

No. 99-0264

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IN THE  
ILLINOIS APPELLATE COURT  
FIRST DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,

*Plaintiff-Appellee,*

v.

DAVID HERNANDEZ

*Defendant-Appellant.*

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Appeal from the Circuit Court of Cook County,  
No. 97 CR 22889-01 —George Morrissey, *Judge.*

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**BRIEF AND APPENDIX  
OF DEFENDANT-APPELLANT**

Kenneth N. Flaxman  
122 South Michigan Avenue  
Suite 1850  
Chicago, Illinois 60603  
(312) 427-3200

*Attorney for Defendant-Appellant*

ORAL ARGUMENT REQUESTED

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## **BRIEF AND APPENDIX OF DEFENDANT-APPELLANT**

### **I. INTRODUCTION**

Defendant was found guilty of murder and received a 50 year sentence. No question is raised on the pleadings.

### **II. STATEMENT OF JURISDICTION**

This is a direct criminal appeal, in accordance with Supreme Court Rule 603.

### **III. STATEMENT OF FACTS**

On April 24, 1997, a man named Andrew Travis was shot on the street in Dixmoor, Illinois. (R175.) Travis subsequently died as a result of three gunshot wounds. (R112.)

The sole witness to the shooting was Jerry Phillips, a school bus driver who observed the incident while sitting in his parked bus, about 90 feet away. (R33-34.)

The police showed Phillips photographs of defendant on May 29, 1997 (R84) and June 26, 1997 (R85) and arrested defendant on July 24, 1998 (R86) and to see if Phillips could make a positive identification at a lineup. Phillips identified defendant at a lineup on July 25, 1997 and defendant was formally charged with with murder on July 26, 1997. (C3.)

Before trial, defendant moved to suppress the identification testimony. (C20-23.) Defendant's waived a jury (R6), and the motion to suppress was taken with the case. (R9.)

## **A. Trial Proceedings**

### **1. Earlean Travis**

Earlean Travis, the mother of the deceased, testified as the life and death witness. (R10-14.)

### **2. Jerry Phillips**

Jerry Phillips is a 54 year old school bus driver. (R15.) At about 3:00 p.m. on April 24, 1997, he was sitting in his school bus waiting for a child in front of 14500 South Cooper, in Dixmoor, Illinois. (R15-R17.)

While sitting in his bus, Phillips observed a small, dark colored minivan "approximately four to five car lengths in front." (R17.) On cross-examination, Phillips stated that the distance between his bus and the minivan was the same as the distance from the witness box to the door of the courtroom across the corridor, which the parties stipulated was ninety feet. (R34.) Phillips testified that he saw two men standing beside the van and a third man standing in front

of it. (R18.) Phillips described the two men beside the van as 19-20 years of age, about the same height and weight (R37), and identified the defendant as one of the men who had been next to the van. (R18.) On redirect examination, Phillips stated that the two offenders had been between five feet two inches and five feet four inches in height, and each weighed "[a]bout a hundred and fifty-five, a hundred sixty pounds." (R74.)

According to Phillips, defendant and the other man who was next to the van argued with the man who was in front of the van (R18) and defendant then pulled out a gun and started to shoot at the man who was in front of the van. (R18.) Phillips stated on cross-examination that he had been unable to hear any of the words that had been spoken during the argument. (R36.) Phillips testified that "[t]hey shot," the victim fell to the ground, got up and "[h]e shot him again." (R20.) Phillips stated that the defendant shot four times as the victim was trying to get away. (R20.) According to Phillips, defendant fired one shot into the victim's car and defendant and a "lighter skin dude" then got into the van and drove off. (R21.)

Phillips was interviewed by the police immediately after the shooting. (R39.) Phillips testified at trial that in this this initial interview he had not supplied any description of the offenders other than that one was light skinned and the other (the shooter) was dark skinned. (R45.)

Phillips was reinterviewed by the police on May 13, 1997 (R52) and described the light skinned offender as five feet seven inches tall and weighing about 155 pound and the dark skinned male as approximately five feet ten inches tall and weighing 175 pounds. (R52.)

Phillips was contacted by state police on May 29, 1997 (R26) and shown photographs. (R27.) According to Phillips, he picked out one photograph "as the driver." (R27.)

Phillips viewed more photographs on June 26, 1997 (R28) and picked out one photo because it showed the "profile that I seen when the guy [the shooter] turned his head towards me." (R27.) Phillips agreed that he had been unable to make a positive identification from the photographs. (Id.)

Phillips viewed a lineup on on July 25, 1997 and identified defendant. (R31.)

### **3. Sergeant Pfothenhauer**

Illinois State Police Sergeant Pfothenhauer interviewed Phillips on May 13, 1997. (R83.) During this interview, Phillips told Pfothenhauer that there had been two offenders: one was five feet ten inches tall and weighted about 175 pounds, the other was five feet seven inches tall, and weighed 155 pounds. (R92.) The taller offender was dark skinned and had been the shooter. (R93.) Phillips told Pfothenhauer that he was unsure if he could identify anyone because he had been looking at the backs of their heads most of the time. (R93.)

Pfothenhauer showed photographs to Phillips on May 29, 1997. (R83-84.) Phillips made a positive identification of the driver of the van (R84), but could not positively identify the shooter. According to Pfothenhauer, Phillips stated "there were two subjects, Number 2 and Number 4, who had hair, curly hair just like the shooter." (R85.)

Pfothenhauer showed more photographs to Phillips on June 26, 1997. (R85.) Only one photograph — defendant's — had been in the array that

Phillips saw on May 29th and June 26th. (Id.)

After looking at defendant's photograph on June 26th, Phillips stated that defendant "was a definite suspect" (R86) "because of his jaw and cheek features." (R99.)

Pfotenhauer conducted a lineup on July 25, 1997 (R86) and Phillips made a positive identification of defendant. (R87.)

#### **4. Jill Rizzs**

Jill Rizzs, an Illinois state police sergeant, investigated the crime scene (R110), recovered shell casings (R112), and photographed the scene. (R113-115.)

#### **5. Joseph Falica**

In April of 1997, Joseph Falica was the police chief of Dixmoor, Illinois. (R116.) Falica interviewed Phillips immediately after the incident (R121) and asked the state police to take over the investigation. (R120.)

#### **6. Stipulations**

The parties stipulated that on April 24, 1997, a man named Andrew Travis was had died of three bullet wounds. (R54-57.)

#### **7. Detective Murtagh**

The defense called Dixmoor Police Officer Murtagh, who was present when Phillips gave his first description of the offenders. (R142.) Following Murtagh's testimony, the court accepted into evidence the written statement given by Mr. Phillips. (R148.)

#### **8. Defense Exhibit 1**

In the written statement, Phillips described the shooter as a darker skinned African-American, about five feet ten inches tall and weighing about 175 pounds; Phillips described the lighter skinned offender as about five feet seven

inches tall and weighing about 155 pounds. (R151.)

### **9. Ruling on The Motion to Suppress**

The trial court denied the motion to suppress, finding "that the photographs were not suggestive, [and] that the way they were presented was not suggestive." (R175.)

### **10. The Trial Court's Finding**

The trial judge described the case as "a one-witness shooting in the streets of Dixmoor" (R175) and found that the testimony of the eyewitness was sufficient to establish defendant's guilty. (R178.)

In denying defendant's post-trial motion, the trial judge stated that the witness had viewed the incident "[s]ome 15 or 20 feet in front of him. Or about four car lengths in front of him." (R186.) The trial judge described the testimony of the eyewitness as "unequivocal" (R187) and denied the post-trial motion. (Id.)

### **B. Sentencing**

After hearing arguments in aggravation and mitigation, the trial judge imposed a 50 year sentence. (R193.) Defendant filed a timely motion to reduce sentence; after hearing arguments of counsel, the trial judge refused to reconsider his sentence. (R208.)

## **IV. ARGUMENT**

### **A. THE TESTIMONY OF THE SINGLE EYEWITNESS WAS NEITHER POSITIVE NOR CREDIBLE**

The State's case against defendant hinges upon the testimony of a single witness, Jerry Phillips. A conviction may be based on the testimony of a single eyewitness only when the witness is "positive and credible." *People v. Steven Smith*, \_\_\_ Ill.2d \_\_\_ (No. 81491, February 19, 1999). The eyewitness

testimony in this case fails on both counts.

When interviewed immediately after the shooting, Phillips described the shooter as about five feet ten inches tall and weighing about 175 pounds. (R151.) At trial, Phillips could not recall his initial description (R45) and described the shooter differently — the shooter was now "[a]bout 5'2", three, four" and weighed "[a]bout a hundred and fifty-five, a hundred sixty pounds." (R74.) These wildly disparate descriptions, and inability to recall the original contradictory descriptions, are hardly positive.

Nor was Phillips' testimony credible. Phillips viewed the incident while sitting in a parked school bus, about 90 feet away from the shooting. Phillips' view was of the back of the heads of the offenders, and, before he was repeatedly exposed to the photograph of defendant, Phillips told the police that he was unsure if he could identify anyone because he had been looking at the backs of their heads most of the time. (R93.)

Phillips viewed a photo-array on May 29, 1997, and picked out a photograph of defendant and of another person because the two men "had hair, curly hair, just like the shooter." (R85.) Phillips had not previously described the shooter as having curly hair and there is no indication in the record that there was anything unusual about an African-American male having curly hair.

The officers showed Phillips another photo-array on June 26, 1997. Defendant's photograph was the only one that appeared in the two arrays. This time, Phillips stated that defendant's "jaw and cheek were exactly like the shooter's." (R60.) Phillips, though, had not observed the offender's "jaw and cheek" and admitted that he was not sure of the identification because, during

the incident, "the subject's back was facing towards Phillips." (R99-100.)

Although Phillips identified defendant at a lineup on July 25, 1997 and made an in-court identification at trial, the testimony of this single witness is insufficient to establish defendant's guilt and defendant's conviction should be reversed outright.

## **B. THE UNRELIABLE IDENTIFICATION WAS UNDERMINED BY SUGGESTIVE PROCEDURES**

The standards for assessing the reliability of eyewitness identification as set out by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972) have been endorsed in numerous Illinois cases. *See, e.g., People v. Bryant*, 94 Ill.2d 514, 520-21, 447 N.E.2d 301, 304 (1983); *People v. Holmes*, 141 Ill.2d 204, 565 N.E.2d 950 (1990); *People v. Kelley*, \_\_\_ Ill.App.3d \_\_\_, 1999 WL 177054 (1999). The reliability factors include:

(1) the witness' opportunity to view the suspect at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the suspect; (4) the level of certainty demonstrated at the time of the confrontation; (5) the length of time between the crime and the confrontation; and (6) any acquaintance with the suspect prior to the crime.  
*Neil v. Biggers*, 409 U.S. at 199-200.

In this case, the witness did not have any opportunity to view the face of the offenders — Mr. Phillips viewed the incident from 90 feet away and was only able to see the back of the offender's heads. While there is no evidence of record about Mr. Phillips' degree of attention, the evidence is undisputed that the witness abandoned his initial descriptions of the offenders as about five feet ten inches tall and weighing about 175 pounds in place of a description more consistent with the physical appearance of defendant — "[a]bout 5'2", three, four" and weighing "[a]bout a hundred and fifty-five, a hundred sixty pounds."

(R74.) Before making the lineup identification, Mr. Phillips had been unable to pick defendant out from photographs — the first time Phillips saw a photograph of defendant, he noted that defendant "had hair, curly hair, just like the shooter."

(R85.) The second time that Phillips saw a photograph of defendant he was still unsure about the identification, and stated that defendant's "jaw and cheek were exactly like the shooter's." (R60.) Three months elapsed between the shooting and the lineup and there is no indication in the record that Phillips had ever seen defendant before he picked him out of the lineup.

The unreliability of the identification was compounded by the multiple display of photographs of defendant. As the Court noted in *People v. Williams*, 60 Ill.2d 1, 10, 322 N.E.2d 819, 824 (1975), "the use of multiple, identical or obviously similar, photographs of the same person is normally an undesirable photographic identification procedure which may often be unduly suggestive." In this case, it appears that the police exhibited the same picture of defendant to Mr. Phillips on two occasions, a procedure which increased the "possibility of suggestiveness." *People v. Kubat*, 94 Ill.2d 437, 472, 447 N.E.2d 247, 262 (1983).

A conviction cannot be sustained on doubtful, vague, and unreliable identification testimony. *People v. Gardner*, 35 Ill.2d 564, 571, 221 N.E.2d 232 (1966); *People v. Cullotta*, 32 Ill.2d 502, 504, 207 N.E.2d 444 (1965); *People v. Hister* 20 Ill.App.3d 933, 937, 314 N.E.2d 562 (1974). *People v. Ash*, 102 Ill.2d 485, 494, 468 N.E.2d 1153, 1157 (1984); *People v. Wehrwein*, 190 Ill.App.3d 35, 39, 545 N.E.2d 1005, 1008 (1989). As in *People v. Steven Smith*, \_\_\_ Ill.2d \_\_\_ (No. 81491, February 19, 1999), defendant's conviction should be reversed outright.

## **V. CONCLUSION**

For the reasons above stated, defendant's conviction should be reversed outright.

Kenneth N. Flaxman  
122 South Michigan Avenue  
Suite 1850  
Chicago, Illinois 60603

(312) 427-3200

Attorney for Appellant