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OFFICE OF THE PUBLIC DEFENDER
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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
JULY 2006 THROUGH SEPTEMBER 2006

JENKINS V. STATE, (7/10/06): VIOLATION OF PROBATION

Defendant charged with violating probation based on new drug charges. He filed a motion to suppress the evidence in the new case. Because he failed to appear for the combined vop/suppression hearing, the suppression motion was dismissed. After he turned himself in, his attorney did not renew the suppression motion and he conceded a violation of probation. The suppression motion was later renewed and the evidence in the new charges was suppressed.

Held: The vop finding was not required to be reversed as the motion to suppress the evidence was never renewed with respect to vop hearing.

BRATHWAITE V. STATE, (7/10/06): RIGHT TO SELF REPRESENTATION

Defendant filed a motion to proceed *pro se*. The court refused to entertain the motion because the defendant had not previously been authorized to "participate with counsel." Defendant filed a motion to participate with counsel. The court refused to address this motion. Defendant's attorney then withdrew and new counsel was appointed. Defendant was happy with the representation of this attorney and never again requested to proceed *pro se*.

After conviction of sex crimes, defendant moved for a new trial. He argued the court violated his right to self representation. After one appeal and on remand, the trial court held that, the defendant had not completely pursued his right under the rules of the court and applicable law.

Held: "A motion to proceed *pro se* is properly 'perfected' when filed with the court." Further, "when a defendant fails to reassert his right, it is waived"

HAWKINS V. STATE, (7/11/07): EVIDENCE - PRIOR BAD ACTS

Defendant was convicted of crimes related to threatening his wife with a knife; telling her he was going to kill her; throwing her to the ground and kicking her. The wife testified that she had previously left the defendant because he had routinely beat her and drank alcohol. The trial court denied defendant's objection finding the evidence to

be relevant to motive. The trial court also denied defendant's request to cross examine the victim regarding a 13 year old murder charge upon which she was exonerated based on self defense.

Held: 1) The trial court abused its discretion as motive was not at issue and, even if it was, the prior bad acts did not show motive. However, it was **harmless error** beyond reasonable doubt because all other evidence overwhelmingly corroborated the testimony of the victim. 2) the trial court did not err in prohibiting the defendant from cross examining the victim on her prior conduct.

HASSAN-EL V. STATE, (7/13/06) FELONY MURDER/ JURY INSTRUCTIONS/3507

Defendant was convicted of felony murder, murder second degree, possession of a firearm during the commission of a felony, attempted robbery first degree and conspiracy second for his part in the attempted robbery of an ice cream truck. At trial, the State introduced, *via* 3507, a video of a witness' interrogation in which police expressed their opinion regarding his credibility. Also, Defendant requested instruction that defendant could only be guilty of felony murder if his intent as an accomplice was equivalent to the state of mind required of the principle. At the time, felony-murder statute required that the murder be in the "course of and *in furtherance* of the commission or attempted commission of a felony[.]"

Felony Murder: 1) The homicide occurred in the furtherance of the attempted robbery. By shooting the ice cream man, they cleared the way to commit robbery. That they then chose not to commit the robbery is irrelevant. The result may have been different if the underlying felony had been actual robbery, not attempted robbery.

Jury instruction:"[I]f the 'accomplice' intended to commit the underlying felony[...], then he or she is also guilty of any 'consequential crime' that is committed, [...], as long as the consequential crime was a foreseeable consequence" of the underlying felony.

3507: Introduction of a videotape of a witness' interrogation under 3507 impermissibly allowed the jury to consider and be influenced by statements by police that expressed their own opinions regarding the witness' credibility. It was harmless error beyond reasonable doubt because a limiting instruction was given.

WISHER V. STATE, (7/17/06): ACCOMPLICE TESTIMONY

An informant arranged a drug deal between police and co-defendant. Defendant drove co-defendant to the meeting place. Upon a search of the vehicle, police found drugs in the back seat, a blunt in the driver's side door pocket and $1,431 on Wisher. Johnson testified at trial that defendant was his business partner and was the one who selected the location. He also said he originally took responsibility for all of the drugs because he felt responsible for getting defendant in trouble. There were many inconsistencies in Johnson's testimony.

Held: No error by failing to enter a judgment of acquittal based on the many inconsistencies of the uncorroborated accomplice testimony as they were reconcilable. And, failure to *sua sponte* instruct jury on inherent limitations of such testimony was not plain error.

MASON V. STATE, (7/19/06): *LOLLY* INSTRUCTION

Defendant was charged with robbing a liquor store. One of the victim's of the robbery recorded the license plate number on the get-away car. Two days later, police stopped defendant in the same car. Because the driver's side door could only be opened from the inside, the defendant argued that the events of the crime could not have occurred as the victim claimed. The defendant requested a *Lolly* instruction as the car was never returned to him prior to trial. The trial court denied the request finding the State was not negligent and there was undisputed testimony as to the condition of the car.

Held: Even if the police breached duty to preserve car, it was only harmless error.

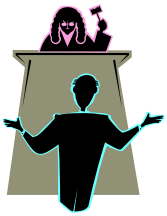
BOWEN V. STATE, (7/24/06): EVIDENCE – PRIOR BAD ACTS

Defendant was convicted of carjacking first degree, two counts of possession of a deadly weapon during the commission of a felony and possession of a deadly weapon by a person prohibited. He refused to stipulate to having a prior felony conviction. The State proffered a certified court record of his prior conviction to establish his prohibited

status. The defendant did not ask for, and the court did not give, a limiting instruction as required by *Weber v. State* for prior bad acts.

Held: The trial court's failure to *sua sponte* give a proper instruction limiting the evidence of defendant's criminal record was not clearly prejudicial and did not amount to plain error.

STARLING V. STATE, (7/24/06): DEATH PENALTY REVIEW



Defendant was convicted of killing two people at the Made-4-Men barbershop in 2001. One victim was a 5 year-old boy. At his first trial, defendant received a death sentence. However, the sentence was vacated and remanded for "the limited purpose of resentencing under the appropriate standard articulated in 11 *Del.C.* §4209." The defendant again received a death sentence. The sentence was upheld based on applying the mandatory statutory review: 1) did evidence support the unanimous finding of the jury that the statutory aggravating circumstances have been established beyond reasonable doubt; 2) whether the trial judge's imposition of the death penalty was arbitrary or capricious; and whether the penalty imposed was disproportionate to the penalty imposed in similar cases arising under the statute.

BRISCOE V. STATE, (7/28/06): JURY *VOIR DIRE*/ PROSECUTORIAL MISCONDUCT

Defendant appealed his convictions of arson second degree, possession of an incendiary device and conspiracy second degree arguing that the court erred when it refused to *voir dire* the entire jury panel after two jurors reported they were uncomfortable that the defendant was not incarcerated. It was also argued that the prosecutor improperly appealed to the jury's sympathy in closing by stating that the 14 year-old victim would "never get the chance to decide whether he wants to leave the environment in which he grew up and escape the hood."

Jury *Voir Dire*: No abuse of discretion in denying request to voir dire jury panel because no evidence that jurors were biased against defendant.

Prosecutorial Misconduct: The trial court did err in overruling defendant's objection as to the prosecutor's comments. Under the *Hughes* analysis, it was **harmless error** beyond reasonable doubt.

BUTCHER V. STATE, (8/17/06), CONFIDENTIAL INFORMANTS

Confidential Informant arranged drug sale with defendant. The informant drove to the meeting point with police. At trial, there was some question as to the officer's ability to identify the defendant. Thus, the defendant sought the identity of the confidential informant as he would have information that might clear the defendant. Under *D.R.E.* 509 (c) (2), an *in camera* review is required when defendant argues that an informant may have information that would materially help him and the State argues the informant's identity is privileged. An *in camera* hearing was held, but the prosecutor asked all of the questions of police officers. The CI was not present and did not submit an affidavit.

Held: Only the judge and court reporter should be present at hearing with the CI. Thus, the matter was remanded for proper proceedings and conclusions to be made within 60 days.

MATHIS V. STATE, (8/21/06), EXPERT&LAY WITNESS OPINIONS/PROSECUTORIAL COMMENTS/ EVIDENCE OF PRIOR OFFENSES

Defendant was convicted of shooting and killing the victim. At trial, an EDU officer testified that he found no evidence as to the projectile's path of travel or point of origin. One projectile was found under a nearby car and another found in the victim's body. Trial court denied defendant's request to cross examine the officer on the bullet trajectories based on his years of experience and perception of physical evidence found at the scene. Defendant also sought the introduction of the victim's prior terroristic threatening and assault third degree charges to counter testimony that the victim had a good heart and was not a bad person. Also, the State told the jury that the victim lived in a "neighborhood where guns, drugs, violence are all too commonplace" and that "you'll hear about things that some of you may have only seen or heard on TV." In rebuttal, for the first time, the State said the defendant "threw the gun, left it on the street, immediately took the braids out of his hair."

Witness Opinions: Testimony sought from EDU officer was not admissible as either a lay opinion under *D.R.E.* 701 or as an expert under *D.R.E.* 702. There was no evidence that the officer was qualified as an expert and determination of trajectory was beyond the competence of a nonexpert.

Prosecutorial Misconduct: The prosecutor's comments about the neighborhood and television were not plain error. Also, the State is not required to address every piece

of evidence in its opening summation in order for it to be addressed in rebuttal. Thus, there was no sandbagging.

Prior Bad Acts: No error in denying introduction of the victim's prior convictions as the victim's testimony did not address defendant's trait as to peacefulness.

RANDALL V. STATE, (8/21/06): TENDER YEARS STATUTE - 3513

Fourteen year-old defendant was charged with raping his 4 year-old cousin. The victim had told an interviewer that the defendant has digitally penetrated her vagina. A detective viewed the interview through closed-circuit television. At trial, the victim said that the defendant did something to her but could not remember what. She also did not make eye contact and was unresponsive. The court permitted the State to introduce a videotape of the interview through the detective, pursuant to 3513- the "tender years" statute. When the victim resumed the stand, she still could not remember the details.

Held: No abuse of discretion in deeming the child incompetent for purposes of admitting the statement through the statute or in finding tape was authenticated as the detective watched the original and reviewed a copy of the videotape. No prejudice resulted from the court's failure to conduct analysis until defendant moved for judgment of acquittal; and defendant's failure to cross examine the victim foreclosed any potential confrontation-clause argument.

WHEELER V. STATE, (8/23/06): MAINTAINING A VEHICLE

Defendant was a passenger in car that was followed by State Police and two probation officers. The driver failed to signal. Once the car was pulled over, defendant was recognized as wanted by probation and parole. He was taken into custody and police found drugs and paraphernalia in the car. Defendant admitted it was his and that he had been in the car before. At trial, defendant recanted.

Held: The State is not required to prove a defendant's direct control over the vehicle, but must establish the defendant's affirmative and knowing use of the vehicle to keep or maintain the car for illegal drug activity.

MOODY V. STATE, (8/24/06): REASONABLE SUSPICION

Defendant was observed in a restaurant in a high crime area, "loitering" for 20-30 minutes. He was not observed making any purchases or being involved with a suspect that police were watching. Moody walked out of the restaurant away from a marked police car. He then discarded an unidentified object which later turned out to be a blunt.

Held: There was sufficient reasonable suspicion based on defendant's "loitering" in the restaurant; standing feet away from a suspect and leaving the restaurant at the same time; walking away from police while looking over shoulder; and dropping an unidentified object. When the object was confirmed as a blunt, there were sufficient grounds for arrest.

MACK V. STATE, (8/28/06): ROBBERY FIRST DEGREE

Defendant entered a bank and handed a teller a note that read, "Give me all your money or I'll kill you, I have a gun, all the money." At the same time defendant opened his jacket and stuck out what may have been a gun. However, the teller told the police that it looked like it was plastic and fake. After making off with some money, defendant was later apprehended. He admitted to the robbery but denied having a gun. Defendant argued that since the victim did not believe he had a gun, he did not display what "appeared" to be a gun for purposes of conviction under Robbery First Degree.

Held: The victim is not required to be absolutely certain it was a gun, she need only believe the defendant may be armed.

JONES V. STATE, (8/28/06): CHAIN OF CUSTODY/FAIR TRIAL/ DRUG FINGERPRINTTING

Defendant was stopped by police for failing to signal. Police then found drugs in the car. He went to trial on drug charges. While testifying regarding the chain of custody of the drugs, the officer stated that he had earlier in the day opened and resealed the drugs to show another officer. The court admonished the State. Also, defendant was seen by the jury being escorted by corrections. Finally, in closing, the defendant told the jury that no fingerprinting had been done on the drugs.

Chain of Custody: The court did not abuse discretion in allowing the drugs to come in.

Fair trial: There was no unfair prejudice when the jury saw defendant being escorted by correctional officers. The court took measures to make sure it did not happen again and instructed the jury.

Fingerprint: There was no error in cutting off defendant's fingerprint argument as there was no evidence presented on the matter.

BAKER V. STATE, (8/28/06): PROSECUTORIAL MISCONDUCT

Defendant was found guilty of various sex charges related to alleged molestation of his daughter. There was a lot of testimony questioning the victim's credibility. Also, she had made inconsistent statements. The defendant testified that he had the victim examined at the hospital to see if she was still a virgin as she was out late at night and he thought she was having sex. On cross examination, the State inquired, "and you have some familiarity with sex offenses? There are other members that you know, other friends, other people that you know have been accused of sex offense?" Defendant objected as to relevance only. Prosecutor stated he wanted to show the test was conducted so the defendant could see whether there were signs of his molestation. The State also admitted that it did not know what defendant's answer was going to be. The court sustained objection, not in presence of the jury, but gave no curative instruction. On appeal, defendant argued prosecutorial misconduct.

The plain error standard requires a review *de novo*, pursuant to the *Hughes* analysis, as to: 1) whether misconduct occurred; 2) if misconduct then was it so clearly prejudicial to substantial rights as to jeopardize the fairness of the trial; and 3) if so, then reversal is required, if not the *Hunter* test is required. The *Hunter* test the court may, but is not required to, reverse if the record shows repetitive errors by the State.

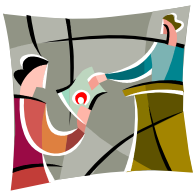
Held: REVERSED, *en banc*, "a prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

MULLIN V. STATE, (8/29/06): DUI-INTOXILYZER

The trial court instructed the jury that the State was "not required to prove the underlying scientific reliability of the method used by the Intoxilyzer." The jury was also told that a person need not be drunk or drive unsafely to be guilty of DUI and the evidence tended to show the reading was .113.

Held: Only error was the court's statement that the evidence tended to indicate .113 as it was an expression of the court's opinion. However, it was **harmless error** because there was no dispute that the reading was .113 and the court told the jury it had to establish this fact.

BUNTING V. STATE, (9/7/06): FAIR TRIAL-REFERENCE TO PROBATION/ PROSECUTORIAL MISCONDUCT/ ADMINISTRATIVE WARRANTS



Defendant's probation officer observed him driving without a license. She arranged for State Police to stop him. Incident to his arrest, police found marijuana in his car. With supervisor permission and the assistance of police, an administrative warrant of defendant's home was conducted. However, all of the administrative rules were not followed. Upon defense request, the judge ordered that there be no reference to defendant being on probation and that the P.O.'s should be referred to as "law enforcement officers." One witness was referred to as a probation officer and another witness testified she had visited his home three times a month over a nine month period.

Reference to probation: No abuse of discretion in denying a mistrial as curative instruction was given.

Prosecutorial misconduct: No misconduct in questioning that led to the reference as it did not affect substantial rights or integrity of the judicial process.

Administrative Warrant: While the technical requirement of probation search procedures were not met, there was reasonable grounds for the search and substantial compliance with departmental regulations.

WHITE V. STATE, (9/14/06): POSSESSION/ TRAFFICKING/ CONSPIRACY

Defendant appealed her trafficking and conspiracy convictions. Police searched the home of James White after an extensive investigation. They found him as well as the defendant, (his wife), standing next to a walk-in closet in the master bedroom. The defendant gave a false name. A significant amount of drugs and cash were found in this closet. Drugs were also found in a dresser drawer in the bedroom. Paraphernalia was found in a smaller closet and in a food box in kitchen. Defendant was only staying in the master bedroom temporarily; her belongings were in trash bags on bedroom floor; the walk-in closet was neat while the rest of the room was a mess; only 4.63 gms of crack on

her person; use paraphernalia found in her belongings; and no items in walk-in closet were hers.

Held: No rational jury could find beyond reasonable doubt that defendant exercised dominion and control over drugs in the walk-in closet or that she agreed to aid or abet another in drug operation. At best, she may have seen or had access to James operation. **REVERSED AND VACATED**.

Dissent: A rational juror could have equally have found that defendant was guilty.

MARTIN V. STATE, (9/19/06): FAIR TRIAL-REFERENCE TO PROBATION

Defendant was tried and convicted of burglary second degree, menacing and criminal mischief. One of the victims testified that the defendant stated, "Don't call the police, I'm on probation, or I'll kill you…"

Held: Court's curative instruction was sufficient to cure any prejudice resulting from reference to probation as "[j]urors are presumed to follow the court's instruction."