

IN THE SUPREME COURT OF OHIO

ORIGINAL

State of Ohio,  
Appellee,

vs.

Damion Smith,  
Appellant,

: S.Ct.No. 13-0150  
:  
:  
: On Appeal from the Hamilton County  
:  
: Court of Appeals, First Appellate  
:  
: District, in Court of Appeals  
:  
: Case Number C-120181  
:

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NOTICE OF APPEAL OF APPELLANT DAMION SMITH

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FILED  
JAN 24 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT DAMION SMITH

Appellant Damion Smith hereby gives NOTICE OF APPEAL to the Supreme Court of Ohio from the judgement of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case Number C-120181, on December 21, 2012.

This case raises a substantial constitutional question and is one of public or great general interest, and involves a felony.

Respectfully Submitted,



Damion Smith, Pro-se

CERTIFICATE OF SERVICE

I, Damion Smith, hereby certify that a true and accurate copy of the foregoing NOTICE OF APPEAL was sent to the Hamilton County Prosecutor on this \_\_\_\_ day of January, 2013, by First Class U.S. Mail.



Damion Smith, Pro-se

IN THE SUPREME COURT OF OHIO

State of Ohio, : S.Ct.No. \_\_\_\_\_  
Appellee, :  
 : On Appeal from the Hamilton County  
vs. : Court of Appeals, First Appellate  
 : District, in Court of Appeals  
Damion Smith, : Case Number C-120181  
Appellant, :

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MEMORANDUM OF SUPPORT OF JURISDICTION OF APPELLANT DAMION SMITH

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When all essential elements of the charges against a criminal defendant are not proven at all, much less beyond a reasonable doubt, and the manifest weight of the evidence doesn't support a conviction, the resulting conviction violates the 5th and 14th Amendments of the U.S. Constitution, and Article I, Section 16 of the Ohio Constitution, as is the case of this Appellant's aggravated robbery and robbery convictions. 5-7

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When the totality of the circumstances involved concerning the victim's identification of the Appellant are unreliable, as is the case herein, and the victim states that he is not certain, the Trial Court's refusal to suppress this unreliable identification violates this Appellant's Rights to a Fair Trial and the Due Process of Law, guaranteed by the 5th and 14th Amendments of the U.S. Constitution and Article I, Section 16, of the Ohio Constitution. 7-10

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When an Attorney's performance falls below the standard of reasonableness, and a criminal Defendant is prejudiced by that failure, as in this case by Trial Counsel's failure to obtain an identification expert to prove that "eye-dentification" is an untested and unreliable junk-science, an Appellant's 5th, 6th and 14th Amendment Rights under the U.S. Constitution, and Article I, Sections 10 and 16 of the Ohio Constitution are violated. 10-12

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MEMORANDUM OF SUPPORT OF JURISDICTION

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents issues of substantial interest and involves many constitutional questions, since, if this conviction is left to stand unchallenged by this Court, the result will be a new form of identification, which can only be described as "human eye-identification." This is not to be confused with any existing type of scientific and proven method, such as a Retinal Scan, but is one in which a self-described "expert" identifies others based on a fleeting observation of their eyes. A new so-called science could possibly emerge, albeit junk science.

Also, this case, if not reversed by this Court, lowers the requirements for reasonable doubt, concerning identification by an alleged victim who, in this case, told the Court, "But out of all the people, it was the closest I could ID, you know?" (T.p. Motion to Suppress, 43) This does not comport with any constitutional requirements. The victim clearly stated that he was not sure. This is not "Beyond a reasonable doubt."

This case could easily open a door for those foolish enough to receive stolen property to be convicted of the underlying offense in which that property was taken. Just because a person has in his possession the proceeds of a crime, this does not necessarily mean that he committed the original crime. Appellants, like the one in this case, should not be convicted solely on this basis. Due process

requires that all of the essential elements of a criminal charge be proven beyond a reasonable doubt, and an essential element of any robbery or aggravated robbery is that the Defendant actually committed the robbery, not simply used the credit cards unknowingly after the fact. It should be apparent that this Appellant did not know that the cards were stolen, as while using one to make a purchase, he signed his own real name to the receipt. He even admitted using the cards to the Police, only invoking his right to remain silent when it became obvious that they were trying to pin a robbery on him.

This case also calls into question whether the 6th Amendment Right to the Effective Assistance of Counsel is violated when Counsel fails inter alia to obtain an identification expert to testify to the veracity, or in this case, the lack thereof, of the new, "scientific" identification method relied on by the State, "eye-identification", as described by the victim in forming his identification of this Appellant. This "method" does not comport with the requirements in *Biggers*, as will be discussed below, in the argument of that Assignment of Error.

Counsel was on notice from the suppression hearing that the State intended for the victim to demonstrate this new "method" of suspect "eye-identification" to the Jury, and as such, should have obtained an actual expert scientific authority to inform the Jury that no such "eye-identification" has any scientific support, and as such is completely unreliable.

The inroads made in this case will further erode the constitutional level of Justice in Ohio, as all who come before Ohio Courts will

potentially suffer the consequences of those improper actions, and new caselaw will result, supporting future such violations as occurred in this case. To stop this infection of Justice, which threatens Ohio jurisprudence with the establishment of a new junk science, this Honorable Court should sustain the propositions of Law presented herein, and accept jurisdiction of this case. Only the intervention of this Honorable Court will prevent further miscarriages of Justice as have occurred in this case sub judice.

**STATEMENT OF THE CASE AND FACTS:**

The victim in this case, David Malloy, was robbed at gunpoint on January 7, 2011, while walking through an apartment complex next to where he himself lived. Mr. Malloy testified that the robber wore a ninja-style mask, which only showed the perpetrator's eyes, despite the State's Bill of Particulars claiming that the robber used a scarf to conceal his identity. Among the variety of items taken in the robbery, only the credit cards were found to have been used by this Appellant, once even signing his own real name, which is clearly an action inconsistent with a robber who wore a mask to conceal his identity.

This Appellant, who was not at all aware that the cards were stolen, much less as the result of any armed robbery, cooperated fully with the police, and openly admitted that he did in fact use the cards, thinking that they had been obtained to satisfy debts. It was not until Police began questioning him about the actual robbery, at which time it became quickly apparent to him that he was being

blamed for that crime, that he chose to invoke his 5th Amendment Right to Remain Silent.

The inclusion of this Appellant's photo in the array was based solely on the fact that he used the credit cards. It was at this initial photo array in which the victim first used his "eye-identification" technique. However, there is no scientific testing or method behind this technique. It is simply an opinion, a guess as to whether or not the Appellant looks like the original assailant. The victim admitted that he was at best 80% sure, and<sup>based on</sup> that admission,<sup>and</sup> based on the untested nature of the method used, Trial Counsel filed a Motion to Suppress, as the reliability of the identification was in question, and considering the totality of the circumstances. Despite the fact that the factors set forth by the U.S. Supreme Court weighed heavily in the Appellant's favor, the Trial Court denied that motion.

A Jury Trial was held, beginning on January 26, 2012. At Trial, the evidence of the use of the stolen cards, combined with the victim's "eye-identification", were used by the State to achieve a conviction, despite the unreliable and unproven nature of the identification, and the pure speculation that the only way this Appellant could have come into possession of the stolen credit cards is to have actually committed the robbery, an untrue assumption. This Appellant was sentenced to eight years in prison.

A timely appeal was taken to the First District Court of Appeals, raising the Assignments of Error which form the Propositions of Law raised herein. The Appellate Court merely upheld the Trial Court's judgements, with little, if any analysis under prevailing precedent,

which in itself is unconstitutional and fundamentally unfair. To stop this practice from becoming the norm, and to arrest the erosion of constitutional rights described herein, it is the duty of this Honorable Court to accept jurisdiction of this case, and to sustain the Propositions of Law herein.

**FIRST PROPOSITION OF LAW:**

When all essential elements of the charges against a criminal defendant are not proven at all, much less beyond a reasonable doubt, and the manifest weight of the evidence doesn't support a conviction, the resulting conviction violates the 5th and 14th Amendments of the U.S. Constitution, and Article I, Section 16 of the Ohio Constitution, as is the case of this Appellant's aggravated robbery and robbery convictions.

It is well settled that Due Process requires that all essential elements of any criminal charge against any defendant be proven beyond a reasonable doubt. See E.G. RE Winship 397 US 358 and Jackson v Virginia 433 US 218. In this case, that constitutional requirement was not met in any way. While this Appellant did use the credit cards, which were included in the proceeds of the robbery, this fact alone does not mean that this Appellant committed the robbery itself. At best, this mere fact only supports a conviction for receiving stolen property. The only thing in this case which purports to support the robbery charge is the flimsiest of identification, using a new form of offender identification which can only be described as "eye-identification". The victim testified that he is able to correctly identify a person based solely on the eyes themselves, which is all he could see with the mask worn by the robber.

The victim claimed that he was 80% sure of a correct identification, based on the pool of photos to choose from. He gave conflicting statements stating that it had been so quick, he could not remember anything, with the apparent exception of the eyes. Any testimony using this form of identification should have been suppressed. It was fundamentally unfair of the Police to include in the photo array a picture of the Appellant, solely because he used the cards. It is very suggestive of undue influence by the Police to assist the victim in this choice.

No actual evidence exists to support the aggravated robbery or robbery charge; No reliable eyewitness testimony, DNA or any other physical evidence. It is logical that if the Jury had not been exposed to the improper testimony of the victim's purported "eye-identification" junk-science method of identification of this Appellant, then this Appellant would have been acquitted. The Trial Court erred in admitting it, and the entire conviction is constitutionally infirm.

The Court of Appeals erred in upholding the conviction on this new Proposition of Law. The Court simply stated, in reference to the sufficiency claim, that "upon the evidence adduced at Trial, reasonable minds could have reached different conclusions as to whether each element of the offenses had been proved beyond a reasonable doubt." This hardly constitutes any analysis of the constitutional claim of insufficient evidence. Actually, this statement could be read to imply that the evidence could go either way. No actual adjudication of the claim occurred.

As to the manifest weight claim, the Appeals Court states that nothing in the record would suggest that the Jury lost its way, or

that a miscarriage of Justice had occurred. The Court erred in making this holding, which is not an adjudication either, because the Jury was misled by the junk-science of "eye-identification" as a cognizant, accepted form of ID. Thus, the Jury did in fact lose its way, and a miscarriage of Justice did occur, in which this Appellant, who is only guilty of misuse of credit cards or receiving stolen property at best, was convicted of robbery and aggravated robbery. The Appeals Court's decision itself violates Due Process and Ohio Appellate Rules.

Such an adjudication of a wrongful conviction under these circumstances cannot stand. As such, this Honorable Court should sustain this Proposition of Law and accept jurisdiction of this case, to keep Ohio jurisprudence constitutionally intact.

#### SECOND PROPOSITION OF LAW:

When the totality of the circumstances involved concerning the victim's identification of the Appellant are unreliable, as is the case herein, and the victim states that he is not certain, the Trial Court's refusal to suppress this unreliable identification violates this Appellant's Rights to a Fair Trial and the Due Process of Law, guaranteed by the 5th and 14th Amendments of the U.S. Constitution and Article I, Section 16, of the Ohio Constitution.

It is well settled that the U.S. Supreme Court precedent on this issue is set forth in *Neil v Biggers* 409 US 188, and further elaborated on in *Manson v Brathwaite* 432 US 98. The purpose of a suppression hearing is to eliminate a Jury from being exposed to unreliable evidence, which when used, deprives a criminal defendant of his constitutional Right to a Fair Trial and the Due Process of Law.

It is also well known in American jurisprudence and legal scholarship that while eyewitness testimony has a profound effect on juries, it is oftentimes extremely unreliable. See e.g. *Watkins v Souders* 449 US 341 (1981). This is the case here, as even admitted by the victim, both at Trial and the suppression hearing, in which he claims, as a result of the "crazy five seconds", (T.p. 44, Suppression Hearing), he was 80% sure, as the Appellant was the closest match of those available in the array, which connotes a high level of improper suggestibility on the part of the Police.

The U.S. Supreme Court has listed the factors that a Court should weigh in determining whether an identification is reliable enough, even though an unduly suggestive identification procedure may have been used. These factors are:

- 1) The Witness's opportunity to view the criminal at the time of the crime;
- 2) The Witness's degree of attention;
- 3) The accuracy of the Witness's prior description of the criminal;
- 4) The level of certainty demonstrated at the time of confrontation.

(*Neil v Biggers* 409 US 188)

The following analysis will demonstrate that all the factors articulated by the Supreme Court weigh heavily in this Appellant's favor, and the Trial Court erred in refusing to suppress this unconstitutional identification, and that error was compounded by the Court of Appeals, whose decision is both contrary to, and an unreasonable application of, Supreme Court mandate by precedent in *Biggers*.

- 1) The Witness only saw the robber for a few seconds, wearing a "ninja-style mask" at dusk;
- 2) The Witness said that he was very unsure, and could not remember any significant details about the robber's coat or clothing;
- 3) The Witness's testimony conflicted with itself throughout the proceedings;
- 4) The Witness claimed that the Appellant was the "closest" of those photos presented, which is hardly conclusive, and at best, he was 80% sure. This is further compounded by his use of a junk-science "eye-identification" technique which was unheard-of, had no true scientific basis, and could not be considered reliable.

It should be apparent that the Trial Court did not follow the Supreme Court's rules, as it improperly denied the Appellant's Motion to Suppress, and allowed the Jury to hear the unreliable and unconstitutional identification, based most likely on the idea that, if the Appellant used the cards, then he must be guilty of the robbery. The Trial Court, if it had correctly applied U.S. Supreme Court precedent, would have had to grant the suppression motion, to ensure that the Appellant received a fair Trial.

The Court of Appeals was presented with this constitutional question, yet merely, in a single sentence, with no actual analysis as required in *Biggers*, with merely a mention thereof, states that the record supports the Trial Court's decision to deny the Motion, but that skeletal assertion is incorrect. It constitutes a violation of Due Process itself, as the Appellate Court did not properly address an assignment of error properly presented.

To ensure future compliance with Biggers in the Trial Courts of Ohio, and to keep fair Trials intact, as well as to send a message to all Appellate Courts to properly address all Assignments of Error properly raised before them, this Honorable Court should sustain this Proposition of Law and accept jurisdiction of this case.

**THIRD PROPOSITION OF LAW:**

When an Attorney's performance falls below the standard of reasonableness, and a criminal Defendant is prejudiced by that failure, as in this case by Trial Counsel's failure to obtain an identification expert to prove that "eye-identification" is an untested and unreliable junk-science, an Appellant's 5th, 6th and 14th Amendment Rights under the U.S. Constitution, and Article I, Sections 10 and 16 of the Ohio Constitution are violated.

It is well settled that all claims of ineffective assistance of Counsel in criminal Trials are adjudicated under U.S. Supreme Court precedent in *Strickland v Washington* 466 US 668. The two-prong analysis set forth in *Strickland* requires an Appellant to show that Counsel's performance fell below the standard of reasonableness, and that Counsel's errors resulted in actual prejudice, which undermines confidence in the ultimate verdict.

In the case at Bar, the State's case rested on two factors. The first of these was that the Appellant used the victim's credit cards, which does not in itself automatically mean that he was in fact the robber. To make the necessary connection of the Appellant to the robbery incident, the State relied on an assertion by the victim that he is somehow qualified to identify people by using only the appearance of their eyes, an unknown, unproven, and scientifically

suspect method, which has been dubbed "eye-identification". This clearly junk-science method, unchallenged by Counsel, was presented to the Jury, leading them to believe it was some known, reliable method, which is completely untrue.

Defense Counsel was put on notice prior to Trial, and at the Suppression Hearing, that the State intended to present this unusual form of identification essentially as expert testimony, despite its complete non-compliance with Supreme Court rules for such testimony. See Fed. R. Evid. 702, and *Daubert v Merril Dow Pharmaceuticals* 509 US 579.

Defense Counsel now had a constitutionally required duty to present an identification expert to give reliable, scientific testimony, that the form of identification relied on by the State, as given by the Victim, was totally unreliable. Without such testimony, the Jury was led to believe that this odd form of identification was reliable, and used it to find this Appellant guilty, albeit erroneously.

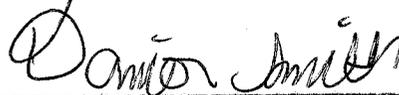
As such, both prongs of *Strickland* are satisfied, as any confidence in the verdict is called into serious question by Counsel's failure at this critical juncture. The Court of Appeals simply claimed that this Appellant failed to show that Counsel's failure to obtain <sup>an</sup> expert identification witness was deficient, or that he was prejudiced by that failure. This holding is illogical, since the Victim's identification testimony is the only evidence to support a robbery conviction, as the use of the credit cards by itself can only show the possibility of receiving stolen property or misuse of a credit card. Both of these,

however, are questionable in themselves, since the Appellant's actions indicate his unawareness that they were stolen, as he even signed his own name to the receipt. Counsel clearly failed in his constitutionally required duty to render effective assistance of Counsel to the Appellant. As such, to keep the level of representation of criminal defendants in Ohio up to the requirements of the 6th Amendment, this Honorable Court should sustain this Proposition of Law and accept jurisdiction of the case. This will send a message to Ohio Appellate Courts to properly adjudicate Ineffective Assistance of Counsel claims under the U.S. Supreme Court mandate as set forth in Strickland.

#### CONCLUSION

To protect future Ohioans from being convicted wrongfully of robbery, simply because they inadvertently used stolen credit cards, and to ensure that all criminal defendants will receive fair trials and the Due Process of Law during Trial and on Appeal, this Honorable Court should sustain this Appellant's Propositions of Law and accept jurisdiction of this case.

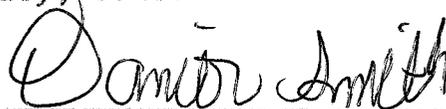
Respectfully Submitted,



Damion Smith, Pro-se

#### CERTIFICATE OF SERVICE

I, Damion Smith, hereby certify that a true and accurate copy of the foregoing MEMORANDUM OF SUPPORT OF JURISDICTION was sent to the Hamilton County Prosecutor on this 16<sup>th</sup> day of January, 2013.



Damion Smith, Pro-se



**OHIO FIRST DISTRICT COURT OF APPEALS**

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on Smith's eyes, head shape, and skin tone, which he was trained to focus on as part of his job as a sculptor of facial prosthetics for actors.

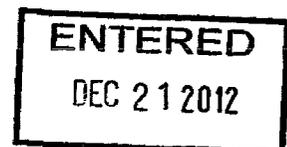
After his arrest, Smith denied participating in the robbery, but, according to the arresting officer, he admitted that a man named "Sean" had given him Molloy's card and that he had used it for one transaction. At trial, Smith testified that his uncle had given it to him. His uncle, a convicted felon, testified that a man named "Mark" had given it to him before he gave it to Smith.

Prior to trial, Smith moved to suppress Molloy's identification of him. The trial court denied the motion, and this evidence was admitted at trial. Smith was subsequently convicted of aggravated robbery with a three-year firearm specification and robbery.

In his first assignment of error, Smith argues that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. We overrule this assignment of error.

First, upon the evidence adduced at trial, reasonable minds could have reached different conclusions as to whether each element of the offenses had been proved beyond a reasonable doubt. See *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

And second, we find nothing in the record of the proceedings below to suggest that the jury, in resolving the conflicts in the evidence adduced on the charged offenses, including Smith's defense, lost its way or created such a manifest miscarriage of justice as to warrant the reversal of Smith's convictions. See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We note that the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.



**OHIO FIRST DISTRICT COURT OF APPEALS**

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In his second assignment of error, Smith argues that the trial court erred by failing to suppress Molloy's identification of him as his assailant. He claims that the identification was unreliable based on the totality of the circumstances, including the police's failure to comply with R.C. 2933.83, and Molloy's level of certainty and his ability to view his assailant.

We find that the record supports the conclusion that under the totality of the circumstances the identification was reliable and admissible. *See State v. Davie*, 80 Ohio St.3d 311, 321-322, 686 N.E.2d 245 (1997), citing *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *see also State v. Ruff*, 1st Dist. No. C-110250, 2012-Ohio-1910, ¶ 7 ("R.C. 2933.83(C)(1) does not provide an independent ground for suppression"). Accordingly, we overrule the second assignment of error.

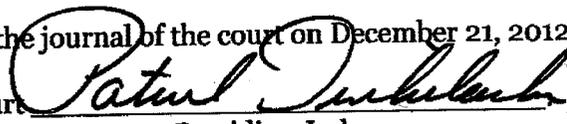
We overrule the third assignment of error, because Smith has failed to demonstrate, in the record before us, that counsel's decision to forgo an eyewitness-identification expert was deficient, or that prejudice arose from counsel's performance. *See State v. Madrigal*, 87 Ohio St.3d 378, 390-91, 721 N.E.2d 52 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); *see also State v. Keeling*, 1st Dist. No. C-010610, 2002-Ohio-3299, ¶ 8-9.

Therefore, we affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**SUNDERMANN, P.J., CUNNINGHAM and FISCHER, JJ.**

To the clerk:

Enter upon the journal of the court on December 21, 2012  
per order of the court   
Presiding Judge

