During the proceedings on the remaining charges, Appellant chose to represent himself at trial, with advisory counsel being appointed by the trial court. In both cases, Appellant was convicted on all counts.

The trial court appointed counsel to represent Appellant on direct appeal. While the appeal was pending, Appellant attempted to file, pro se, his motion with the appellate court under App.R.9(E). Appellant asserted that the transcript did not accurately reflect the testimony given on cross-examination by the State's witnesses. The Appellant has maintained that those witnesses actually exonerated him at trial, when in fact the record does not support that assertion.

On July 24, 2007, the appellate court held that Appellant was not entitled to "hybrid" representation and that he could not maintain his appeal because he was already represented by counsel in his direct appeal. This appeal followed.

STATEMENT OF THE FACTS

Sky Bank Robbery, CR05-1209, Aug. 29, 2005:

Appellant Verdell Starks was indicted on January 28, 2005 and charged with the aggravated robbery of Sky Bank on September 30, 2004. Although the perpetrator appeared to touch the counter surfaces in the bank, no prints actually identifying Appellant were obtained by police. Testimony at trial established that it is not uncommon, however, for police to be unable to obtain useable fingerprints from such surfaces. Trial Tr. Aug. 30, 2005 at p. 255.

Witness Sandra Allen testified that the perpetrator had a curved object in his hands wrapped in "socks." Trial Tr. Aug. 29, 2005 at p. 192. The perpetrator brandished this object by holding it up so everyone could see it. Trial Tr. Aug. 29, 2005 at p. 193. Likewise, witness Cathy Clark saw that the perpetrator had an object in his hand that was covered with some type of material. Trial Tr. Aug. 29, 2005 at p. 216. The perpetrator gave everyone the impression that he had a gun. Trial Tr. Aug. 29, 2005 at p. 208-209. Ms. Clark believed the object was a gun. Trial Tr. Aug. 29, 2005 at p. 210-211.

Evidence introduced at trial also indicated that the perpetrator of the Sky Bank robbery was a black male, wearing a blue dress and carrying a handbag. Since the only reason for carrying a handbag is to carry objects, and if the perpetrator placed the money and dye pack into the handbag, there was no logical reason to expect the perpetrator or Appellant to have any dye on his person, in his car, or anywhere else other than in the handbag, which was never found. Trial Tr. Aug. 29, 2005 at pps. 188, 211.

Finally, F.B.I. Agent Kyle Fulmer testified at trial that Appellant confessed to the Sky Bank robbery. Trial Tr. Aug. 30, 2005 at pps. 283-286. Appellant told agent Fulmer that he did not use a gun, but instead used a plastic drill as a weapon. *Id.* Agent Fulmer identified Appellant as the person who confessed to him during the interview. Trial Tr. Aug. 30, 2005 at p. 286.

BP gas station robbery, Aug. 29, 2004

Witness Victoria Hall testified that she was alone when the robber entered the store. Trial Tr. at p. 124. She did not tell Det. Quinn that when the perpetrator entered the store a customer was present. Nor did she tell the detective that the robber wore sunglasses. Rather she testified that Detective Quinn's report was erroneous as to those two facts. Trial Tr. at pps. 143-144.

Ms. Hall testified that she remembered the suspect because he wore a plastic bag over a black shoulder length wig. Trial Tr. p. 128. Ms. Hall stated that the suspect entered the store as she was coming out of the back storeroom. Before she could say anything, he jumped the counter, grabbed her, pointed a gun at her and demanded that she open the drawer. Trial Tr. p. 126-128. Ms. Hall also testified that although the store was equipped with video surveillance, the tape equipment did not work. Trial Tr. p. 147-148.

At trial, after being cross-examined by Appellant, Ms. Hall stated that she was absolutely certain that the Appellant was the person who robbed her. Trial Tr. p. 175.

While it is true that Victoria Hall was shown 2 photo arrays during the course of the investigation, it is not true that when shown Detective Quinn's array sometime later, she could not identify anyone. Rather, Detective Quinn testified that when shown his

array, Ms. Hall picked Appellant as the perpetrator within a few seconds. Trial Tr. at pps. 348, 373.

The number of photo arrays shown to Ms. Hall was in fact established during trial. Ms. Hall testified that she was initially shown 2 photo arrays. Trial Tr. at p. 135. She testified that Detective Quinn had shown her 2 arrays from which she was not able to identify the robber. *Id.* Later, she testified she was shown a third array from which she identified Appellant. Trial Tr. at p. 135-136. Detective Quinn testified that he had only presented one array to her, from which she identified the Appellant. Trial Tr. at pps. 137, 349-350. The sum of all this information means that Ms. Hall may have been shown three photo arrays, the first two of which may have been presented to Ms. Hall by another detective, and/or which may have been the same array. Suppression Tr. March 31, 2005 at p. 86. In other words, Ms. Hall may have been inadvertently shown one array twice.

Sunoco Gas Station robbery, September 26, 2004.

Gwen Bowers testified regarding the robbery of a Sunoco gas station. She testified that she was shown a photo array which (in her lay opinion) each of the black males depicted had either the "wide nose" or "bubble lips" that she described to police. Not all of the photos had both features. Trial Tr. at p. 214. However, in her opinion, at least 4 of the 6 photos resembled each other. *Id.*

Ms. Bowers testified that she was working at the Sunoco store on the date of the robbery. After 9 p.m., a man entered the store wearing a hooded sweatshirt, dark sunglasses, dark jeans and dark shoes. Trial Tr. at pps. 180-183. He pulled a gun out

of a jacket pocket and pointed it at her. She walked from the coffee machine area to the front of the counter, while the suspect pointed the gun at her back. When she tried to open the cash drawer he said, "you have ten seconds." Trial Tr. at pps. 185-186. After hitting the wrong buttons 2 or 3 times, she finally removed the till and placed it on the counter. Trial Tr. p. 187. As he walked out of the store, she asked him if he wanted the change. The man said "no" and left. *Id.*

Ms. Bowers described the man as a black male, approximately 130-140 pounds, about 5'7" or 5'8" inches tall. Gwen Bowers testified that after the robbery, she was shown arrays by Detective Tetuan (who did not appear for medical reasons, despite being subpoenaed by the State), and Detective Quinn. Trial Tr. at pgs. 190-191. While she was not able to identify anyone from the first array, she did identify Appellant from the second array, shown to her by Det. Quinn, and did so within 1 minute. Trial Tr. at p. 190-191.

At trial, after being personally cross-examined by Appellant, Ms. Bowers stated that she was absolutely certain that the Appellant was the person who robbed her. Trial Tr. p. 227.

Cash Advance robbery, August 23, 2004.

Laura Maunz testified concerning the Cash Advance robbery. She testified that she did not in fact identify a perpetrator from the first photo array she was shown. Trial Tr. at pps. 268-269. While she did state that she had previously "picked" someone she "thought" might have been the perpetrator, more telling is the fact that she stated that she did not sign or date the photo since she was not certain about the identification.

Trial Tr. at pps. 270-272; Suppression Tr. May 6, 2005 at pps. 43-44. If the witness refuses to sign and date the photo, the "pick" cannot be considered "an identification."

Appellant presented no viable alibi to the Cash Advance robbery. At trial, Appellant introduced into evidence his class schedule and that of his wife Andrea Starks. Defense Exhibits O and P. Although Andrea Starks testified that Appellant was with her on Monday, August 23, 2004, prior to her 10:00 a.m. to 10:50 a.m. class, Trial Tr. at 390-391, she failed to account for his whereabouts during that class. Likewise, she was unable to account for his whereabouts during her 11:00 a.m. - 11:50 a.m. class. *Id.* at p. 391-392, 397-400. She testified that Appellant had possession of the car keys at all relevant times. Tr. p. 397. As a result, no alibi to the Cash Advance robbery was actually proven¹.

Additionally the State notes that the jury is free to reject all, or part of a witness' testimony. *State v. Hall*, Franklin App. No. 06-AP-390, 2006-Ohio-6640 at §19; *Curtis v. State* (1925), 113 Ohio St. 187, 212, 148 N.E. 834. As a result, the jury may have chosen to disbelieve Ms. Starks' testimony that Appellant met her after class at 10:50 a.m. And it should be noted that at no time during trial did Appellant prove that he **actually attended** his 10:00 a.m.- 10:50 a.m. class on Monday, August 23, 2004. He certainly did not call his professor as a witness to vouch for his attendance.

And while Laura Maunz did testify that it took approximately 20-25 minutes to drive from Owens Community College to Cash Advance, Trial Tr. at 249-250, according

¹ It should be noted that the Appellant continues to assert in the trial court and appellate court below that the trial transcript is not accurate. He has asserted that all of the State's witnesses actually exonerated him while the transcript reflects just the opposite. It is Appellant's delusional misconception of the record that leads him to believe his wife provided him an alibi. And even if she had, which the State denies, the jury was free to disbelieve any such alibi testimony. *Hall, supra; Curtis, supra.*

to the testimony of Andrea Starks, Appellant had at least one hour in which he could have committed the robbery unbeknownst to his wife².

After being cross-examined at trial by Appellant personally and hearing his voice, all the victims, Ms. Hall, Ms. Bowers, and Ms. Maunz were even more convinced, that he was the robber. Trial Tr. at pps. 170-171, 228, 285-286.

² Assuming he attended his 10:00 a.m. Monday class which he never established.

Argument: Appellant is not entitled to "hybrid representation."

Appellant asserts that the appellate court below erred when it dismissed his appeal. However, Appellant does not dispute that at the time of the filing of his motion, he was represented by appellate counsel. Appellant's motion to correct the record was clearly related to the issues and the record in his direct appeal, currently pending in front of the appellate court.

It is axiomatic that an appellate court cannot entertain motions filed by an appellant pro se, when the appellant is already represented by appellate counsel. *State v. Keenan* (1998), 81 Ohio St.3d 133, 138, 1998-Ohio-459, 659 N.E.2d 929. Accordingly, the appellate court did not err and did not abuse its discretion in dismissing the appeal.

CONCLUSION

Based on the foregoing, the State respectfully asserts that the Appellant's appeal was properly stricken from the record. The State therefore respectfully urges the Court to deny Appellant jurisdiction.

Respectfully submitted,

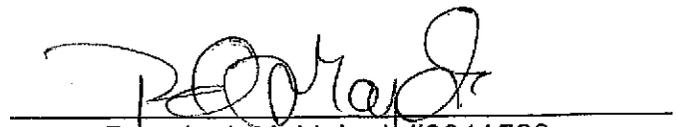
JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By:


Brenda J. Majdalani, #0041509
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was sent via ordinary U.S. Mail this 10th day of September, 2007, to Verdell Starks, #515-417, Toledo Correctional Institution, 2001 E. Central Avenue, Toledo, Ohio 43608, Defendant-Appellant, *pro se*.


Brenda J. Majdalani #0041509
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