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Case Number 56,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAMON RUFFIN,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 56, 2015
	)	
STATE OF DELAWARE,	)	
	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

APPELLANT'S REPLY BRIEF

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DATED: July 6, 2015

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I. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO INTRODUCE HEARSAY EVIDENCE TO PROVE RUFFIN RECEIVED A STOLEN FIREARM.

Perhaps sensing it could be effective and in an attempt to distract the Court, the State in its answering brief goes on ad nauseam of how the ATF report was introduced into evidence. However the procedural posture in this case is not in dispute. What the State fails to acknowledge entirely is the fact that ATF trace data can only be disseminated to a law enforcement officer in connection with a bona fide criminal investigation. This was fatal to the State's argument in the case at bar.

The State's response to Ruffin's argument is essentially that the ATF did not have a duty to compile/disseminate the report, however the licensed dealer did. Ans. Br. at 13. This contention is misleading because whether the licensed firearm dealer had a duty to report to the ATF is irrelevant. As emphasized in Ruffin's opening brief, the ATF report at issue was offered by the State in a criminal case, and it contained factual findings resulting from an investigation prepared by or for the government. There can be no question that the ATF agent who gathered the trace data was carrying out a function of law enforcement on behalf of the government.[1] he report was

1 *See, U.S. v. Ruffin*, 575 F.2d 346, 356 (2nd Cir. 1978) (holding that IRS personnel who gather data and information and commit that information to records which are routinely

therefore an investigation prepared by the United States government [for the State of Delaware] and precluded under D.R.E. 803(8) (B).[2]

Finally, the State contends that federal courts have held that reports by the ATF are public records and admissible under D.R.E. 803(8). To support this claim, the State cites to *Augustson v. Holder*[3], *Chism v. Ethicon Endo-Surgery, Inc.*,[4] and *United States v. Johnson*[5]. Ans. Br. at 14. The authority that the State relies on does not support the State's position and, in fact, supports Ruffin's argument when examined closely. For instance, *Augustson* involved the use of an ATF Report of Violations, which is a document that enumerates the specific violations found during a **compliance inspection** and outlines the required corrective action, in a **civil proceeding**. *Chism* involved evidence of similar incidents that came in the form of medical device reports ("MDR") and product inquiry verification reports ("PIVR"). However in *Chism*, the Court compares MDR and PIVR to ATF reports, but the case did not hold that ATF reports are admissible. Rather, it merely relied on *United States v. Johnson*.

In *Johnson*, the government sought to introduce a serial number

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used in criminal prosecutions are performing what can legitimately be characterized as a law enforcement function).

2 *United States v. Davis*, 571 F.2d 1354, 1357 (5th Cir. 1978).

3 728 F.Supp.2d 1279, 1284 (D.N.M. 2010).

4 2009 WL 3066679 (E.D. Ark. Sept. 23, 2009).

5 722 F.2d 407 (8th Cir. 1983).

report, not an ATF Trace Report, from the manufacturer of the firearm showing the gun was shipped to California. The report, however, was not received from the manufacturer but was obtained from the ATF because the manufacturer had discontinued its business. When a firearms dealer discontinues his business, only then does the ATF become the custodian of the record. Moreover, in *Johnson*, the ATF Serial Number exhibit included a Certification of Authenticity from the custodian of records and the government did present any witnesses in support of the exhibit. That is not so in the instant case. Finally, the State fails to cite a single authority that supports the admission of the ATF's trace reports as public records because the Court's decisions do not support that position which is reflected in the State's argument.

Since the ATF report was essential to the State's case, as it was the only credible evidence that Ruffin knowingly received a stolen firearm, its admission cannot be deemed harmless. Therefore, Ruffin's conviction for receiving a stolen firearm in violation of 11 *Del. C.* § 1450 must be reversed.

II. THE TRIAL COURT VIOLATED RUFFIN'S RIGHT TO A FAIR TRIAL WHEN IT REFUSED TO DECLARE A MISTRIAL, UPON HIS REQUEST, BASED ON IMPERMISSBLY SUGGESTIVE EYEWITNESS IDENTIFCATIONS WHICH GAVE RISE TO A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION.

The State argues that the identification in this case was not unnecessarily suggestive because both witnesses had the opportunity to view Ruffin in the daylight at the time of the crime and there was no discrepancy from prior descriptions. Ans. Br. at 23. This contention is misplaced. First, neither witness viewed the suspect for more than a "minute or two" and it had been ten months prior to the pretrial/ in-court identifications. Moreover, neither witness provided statements to the police and so the only thing that was commented about the identity of the suspect was "tall, African American." Therefore, its apparent that discrepancy wasn't at issue since the prior descriptions were so exceptionally vague that the only statement(s) that could create a discrepancy is a contradiction of the suspect's "tallness" or race.

The State's reliance on *Harris v. State*[6] to support its contention that the in-court identifications were sufficiently reliable is misplaced. Ans. Br. at 22. When examined carefully, *Harris* supports Ruffin's position more

6 2015 WL 1570224 (Del. April 8, 2015).

than that advanced by the State. In *Harris* all three witness identifications were deemed reliable. However, the differences from the instant case are too significant to ignore. Witness 1 observed the defendant's face for 15-20 minutes and testified as to his clothing. Witness 2 followed the defendant after the incident and likewise testified as to his clothing. Witness 3 had the opportunity to view Harris for a "whole half an hour" and then identified Harris twenty to thirty minutes after the arrest.

Unlike in *Harris*, both witnesses had only a small window to view Ruffin and nearly a year had elapsed between the crime and the pretrial in-court identification. The record reflects that the in-court identifications are not sufficiently reliable due to a multitude of reasons including: short amount of time to view the suspect, during which one of the witnesses' vision was blurred and the other witness viewed the suspect from his truck (in other words, he watched as the suspect and victim tussled with one another so the witness couldn't have seen the suspect's face the whole time); exceptionally vague descriptions of the suspect's appearance and clothing; and long time passage between the crime and the confrontation.

Finally, the State glosses over the fact that the prosecutor showed these two photos just before opening statements and conducted a wholly improper pretrial lineup and then immediately after the witnesses identify

Ruffin at trial. The real problem here is that showing the witnesses a picture of the Defendant just before trial served no purpose other than to influence their in-court identifications. There is no *proper* purpose for conducting such a line-up, especially without any procedural safeguards. As a result, its conjecture to know for sure whether the witnesses' made the identification based on their independent memories or based on being shown a picture of the Defendant hours before making an in-court identification. Since the pretrial procedures utilized in this case created a very substantial likelihood of irreparable misidentification, reversal is required.

CONCLUSION

For the reasons and upon the authorities set forth herein, the Court should reverse Ramon Ruffin's convictions.

Respectfully submitted,

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