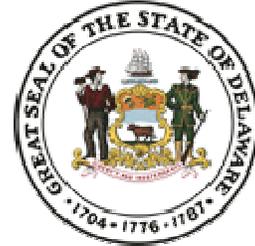


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LAWRENCE M. SULLIVAN, PUBLIC DEFENDER OF THE
STATE OF DELAWARE



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

**Cases Summarized and Compiled by
Nicole M. Walker, Esquire**



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**DELAWARE SUPREME COURT CASES
JULY 2007 THROUGH SEPTEMBER 2007**

THIRD CIRCUIT

**U.S. V. VOELKER, (6/5/07): LIMITS OF JUDICIAL DISCRETION IN
CRAFTING CONDITIONS OF SUPERVISED RELEASE**

Based on conduct he engaged in on his computer, D pled guilty to receipt of material depicting the sexual exploitation of a minor. D received 71 months in prison followed by life of supervised release. Conditions of his sentence included: a prohibition of accessing any computer equipment etc. at any location, including work or school; and a prohibition of possessing any sexually explicit adult material.

On appeal, the Court held that the computer ban was not narrowly tailored to what was necessary. The ban was similar to someone being prevented from possessing any books or magazines of any kind the rest of his life. "It is hard to imagine how D could function in modern society given this lifetime ban on all forms of computer access and use." Thus, the condition was struck.

The Court also found that, while the court can restrict D's access to sexually oriented materials, "such a restriction must have a nexus to the goals of supervised release." "Nothing in the record suggested that sexually explicit adult material contributed to the offense."

DELAWARE SUPREME COURT

**ANDREWS V. STATE, (7/2/07): FIRST AMENDMENT/ TERRORISTIC
THREATENING/HATE CRIMES**



D, a Caucasian juvenile, was in a program for students with behavioral issues. He often used profane and racially charged language toward V, a black teacher. One morning, D called V a "nigger," told him he had cousins in the KKK that would hang him and that he had a shotgun and would blow V's brains out. V testified that he knew D had guns and was afraid he would use one. D was convicted of terroristic threatening and committing a hate crime.

On appeal, D argued that his statement was not a "true threat" and was protected by the First Amendment and that he did not "select" V for the threat because of his race. The Court held that "terroristic threatening" applies to speech made with the intent to threaten or intimidate not necessarily an intent to carry out the threat. Further, the term

“select,” in 11 *Del.C.* § 1304, applies to: 1) selection of words; and 2) selection of the victim. Here, D directed the words only to V. D’s conviction was upheld.

HARRIS V. STATE, (7/5/07): COUNSEL’S DUTY RE: APPEAL OF VOP

In this very short order, the Court held that “[a]lthough Supreme Court Rule 26 does not explicitly impose a continuing obligation on court-appointed counsel in VOP proceedings to represent the client on appeal, we conclude that counsel, at a minimum, has an ethical duty to inform the client of the right to appeal[.]” *See Del.Lawyers’ R.Prof.Cond.* 1.2(c), 1.3 cmt. 4 (2007).

ANDERSON V. STATE, (7/19/07): SUFFICIENCY OF THE EVIDENCE



V testified that he was walking down the street when he heard 2 or 3 shots –not alleged to come from D. V ran, D exited a car, shot V, allegedly hitting him at least twice, then fled. A revolver, matching bullet, 8 shell casings and two semi-automatic bullets were found.

At trial, D moved for a judgment of acquittal on an attempted murder charge and essentially conceded a *prima facie* case on a lesser included of assault. Later, he appealed an assault conviction arguing the State failed to prove his guilt beyond reasonable doubt. The Court held that D waived this issue when he acknowledged a *prima facie* case on assault at trial. Additionally, there was sufficient evidence to uphold the verdict and find D caused V’s injuries. Even though the attempted murder charge alleged that D intended to kill D by “shooting him” the State was not required to prove one of D’s 8 bullets actually hit V.

CHRISTOPHER V. STATE, (7/19/07): SELF REPRESENTATION

D was charged with assault first degree and possession of a deadly weapon during the commission of a felony. On appeal, D argued that the court conducted an inadequate colloquy with respect to his request to represent himself.

After direct examination of the first witness, D asked to represent himself. The court told him it was his choice and questioned him on his education and knowledge of the legal system. However, without stating that self representation would delay the trial and without finding that D was not competent to represent himself, the court denied his request. It said that self representation would “put a few more nails in” his case. The Court held, under *Hartman*, that the judge improperly failed to address the validity of D’s waiver of counsel or determine that potential mid-trial disruption outweighed his right.

The error was harmless as D later told the court that he was satisfied with his attorney's representation.

SULLINS V. STATE, (7/23/07): DOUBLE JEOPARDY/ PROBATION

Probation and police officers went to D's residence and recovered \$1,630 from D and 2 bags of crack cocaine in a vent in the basement. At trial, there were 2 references to police working with an informant and the information provided. Therefore, the court granted D's motion for a mistrial. On appeal, the Court upheld the denial of D's subsequent request to dismiss the indictment due to double jeopardy. There was no evidence that the prosecutor intentionally tried to goad D to ask for a mistrial.

At the second trial, D put in evidence that two others lived with him and possessed the drugs, not him. On rebuttal, his probation officer testified that he was required to report who was living with him and he never reported these two individuals. On appeal, the Court held that the probative value of this testimony was not substantially outweighed by danger of unfair prejudice.

RICHARDSON V. STATE, (7/24/07): ACCOMPLICE LIABILITY



D broke into V's house while V was asleep. After entering V's room, V woke up and chased him downstairs with a loaded pistol. When V reached bottom of the steps he saw D and his accomplice in the dark living room. After a confrontation, the accomplice was killed and D was seriously injured. D was charged with attempted murder.

On appeal, D argued that the judge erroneously inserted the term "reasonably" into the accomplice-liability instruction. The Court held that "the State is not required to prove that D subjectively foresaw the consequential crime. Instead, it need only prove that it was reasonable for someone in D's position to foresee the consequential crime."

D also argued that, in an accomplice-liability case, the jury is required to be instructed on 11 *Del.C.* §274 which states that when there is more than one person criminally liable for an offense which is divided into degrees, each actor's mental state has to be examined. The Court held the underlying offenses in the case all required the same *mens rea*, so the instruction was not required.

Finally, the court's instruction on burglary first degree was not flawed because it failed to indicate D had to know that the accomplice was armed with a deadly weapon. The instructions read together from burglary and possession of a firearm during the commission of a felony adequately informed the jury of the required state of mind.



SIMS V. STATE, (7/25/07): SCIENTIFIC TESTING OF DRUGS

D was arrested on drug charges, he then swallowed something then spit out a little white foamy substance. The material allegedly tested positive for cocaine, however the results were lost.

On appeal, D argued the State did not present sufficient evidence that the substance existed and that it was cocaine. The Court restated its holding from *Seward v. State* that, “scientific testing is not required to support a drug conviction.” Based on the testimony of the officers and D’s own admission, there was sufficient evidence to support his convictions.

HITCHENS V. STATE, (7/26/07): CONFLICT OF INTEREST

D was represented at a VOP hearing by an attorney who had been the DAG who prosecuted his original charges and signed the charging documents and plea agreement that secured his convictions. On appeal, D argued that his attorney had a *per se* conflict of interest.

The Court held that the attorney’s representation of D on the current VOP was not related to the facts underlying the original conviction. “[T]he VOP proceeding did not involve the same ‘matter’ as his original criminal proceeding.” D also failed to show prejudice. The matter was remanded for resentencing, because the court failed to give D credit for time served.

NALLEY V. STATE, (8/6/07): “EXCITED UTTERANCE”/RIGHT TO CONFRONTATION



Police chased D in an effort to arrest him. At one point, a bystander yelled that D’s car had gone “between the yards and over towards Cynthia.” D was subsequently apprehended and charged with drug and motor vehicle offenses. He was convicted of the drug charges. At trial, the court found the statement admissible through an officer’s testimony as it was an “excited utterance.”

On appeal, the Court upheld the decision finding that: the excitement was precipitated by an event; and the statement was made during that period of excitement

and was related to the startling event. The statement was also nontestimonial, so there were confrontation clause issues.

**CARNEY V. STATE, (8/7/07): TIME FOR FILING MOTIONS/
AMMUNITION/SENTENCING**

D was charged with possession of ammunition by a person prohibited when police found 4 9mm bullets on him. At D's final case review, the court denied his request to file a motion to suppress as it was untimely. On appeal, the Court upheld this decision because D offered no exceptional circumstances to justify the failure to timely file the motion.

D also argued that the State failed to present sufficient evidence that he possessed "ammunition" as that term is defined in 11 *Del.C.* §1448 (c). The definition requires, in part, that the bullets not be inert. The Court held that the State is not required to test fire the bullets to determine if they are live. Testimony by police, based on training and experience, that the bullets appeared to be live is sufficient.

Finally, there was no abuse of discretion in imposing a lengthy sentence as judge reviewed criminal history and it was well within the statutory limits.

BENNETT V. STATE, (8/10/07):EXPLOITATION OF AN INFIRM ADULT

V was a 75-year-old who had suffered a stroke and ended up living with 2 D's whose child had already pled guilty to exploiting V by taking her money. V had another stroke, was taken to the hospital and the State petitioned for appointment of a guardian. An investigation revealed a transfer from V's account to D's of \$151,000. Ds were later convicted of Exploiting the Resources of an Infirm Adult and Conspiracy Second Degree.

On appeal, D claimed that the lack of medical testimony establishing that V was an "infirm adult" required a judgment of acquittal. The Court affirmed the conviction finding that the testimony of 2 other individuals who had cared for her was sufficient.

**HOWARD V. STATE, (8/14/07): PRETEXTUAL TRAFFIC STOP/ EXTENDED
DENTENTION FOR K-9 SNIFF/ REASONABLE SUSPICION**



Police received an informant's tip that a male named "J" was "allegedly selling Crack Cocaine from his Maroon Dodge Durango." A month later, police determined that "J" may be D and D owned a maroon Dodge Durango. In an unrelated investigation, police watched a house where they saw a female come out to a maroon Dodge Durango and interact with the driver. Police followed the Dodge, registered to D, when it drove away. They saw him stop in another neighborhood and interact with someone. Police

then stopped him for motor vehicle offenses. When asked, D denied being at the first house, admitted being at the second house but denied contact with anyone. D was detained for 40 minutes to wait for a K-9 who ultimately led to discovery of several bags of cocaine in the car.

D argued the stop violated the Delaware Constitution because it was pretextual. The Court did not address this issue, leaving it open. Rather, the Court found there was reasonable suspicion to stop D on illegal drug activity, not just for the traffic offenses. After his answers when stopped, police were permitted to detain him 40 minutes for the K-9 sniff which resulted in a valid search of the car.

WHITE V. STATE, (8/15/07): LIO/ MAINTAINING A DWELLING

Police received a tip that D, prohibited, tried to buy a gun. After a search of his bedroom, they found drugs, money and other items with D's name on them. Guns and ammunition were found at his work. D admitted that he resided in the bedroom. D was charged with drug and weapons offenses. The weapons charges were dismissed.

On appeal, D argued there was insufficient evidence to support a conviction of maintaining a dwelling. The Court held that "more than a single incident of using the apartment is sufficient to support the conviction." Also, the State established constructive possession.

The Court also ruled that possession is not a LIO of maintaining a dwelling because the two offenses are dissimilar. Possession "is an offense involving a person who knowingly or intentionally possesses" the drug while maintaining is "knowingly keeping a dwelling with knowledge that the dwelling is used for keeping controlled substances." The 2 statutes punish two different acts.

BAINE V. STATE, (8/21/07): BALLISTICS TESTS/ SENTENCING



D was convicted of manslaughter and related offenses. In addition to testimony regarding the circumstances surrounding V's killing, police found, in D's house, a box of ammunition that matched that which was found in V's body. However, no ballistics, DNA or other tests were conducted. On appeal, D argued insufficient evidence due to the lack of testing and inconsistencies in witness testimony. The Court held there is no requirement for testing and the jury determined credibility. D also argued that the judge sentenced him with a closed mind because he stated, "you will have to get your justice in the Delaware Supreme Court." The Court rejected this argument because the judge reviewed D's criminal history, probation, the victims and his undue appreciation of the offenses.

GRAHAM V. STATE, (8/21/07): GETZ-D.R.E. 404(b)

D was seen by police sitting in a stolen car behind a hotel. When police approached, D fled. Police found owner of car and went to her house. There was an open window, the V said her car was in the driveway when she went to bed and her purse was missing. At trial, the court permitted the State to present evidence that D picked up friends, wanted them to get crack, smoked crack and that another female left to get more crack when police approached the car. D was convicted of burglary and other offenses. The court did not do a *Getz* analysis until after the evidence was presented. Also, the trial court noted incorrect facts in conducting the analysis.

On appeal, the Court held that the trial court should always conduct the analysis prior to admitting the evidence. However, it was harmless error because the *Getz* analysis was satisfied. The trial court's refusal to give a limiting instruction as it would draw more attention did not establish that the evidence was unfairly prejudicial. Citing incorrect facts was also harmless as the judge conducted the analysis on the premise of the correct facts.

BROWN V. STATE, (8/22/07): PROSECUTORIAL COMMENTS

D was convicted of several robbery related offenses. The offenses stemmed from a 5 month crime spree wherein all of the victims claimed the assailant wore a mask, bandanna or scarf over his face. During closing, the prosecutor repeatedly stated that D put the mask on during the crimes to challenge the State to "prove it was him." Applying a plain error standard, the Court found that there was no due process violation as the prosecutor also reminded the jury of the reasonable doubt standard at least twice.

CARTER V. STATE, (8/29/07): DANGEROUS INSTRUMENT



D was found delinquent of assault second degree after hitting his dad in the hand with the plastic end of a lacrosse stick. Dad's only injury was a swollen hand. D testified that he struck Dad in self defense. The trial court found that D intentionally caused physically injury by means of a dangerous instrument.

On appeal, the Court held that there was insufficient evidence that D used a "dangerous instrument." The State was required to prove the lacrosse stick "under the circumstances in which it is used was readily capable of causing death or serious physical injury." 11 *Del.C.* §222 (4). The statute requires the fact finder to look to the actual circumstances of the case and not possible circumstances. The case was remanded for entry of delinquency of assault third degree.

KENNARD V. STATE, (9/6/07): CONFIDENTIAL INFORMANTS

C.I. gave police tip that Jackson was in a car with a female to meet “Sean” in order to dispose of some guns. Police found and stopped the car for failure to signal then conducted a consensual search. Found were marijuana, weapons and D’s jacket. Two of the guns matched up to a prior burglary. Jackson later implicated D in the burglary of 2 homes. The State referred to the C.I. in its opening statement. Defense counsel objected, the trial court met with prosecutors *ex parte* to inquire as to C.I.’s role then ruled disclosure was not required. Defense counsel then asked for a *Flowers* hearing. The judge denied the request.

On appeal, the Court reviewed the sealed *ex parte* conference transcripts and found that the C.I. made no mention of D or implicated him in anyway. Thus, D failed to demonstrate that his need for disclosure outweighed the State’s need to protect the C.I.’s identity. Therefore, there was no need for a *Flowers* hearing.

WATSON V. STATE, (9/11/07): JUDGE’S RECUSAL

D was found delinquent of 2 counts of rape second degree. Both V and D were 14 years-old and had been dating for 3 years. V denied ever having consensual sex with D and claimed that he forced her to have sex twice. D testified that the sex was consensual.

Just minutes before trial, the judge tried D on an assault and robbery offense wherein D had testified. The judge had found D delinquent after determining he was not credible. However, the judge denied D’s request in this case for a continuance to obtain a different judge. In this case, the evidence was “he said, she said” and V provided inconsistent statements.

On appeal, the Court applied the 2-part *Los* test and held that the “appearance of bias was sufficient to doubt the judge’s ability to weigh the truthfulness of the testimony impartially.” While she met the subjective part of the test, believing she could be free from bias, she failed to meet the objective part.

MARVEL V. STATE, (9/18/07): RELEVANCE

D was convicted in 1990 of raping V. He always maintained his innocence. In 2003, while in prison, D met an inmate who was about to be released. D “hired” him to “cripple” V for ruining his life. When the inmate was released, he told police about D’s plans. D was convicted of criminal solicitation and second degree conspiracy.

On appeal, D argued that the judge erred in allowing evidence that he was in prison for raping V. The Court held that the trial court properly applied the *Getz* analysis. The fact that he was convicted was highly probative of his motive.

D also argued that the judge should have excluded evidence of 3 other convictions. The Court held the evidence was admissible to impeach D’s testimony that he was trying to clear his good name.

Finally, the trial court did not err when it excluded 2 letters written by another inmate to the hired inmate that claimed D was a “snitch.” D argued this explained why

the inmate told police about the alleged plan. Even if the letters went to state of mind, exclusion was not prejudicial as the inmate testified to this evidence.

JEFFERS V. STATE, (9/24/07): DEADLY WEAPON



In an unusual move, the Court issued an opinion, rather than an order, affirming the trial court's decision after a rule 26 (c) brief was filed. The issue the Court may have wanted to explore in detail is whether use of the term "handgun" in the indictment sufficiently notified D that he was being charged with unlawful possession of a firearm, thus triggering the applicable enhanced sentencing provisions of 11 *Del.C.* §1448 (e)(2). The Court held that the trial court correctly concluded that the definition of "deadly weapon" includes "firearm," and the definition of "firearm" includes handguns. Thus, D had proper notice that he was subject to an enhanced sentence.