

January 1, 2006

Vol.: 06.1

OFFICE OF THE PUBLIC DEFENDER

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STATE OF DELAWARE



**COMPENDIUM OF RECENT CRIMINAL-LAW
DECISIONS FROM THE UNITED STATES SUPREME
COURT AND THE DELAWARE SUPREME COURT**

**Cases Summarized and Compiled by
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DELAWARE SUPREME COURT CASES JANUARY 2006 THROUGH MARCH 2006

RILEY V. STATE, (1/9/06): MOTION TO SUPPRESS EVIDENCE

Defendant was convicted of drug offenses and appealed on the ground that the evidence should be suppressed. Police observed: defendant get out of his car in a liquor store parking lot and get in the back seat of an Escort occupied by two females; the women, whom they thought were possibly underage, talked to defendant and looked around; what they “believed” to be some type of exchange, but not sure what. The police then parked their car behind the Escort, approached car and flashed their badges. When they opened the door, they smelled marijuana and saw a pill bottle on the floor. When asked where he had his drugs, defendant showed them the location in his pants.

On appeal, the State argued that the defendant was seized based on suspicion of drug activity. However, the Supreme Court found this argument unavailing since the State’s argument below was that there was suspicion of sale of liquor to minors. In fact, the officers were there on a detail to prevent the sale of liquor to minors. Further, there was no evidence that the area was known for drug sales, that officers had observed a drug sale before defendant’s stop, that there was an exchange of money or that there was any conduct consistent with drug sales. Thus, the suspicion was unfounded. Thus, the trial court’s denial of the motion was reversed.

CAPANO V. STATE, (1/10/06): INEFFECTIVE ASSISTANCE OF COUNSEL/DEATH PENALTY



Defendant was convicted of Murder 1st. Under 1991 death penalty statute, jury recommended the defendant receive death based, in part, on an 11-1 vote that a statutory aggravator existed. Defendant argued that he had ineffective assistance of counsel and that his sentencing procedure was unconstitutional as the result of *Ring* and its progeny. Defendant also argued ineffective assistance of counsel due to counsel’s failure to object to a victim’s out-of-court statements and failure to request a limiting instruction.

The Supreme Court held that there was no ineffective assistance of counsel as counsel’s decision not to object to victim’s out-of-court statements and not to request limiting instructions were strategic. Further, defendant opened the door when he testified

allowing questioning regarding pre- and post-arrest silence. Thus, counsel's failure to object to that line of questioning was tactical.

With respect to the death penalty issue, the Court remanded the case for a new penalty hearing because the jury's determination of the statutory aggravator, premeditation/substantial planning, was not unanimous. *Ring* held that the statutory aggravator is the functional equivalent of an element of a greater offense. Based on Delaware history, it is clear that unanimity is always required as to the finding of an element of an offense. A second penalty phase does not violate Double Jeopardy because a re-sentencing would not increase his sentence and does not supplement the original jury verdict. Subsequent to this decision, the State chose not to proceed with another sentencing phase and a life sentence was imposed.

CLAYTON V. STATE, (1/17/06): IN-COURT IDENTIFICATION



Defendant was convicted of robbery and related charges based on allegations that he robbed a McDonald's at gunpoint forcing individuals in the refrigerator. He allegedly ordered the manager to open the safe then go back in the refrigerator. Later, the manager told police that the "robber" had marks or decay on his teeth, (lovely). Three months later the manager provided an identification of the defendant from a photo lineup. Defendant was the only one who had his mouth partially open in the photo.

Defendant argued this was an impermissibly suggestive photo array and resulted in unreliable in-court identification. The Court held that it was not unreliable as the teeth were only minimally visible and the placement of defendant's picture first in the lineup was done randomly by the computer. Further, the lower court properly evaluated each of the five issues to be considered as to the witness' ability to identify the defendant pursuant to *Brathwaite*, 432 U.S. 98,114 (1977).

STATE V. HENDERSON, (1/18/06): MOTION TO SUPPRESS

Defendant exited a Boys and Girls Club with Michael Jones when police executed an arrest warrant on Jones. Defendant was ordered to stop and defendant complied. Police then conducted a "pat-down" of the defendant and **felt a gun, then saw it**. Amazingly, the defendant won his motion to suppress the gun. Shocked that they actually lost, the State appealed arguing there was reasonable suspicion for the pat down or the gun was in plain view.

The court upheld the lower court's decision because the frisk, following a justifiable stop, was unwarranted. There was no reasonable suspicion that he was armed and dangerous, he was frisked simply because he was Jones' associate. The court

distinguished this “automatic-companion” case from that of *Hunter v. State* where the officer was outnumbered 2 to 1 in a crowded restaurant when the defendant made a furtive gesture. Because the officer felt the gun first then saw it, the plain view doctrine did not apply.

Justice Berger dissented stating the Court should have paid attention to the officer’s testimony that “drug dealers and their associates remain dangerous even when engaged in seemingly harmless activities, like playing basketball.” So you basketball players amongst us better watch out, you’re engaging in the activities of a drug dealer.

HORSEY V. STATE, (1/24/06): CONFIDENTIAL INFORMANT/MOTION FOR NEW TRIAL



A confidential informant arranged a drug sale between the defendant and police officer. The CI never touched the drugs, money or was in any way involved in the transaction except to arrange the meeting. The trial court did not err in refusing to require the State to reveal the identity of the CI because the defendant failed to meet his burden that the CI’s testimony would materially aid the defense.

Another issue raised was that the State mistakenly showed defendant’s post arrest photo to the cop and the cop identified it as one that he viewed before the drug transaction. This was not sufficient for a new trial because the trial court did not abuse its discretion in finding harmless error.

FLONNORY V. STATE, (2/1/06): 3507; BRADY VIOLATIONS; WITNESS FORMER TESTIMONY & UNAVAILABILITY; PROSECUTORIAL MISCONDUCT

After a retrial, defendant was convicted of M1 and related crimes and received life + 60 years.

3507: Defendant argued that witness’ “3507” statements were “double hearsay” thus inadmissible because they were not based on personal knowledge and based only on the witness’ own conjecture and hearsay. The Supreme Court held that the trial court did not abuse its discretion when it found the witness had personal knowledge. However, admission of statements where “the girls and all that” appeared to be the source of the witness’ knowledge was harmless error. The trial court did not err when it found, based on its own determinations of demeanor, officer’s short-hand notes of a witness interview did not constitute an inadmissible “interpretive narrative.” Admission of statements by defendant’s codefendant to the witness was harmless error.

Crawford: Since the witness' out-of-court statements were based on personal knowledge or hearsay statements made to him and he was present for cross examination, *Crawford* was not violated. With the exception of the two types of statements above the court had found should not have been admitted; harmless error.

*******Admission of 3507 statements as separate exhibits:** "As a general matter, recorded or written out-of-court 3507 statements that are played or read during trial should not be admitted as separate trial exhibits that the jury can take into the jury room during deliberations when all other testimony-including direct and cross-examination testimony of a 3507 declarant, and testimony presented by non-3507 witnesses- are generally not admitted as separate trial exhibits in transcript form after the witness testifies in court. This is due to concern undue emphasis. This is a default rule only and judge can depart after doing 403 balancing test. This does not apply to recorded confessions by defendant as they are central to the case. However, on case-by-case basis counsel can object to exhibits of the defendant's statement going to jury.

Brady violation: At first trial, the State produced video and transcript of witness' police statement. The transcript omitted witness's observation that he saw both defendant and co-defendant in possession of semi-automatics and neither had a revolver. State's theory was that defendant shot and killed one victim with a revolver. Defense contended return gunfire. Defense counsel later discovered that, after defendant was convicted and while awaiting sentencing, the co-defendant got a correct version of the transcript. Defendant moved to exclude as he would not have testified at first trial had he had the correct transcript. Supreme Court upheld denial of motion because defense counsel should have reviewed the video tape.

Witness' former testimony: Defense moved to exclude witness' former testimony because he was arrested and convicted of robbery etc. 2 days after he originally testified that he no longer played with weapons. In a psychiatric evaluation conducted in that case, he said that whenever he sees a white van he "goes off" due to the incident in Flonnory's case. It was not disputed that Flonnory had been in a red car. The Court held that defendant may not have had a *meaningful* opportunity to cross examine, but he did have the opportunity to cross exam. Further, no error because stipulation read to jury that he had been convicted of the later charges and what he had said to the doctor.

Witness unavailability: Trial court's denial of defense request for witness to invoke 5th Amendment in front of jury was not error because there is a concern jury would make an adverse inference.

Prosecutorial Misconduct: Comments from prosecutors in closing not error.
1) "Some witnesses didn't want to recall [facts of earlier interviews] at all when faced 'eyeball to eyeball' with the defendant;" 2) "Out of all the reams of paper that are involved in this case, probably thousands, maybe even hundreds of thousands of pieces of paper in this case, they take out one line;" 3) "[Defendant] never tells anyone about return fire they allegedly experienced[.] He gives the return fire story after he has the

benefit of the ATF report, the report which has definitely concluded at that point that two guns were used.'

BARNETT V. STATE, (2/9/06): UNCHARGED MISCONDUCT- GETZ ANALYSIS

Defendant was charged with various sex offenses against the teenage daughter of his former girlfriend. Four counts were alleged to have occurred between December 1998 and December 2001. The other two supposedly occurred between 2001 and 2002. There were supposedly a number of incidences which took place in this time period. However, the trial court required the State to pick 6 acts to constitute the 6 counts. Despite this, the State was permitted to bring in evidence of other unindicted conduct the defendant allegedly engaged in with the victim. The Court held: while the trial judge did conduct a 403 *Getz* analysis, the admission of this other conduct was an abuse of discretion. There was no dispute of identity, mistake, accident or intent.

KEYSER V. STATE, (2/17/06): HEARSAY/ JURY INSTRUCTIONS/ LIO/JUDICIAL COMMENTS



Defendant was convicted of murder 1st degree and conspiracy 1st degree for raping and murdering the victim along with Jacob Jones. At trial defendant sought to have a statement purportedly made by Jones that he (Jones) wanted to kill the victim admitted into evidence because it was a coconspirator's statement. On appeal defendant argued it should have been admitted under the "state of mind" exception to the hearsay rule. Held: there was no evidence of an ongoing conspiracy at the time the statement was made. Further, the statement was only cumulative evidence that repeated what the defendant had told police in his own statements.

The trial court did not err when it denied defendant's request for a presumption of innocence jury instruction based on the Federal pattern instruction. Instead, the trial court's reasonable doubt instruction did not undermine the jury's ability to perform its duty. Also, the trial court did not err when it did not, *sua sponte*, give a lesser included instruction on attempted murder. Defendant argued that at some point after both defendant and Jones attacked the victim, she could have died at Jones' hand alone. But, the defendant did not point to any evidence that she was alive when he left her.

Finally, the Supreme Court agreed with the defendant that the trial judge "unnecessarily demeaned Defendant's counsel in front of the jury." The judge had personally thanked the prosecutor after their closing and rebuttal but did not do so when defense counsel concluded their argument. Also, in attempts to make objections, the

Court jumped in and rebuked defense counsel. However, defendant failed to meet his burden that this conduct affected the outcome of his trial.

TOLLIVER V. STATE, (2/23/06): CONFIDENTIAL INFORMANT/ IMPROPER PROSECUTORIAL CONDUCT

A criminal informant was used to set up a drug transaction between a cop and defendant. The cop testified he met the defendant and his girlfriend who removed a plastic bag containing cocaine from her blouse and handed it to defendant. Defendant then sold the cocaine to the cop. Defendant argued that disclosure of the CI would materially aid his defense. He claimed that it was the girlfriend and not he who sold the drugs and the CI would corroborate that. After an *in camera* hearing, the trial court denied his request. The Supreme Court, after a review of the *Flowers* hearing transcript, upheld the trial court's decision to not disclose the identity of the CI. At trial, the prosecutor asked the cop if he was the only one to have purchased drugs from the defendant that day. The cop testified that a white female made a purchase just before he did. Defendant's request for a mistrial was denied. The Supreme Court found the prosecutor's intentional questioning regarding the other sale to be improper but the subsequent instruction by the trial court to be curative.

STATE V. YOUNG, (2/23/06) (CCP): SEX OFFENDER REGISTRATION



While not an appellate decision, this is worth noting for future reference. Defendant was convicted of Unlawful Sexual Contact 3rd. According to 11 *Del.C.* §4121(3)(1) such a conviction requires registration as a Tier 1 sex offender unless otherwise ordered by the court. Thus, defendant petitioned in the court of common pleas for relief from designation as a sex offender. As a result, the court held an evidentiary hearing. Defendant presented a doctor who had conducted a psychosexual evaluation of defendant and concluded that he posed a “minimal risk” to the community. Defendant did not possess any of the risk factors such as antisocial behavior, prior criminal history, time spent in prison and childhood sexual or physical abuse. Facts at trial showed that defendant was invited to give the victim a hug, however, his subsequent breast touching, to feel a newly pierced nipple, was not permitted. The State argued that defendant failed to meet his burden by a preponderance of the evidence that he *poses no threat* to the community. The defense pointed out that the burden only required that he show, by a preponderance of the evidence, that he was *not likely to pose a threat* to public safety if released from registration requirements. Ultimately, the court granted defendant's petition.

GUINN V. STATE, (2/28/06): INSUFFICIENCY OF THE EVIDENCE/INTENT



Defendant was charged with 3 counts of Assault in a detention facility. Defendant was acquitted on the third count. The first two counts were based on his alleged throwing on two guards a potent concoction consisting of feces, urine and other fluids. Two guards were hit with this fluid after it came flying their way out of the blue. One guard is drenched and another guard is slightly touched. Neither officer saw defendant throw the substance, although he was the only one in the area. However, the guards both testified that they reported that he tried to hit the inmate, not them. Defendant argued that in order to be found guilty of these two charges, the State must prove that he specific intent to hit the guards. Otherwise, he is only guilty of Offensive Touching if he meant to hit the inmate but hit the guards “by accident.” The jury convicted Guinn on one count of feces throwing but was hung on the second count. The judge entered an acquittal on the second count. The Supreme Court upheld his conviction holding the record supports the conclusion that “the jury could infer Guinn’s [specific] intent to strike the officers.”

CHARBONNEAU V. STATE, (3/1/06): EVIDENCE 403/ 801(d)(2)(e)/ 803 (b)(3)/ (804)(b)(6)



The Supreme Court reversed defendant’s conviction on charges related to the murder of her husband and ex-husband. She was charged in a conspiracy with Melissa Rucinski and Willie Tony Brown. The State entered into plea agreements with Brown and Melissa contingent on truthful testimony at defendant’s trial. Four days into jury selection, prosecutors told the judge they believed Melissa and not Brown so they were not going to call Brown to testify. The trial court denied the defense request for a missing witness instruction and an order admitting Brown’s plea and proffer into evidence. The Supreme Court held that the defense was improperly precluded from presenting the theory it had been working on for months: create reasonable doubt through inconsistencies between the two statements. The Court held that the trial judge improperly invaded the province of the jury to determine the credibility of witnesses and substantially and unfairly undermined the defense.

Dissent: Ridgely, The State was not required to call Brown as a witness or to even prosecute him. Further, the trial judge did not foreclose the defense from using Brown's proffer on cross of Mellisa.

The remaining hearsay issues raised by the defense were affirmed.

HOPKINS V. STATE, (3/2/06): DISCOVERY/EXPERT WITNESS TESTIMONY/MAINTAINING A BUILDING

Defendant had been set up in a sting operation to purchase cocaine in the amount of \$47,000. The transaction took place in a hotel room and was monitored by State Police from the room next door. Defendant purchased a hot plate from Wal Mart to "cook" the cocaine as a test. He said he had previously been "beat for six" (lost money when he bought "bad" drugs). It was as he was plugging in the hot plate that police came in and arrested everyone. The State called its police-officer PWITD expert to explain the term "beat for six." Defendant objected that this was outside the scope of what the expert's testimony was limited to based on the State's response to discovery requests. Wright was permitted to testify. On appeal, the Supreme Court held that this use of Wright's testimony did not amount to a discovery violation. While the State's response in discovery was "broad" defense was aware that the phrase was uttered during the transaction and was thus intertwined with the commercial nature of the transaction to which the expert was testifying.

Further, there was sufficient evidence to support maintaining a building conviction. The DSP leased the hotel room and two other individuals spoke about leasing the hotel room. Under the jurisprudence of the Court's recent decisions in the companion cases of *Priest* and *Fletcher* (addressing maintaining a vehicle), the Court held there was sufficient evidence of affirmative activity by the defendant to facilitate the attempted drug deal.

MILLER V. STATE, (3/9/06): JURY VOIR DIRE/ LIO INSTRUCTION/ 3507/EVIDENCE



Defendant appealed his conviction of several counts of sexual crimes. Defendant requested **jury voir dire** as to whether they would give a police officer's testimony more credence. The trial court denied this. Then, a juror approached because she knew one of the officers. After she acknowledged she would give an officer's testimony more credence, she was excused and the judge then asked the remaining venire the question originally requested. One more juror was excused. The Supreme Court held that where law enforcement officers are key witnesses, the trial court, when requested by the defense, should make an inquiry as to the credence a jury would give the officer's

testimony. There was no harm in this case as the officer's testimony was not central to the case and other probing questions were asked of potential jurors.

The trial court properly denied request for a **LIO instruction** as there was no evidence to support it. The defendant claimed that he hugged and rubbed the victim, the trial court said these actions would not support a crime. Thus, no instruction was available. [HHHMMM?]. The trial court did not err by denying defendant's request for "conduct of the jury" instruction as the instructions that were given adequately stated the law. The defendant failed to demonstrate any prejudice in the police officer's suggestion during the defendant's statement that he may have forgotten what happened because of his use of drugs. Thus, judge properly denied request by defense to redact tape.

The victim's unresponsive answer which commented on alleged uncharged conduct did not warrant mistrial as she was interrupted by the judge and not likely jury heard her. The victim's handwritten statements made to Florida police were admissible under **3507** because she was subject to cross examination. The Florida police were not required to be subject to cross examination.

COLLINS V. STATE, (3/17/06): VIOLATION OF PROBATION/ HEARSAY REGARDING NEW CONVICTION

Defendant's probation was revoked based on the testimony of the State's sole witness, a police officer, regarding a domestic complaint. The Supreme Court held that more than this officer's hearsay was necessary to establish a violation. The officer testified that: the girlfriend told him that defendant had argued with her and broke her phone; he returned, kicked in her door; threatened her and smashed a figurine on the floor and left. The officer also told the jury that he saw: the scuffmarks and smashed figurine, hole in the wall and broken phone. The officer also told the jury what witnesses had told him. The Supreme Court held that, consistent with its 1968 decision in *Brown v. State*, probation cannot be revoked solely upon the basis of testimony of a witness with "no first-hand knowledge of events constituting the violations

CARDONE V. STATE, (3/17/06): SENTENCING/ PRESENTENCE REPORT



The trial court allowed counsel to view a copy of the presentence report but would not allow him to make a photo copy of it. Defendant argued on appeal that this case was similar to *Moore v. State* where the Court recently held that the defendant should be given a fair opportunity to comment on information contained in the report. However, the Supreme Court distinguished the two cases. In *Moore*, information the Court relied on was redacted and defendant was unable to review. In this case however, the defendant did have the opportunity to review. The trial court was not required to allow the defense to photocopy the report.

