

**COURT OF CRIMINAL APPEALS NO. WR-69,994-01
TRIAL COURT WRIT NO. W87-96524(A)
TRIAL COURT CAUSE NO. F87-96524-T**

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| EX PARTE | § | IN THE 283RD JUDICIAL |
| BENJAMINE JOHN SPENCER, | § | DISTRICT COURT |
| Applicant | § | DALLAS COUNTY, TEXAS |

TRIAL COURT'S FINDINGS OF FACT ON REMAND

The Court of Criminal Appeals having remanded this cause to this Court for additional findings of fact and to further develop the record on specific issues, the Court now makes the following supplemental findings of fact:

- 1) With regard to the methods of forensic science that Dr. Michel relied on in his report, this Court finds that Dr. Michel relied upon the application of the physiology of the eye to issues of visual identification. He focused on a person's ability to make facial identifications based upon constraints of illumination, distance and movement. This is a forensic application of optometry. Forensic visual scientific analysis is frequently used in crime scene investigations, motor vehicle accidents and cases involving police shootings. Forensic visual science evaluates what a person could or could not see under a given set of circumstances. This Court notes that the State waived its right to a hearing to challenge the admissibility of forensic visual science or Dr. Michel's qualifications as an expert in that field of science. This Court notes that the State retained Dr. James Hyzer, a forensic visual science expert, who conducted an evaluation of the evidence regarding Gladys Oliver's ability to identify Spencer. The State's expert stated in his report that "it is scientifically unreasonable that Gladys Oliver was able to discern and identify, from a distance of 113 feet, the facial features of the two individuals she testifies exited the vehicle."


- 2) This Court finds that at the time of the trial of this case in 1987, the evidence generated by the application of forensic visual science was unavailable and undiscoverable.
- 3) This Court finds that prior to visiting the scene, Dr. Michel read the trial testimony of Gladys Oliver, Jimmy Cotton, and Charles Stewart from both the *Spencer* and *Mitchell* trials. This Court finds that the fact that the identifications made by the witnesses were not stranger on stranger would not have changed his opinion.
- 4) This Court notes that a plea agreement is not final or enforceable until accepted by the defendant, the State and the trial court. The trial court accepted Edward's plea on April 13, 1987. This Court has previously found that Danny Edwards was not a credible witness. Since the only evidence that Edwards had actually met Spencer was Edward's testimony, this Court can not find with any certainty that Edwards had indeed actually met Spencer. Therefore this Court cannot determine whether or not Edwards made a plea agreement after meeting Spencer.
- 5) This Court finds that there is no confirmatory evidence that Edwards filed any pre-trial motions on Spencer's behalf.
- 6) This Court finds that there is no confirmatory evidence that Spencer's fingerprints had been sanded.
- 7) Because this Court is unable to determine whether Edwards actually met Spencer, and therefore is unable to determine whether Edwards made a plea agreement with the State before meeting Edwards, the Court finds that trial counsel was not ineffective for failing to attempt to impeach Edwards at trial concerning his testimony regarding the plea agreement.

- 8) This Court concludes that trial counsel did not render ineffective assistance of counsel. The Court concludes that trial counsel exercised sound trial strategy in the presentation of Spencer's defense in regard to areas of impeachment of Edwards.
- 9) This Court further finds that trial counsel used sound trial strategy and was not ineffective for not eliciting testimony showing that Van Mitchell Spencer had been ruled out as a suspect.
- 10) This court concludes that the issue of laches as applied to a claim of ineffective assistance of counsel is moot in the instant cause.

The Clerk of the Court is directed to transmit to the Court of Criminal Appeals in Austin, Texas, a supplemental transcript containing these findings, this Court's April, 2009, order to the parties, and any additional filings by the parties in this case not previously forwarded to the Court of Criminal Appeals.

The Clerk is further directed to send a copy of these findings to counsel for the defendant, Cheryl Watley, and to counsel for the State, Karen Wise.

SIGNED this 22 day of July, 2009.



RICK MAGNIS, JUDGE
283RD JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS