RECENT DEVELOPMENTS IN CRIMINAL LAW: 2013 DELAWARE SUPREME COURT DECISIONS

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In 2013, the Delaware Supreme Court issued a number of opinions that covered various criminal law issues. This article will briefly summarize some of those decisions in the areas of evidence, search and seizure, and other areas of significance or first impression. Readers are directed to the Court's opinions for the complete statement of the facts and legal analysis of the Court.

I. EVIDENCE DECISIONS

A. Sufficient Proof Of "Physical Injury" For Assault Conviction-*Kulowiec v. State*

In Kulowiec v. State,[1] the Court held that evidence that the defendant repeatedly bit the victim on the wrist and victim required hospital treatment was sufficient to establish the element of "physical injury" for the charge of assault third degree.[2]

The defendant Ewelina Kulowiec appealed from a Superior Court conviction of Assault Third Degree. The defendant was tried for an incident involving her former husband in which the two were discussing the details of their impending divorce. The defendant was upset about learning of her ex-husband's new girlfriend and family and she pulled a gun and threatened him. During a struggle for the gun, she bit the victim several times. The defendant was convicted after a two day bench trial and contended that there was insufficient evidence of physical injury as defined by 11 *Del. C.* § 222(23).[3]

The defendant relied on *Harris v. State*[4] in which the Supreme Court had previously ruled that a police officer who sustained a scraped knee and was elbowed in the head by a suspect did not sustain physical injury to support the charge of Assault Second Degree.[5] The Court found the evidence of physical injury more substantial than was present in *Harris*. The defendant admitted that she struggled with the victim and bit him because she was frantic. The medical records also indicated that the victim had multiple areas of tenderness along with red bruising, abrasions, and swelling.[6] This evidence was consistent with cases decided after *Harris* which found similar injuries to constitute physical injury under § 222(23). In *Moye v. State*,[7] the Court ruled that a single bite injury could suffice to establish physical injury

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1. 74 A.3d 600 (Del. 2013).

2. *Id*. at 603.

3. *Id*. at 601-02.

4. 965 A.2d 691 (Del. 2009).

5. *Id*. at 693-94.

6. 74 A.3d at 603.

7. 988 A.2d 937 (Del. Jan. 20, 2010) (table).

under the statute.[8] Similarly, in *McKnight v. State*,[9] the Court held that a bite could establish physical injury even without proof of any pain to the victim.[10] The Supreme Court ruled that the *Moye* and *McKnight* cases were directly on point and there was sufficient evidence that the victim's injuries were significant to a degree to establish physical injury and prove the Assault Third Degree offense.[11]

B. Discovery Of Police Dispatch Recordings–*Valentin v. State*

In Valentin v. State,[12] the Court held that the police dispatch recording of the police chase of the defendant charged with several motor vehicle offenses was within the scope of the defense's discovery request and should have be produced as it was central to the credibility of a testifying officer.[13]

Defendant Valentin was tried and convicted on charges of Failing to Stop at the Command of a Police Officer, Reckless Driving, and related offenses. The offenses arose from a midnight chase of Valentin by DNREC officers who spotted the defendant's car in the Horsey Pond Wildlife Area. The officers were in an unmarked pickup truck that had emergency lights. They tried to approach defendant's car in the wildlife area but he fled. The DNREC officers then followed Valentin down Route 24 where he was reported to have committed a number of motor vehicle violations. After he drove into a residential area, the officers attempted to block him but Valentin escaped. He was later trapped a second time, with a DNREC officer stating that he yelled "Police, Stop!" At trial, one DNREC officer testified that he had activated his truck's siren as soon as he initiated the pursuit.[14]

In discovery, the defense requested disclosure of all information relating to the credibility of any prosecution witness and "[a]n opportunity pursuant to [*Jencks…*] to review reports and statements, whether oral, written, or recorded…." During trial, after the DNREC officer had testified about the dispatch recording, defense counsel argued that the recording was within the scope of her request. The trial judge denied the request. Valentin testified at trial that he saw a truck but did not know it was a police vehicle because he never saw emergency lights or heard a siren. The jury convicted the defendant on all charges except Failure to Give a Signal.[15]

On appeal, the Court ruled that the dispatch recording clearly fell within the scope of the defendant's request for "other information relating to the credibility of any prosecution witness." The absence of the siren on the dispatch recording was evidence that the defense could use to challenge the credibility of the officer who testified that his siren was on for the whole chase. The Court also ruled that the dispatch recording fell within the scope of Del. Super. Ct. R. 16(a)(1)(C) as it was a tangible object that was within the State's custody and was material to the preparation of the defense.[16]

8. *Id*. at *1.

9. 753 A.2d 436 (Del. 2000).

10. *Id*. at 437-38.

11. 74 A.3d at 605.

12. 74 A.3d 645 (Del. 2013).

13. *Id*. at 650-51.

14. *Id*. at 646-47.

15. *Id*. at 647-48.

16. *Id*. at 650.

The Court found prejudice to the defense from the lack of production of the dispatch tape and reversed the convictions. The tape was central to the case and the charge of Failing to Stop at the Command of a Police Officer. The Court also noted that the State's case was based almost entirely on the testimony of the two officers and there was not any other independent significant evidence before the jury.[17]

C. Sixth Amendment Confrontation Clause-*Martin v. State*

In *Martin v. State*,[18] the Court held that the defendant has the right to confront the testing analyst who obtained the toxicology results when a certifying analyst did not observe the actual testing process.[19]

Defendant Martin was stopped by the Delaware State Police for speeding and erratic driving. The police collected a blood sample which was sent to the Medical Examiner's Office. The sample was tested by chemist Heather Wert. At the jury trial, the Chief Forensic Toxicologist Jessica Smith testified about the results of the blood tests. Smith certified the final results of the tests but did not see the tests performed.[20]

The Court reviewed the defendant's challenge to Smith's testimony at trial. The Court noted "substantial uncertainty" under existing caselaw on whether a statement is "testimonial" or otherwise subject to the Confrontation Clause of the Sixth Amendment.[21] In *Melendez-Diaz v. Massachusetts*,[22] the United States Supreme Court held that notarized certificates of forensic analysis by a state laboratory were testimonial statements for Sixth Amendment purposes. The *Martin* Court also relied on the decision in *Bullcoming v. New Mexico*[23] where the United States Supreme Court held that the accused had the right to confront the non-testifying analyst who certified the testing report. [24]

The *Martin* Court found that the testing chemist's results in her batch report were testimonial.[25] Although those reports were not admitted, Smith relied on those reports and Wert's statements were introduced through Smith. The Wert report was created solely for an "evidentiary purpose" as part of a police investigation and the Court deemed it to be testimonial.[26] The Court then held that the defendant has the right to confront the testing analyst as well as the analyst who certifies the report if they are two different persons.[27] In a footnote, the Court noted that a solution would be to have

17. *Id*. at 650-51.

18. 60 A.3d 1100 (Del. 2013).

19. *Id*. at 1109.

20. *Id*. at 1101.

21. *Id*. at 1102.

22. 557 U.S. 305, 308-09 (2009).

23. 131 S. Ct. 2705 (2011).

24. *Id*. at 2710.

25. 60 A.3d at 1106 (citing *Bullcoming*, 131 S. Ct. at 2714-15).

26. *Id*. at 1107 (citing Williams v. Illinois, 132 S. Ct. 2221 (2012) (plurality opinion)).

27. *Id*. at 1109.

the same chemist prepare and certify the report.[28] The Court found that the defendant's Sixth Amendment rights were violated and reversed the conviction.[29]

II. SEARCH AND SEIZURE DECISIONS

A. Police Authority To Subpoena Inmate Prison Records-*Whitehurst v. State*

In *Whitehurst v. State*,[30] the Court held the State's subpoena of an incarcerated defendant's phone calls was not subject to probable cause but a showing of reasonableness under the Fourth Amendment.[31]

Defendant Whitehurst was tried for the shooting of a victim in the parking lot of the Budget Inn in New Castle County. During the trial, the State introduced evidence that Whitehurst had engaged in witness tampering. At trial, the defendant conceded that he tampered with witnesses. Whitehurst explained that he believed witness tampering was his best way to approach his situation and make sure certain witnesses did not appear at trial. Prior to trial, a State investigator had obtained the defendant's recorded prison phone calls. The calls were obtained by way of an Attorney General's subpoena served on the prison for the defendant's calls. The police had concerns early on in the case that Whitehurst was actively involved in tampering with witnesses. On the calls, Whitehurst can be heard speaking about certain witnesses not appearing at trial. During the trial, the State played nine of these phone calls.[32]

In a pretrial ruling, the Superior Court denied the defendant's suppression motion after finding that the State had a legitimate and reasonable interest in trying to obtain the defendant's prison records.[33] The Supreme Court found no Fourth Amendment violation in the State's obtaining the phone records by subpoena.[34] Prisoners are notified that their calls will be monitored and they have no expectation of privacy under the Fourth Amendment. The Court noted that probable cause was not required for the State to record a prisoner's calls or to subpoena the recordings.[35]

The Court reviewed the reasonableness of a subpoena under the test set forth in *Procunier v. Martinez*.[36] This test required review of whether "(1) the contested actions furthered an important or substantial government interest…, and (2) the contested actions were no greater than necessary for the protection of that interest."[37] The Court found that

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28. *Id*. at 1109 n. 74.

29. *Id*. at 1109.

30. 83 A.3d 362 (Del. 2013).

31. *Id*. at 367-68.

32. *Id*. at 363-66.

33. *Id*. at 366.

34. *Id*. at 367-68.

35. *Id*. at 367 (citing Johnson v. State, 53 A.3d 302, 2012 WL 3893524, at *1 (Del. 2012) (citing Rowan v. State, 45 A.3d 149, 2012 WL 1795829, at *2 (Del. 2012); Johnson v. State, 983 A.2d 904, 919 (Del. 2009)).

36. 416 U.S. 396, 423 (1974), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

37. 83 A.3d at 367 (quoting *Johnson*, 983 A.2d at 921).

the State had an interest in seeking Whitehurst's records as part of its investigation into the crime for which he was arrested and for the potential subsequent crime of witness tampering. The State had demonstrated a sufficient governmental interest to investigate criminal activity and there was no probable cause requirement, but merely a need for a showing of reasonableness.[38] For the same reasons, the Court found that the State's conduct did not violate the defendant's First Amendment rights.[39]

B. Sufficiency Of Affidavit For Probable Cause For Search Warrant-*State v. Holden*

In *State v. Holden*,[40] the Court ruled that a search warrant for defendant's house was supported by probable cause in light of information from two past proven reliable informants that defendant was still selling drugs and the police officers' arrest of a drug buyer shortly after leaving defendant's house which partially corroborated the informants' tips.[41]

In February 2010, defendant Michael Holden's car was stopped by a Drug Enforcement Administration Task Force which seized 12 pounds of marijuana. The evidence was suppressed in Superior Court based on the warrantless use of a GPS device by the police to track the defendant.[42]

In a subsequent investigation, the Wilmington Police Department received information from two past proven, reliable confidential informants that Holden was dealing drugs. The first informant advised that Holden was selling marijuana and oxycodone from his house in Newark, and provided the address of the house, the name of Holden's girlfriend, the vehicle driven by Holden, and that Holden had a male roommate. This informant advised that Holden had never stopped selling marijuana after the first arrest. The second informant told police that Holden had also continued selling marijuana of multiple pounds at a time, along with ounces of cocaine and oxycodone. This informant stated that Holden was selling from his Newark house, and also provided the make of Holden's car with a Maryland registration, and a description of Holden's girlfriend.[43]

The DEA officers conducted surveillance on Holden's house and observed a man pull into the driveway at the house. Holden returned to the house within minutes, accompanied the driver into the house, and the driver then left the house within ten minutes and drove off. The officers followed the vehicle and stopped it. They found six oxycodone pills in the driver's hand. The driver was also deceptive when asked his whereabouts. An officer then prepared a search warrant for Holden's house which was signed by a Justice of the Peace magistrate. The police executed the warrant and recovered 59.47 grams of cocaine along with cocaine residue and empty prescription bottles for oxycodone. The Superior Court granted a suppression motion ruling that the affidavit did not establish probable cause for the search.[44]

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38. *Id*. at 367-68.

39. *Id*. at 368.

40. 60 A.3d 1110 (Del. 2013).

41. *Id*. at 1115-16.

42. *Id*. at 1112.

43. *Id*.

44. *Id*. at 1112-13.

On appeal, the Supreme Court ruled that the affidavit contained evidence that would allow the issuing magistrate to conclude that evidence of a crime would be found in Holden's house.[45] The police had information from two past proven reliable confidential informants that Holden was selling drugs from his house including oxycodone. The police also stopped a subject immediately after leaving Holden's house and that person was in possession of oxycodone. In past cases, the Court has held that the accurate prediction of future movements can adequately corroborate a tip from even an anonymous informant.[46] The discovery of the oxycodone on the driver leaving Holden's house corroborated the two informants' tips.

The Court noted that role of the issuing magistrate to "make a common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."[47] The Court held that this rule applied, even if part of an informant's tip was not corroborated, and found that probable cause existed under the totality of the circumstances, reversing the ruling of the Superior Court.[48]

III. OTHER SIGNIFICANT DECISIONS

A. Prior Convictions Under Similar Statutes In Other State For Habitual Offender Statute-*Sammons v. State*

In *Sammons v. State*,[49] the Court ruled that the defendant's prior conviction under a substantially similar Florida burglary statute permitted that out of state conviction to be counted as a prior burglary conviction for purposes of the habitual offender statute.[50]

Defendant broke into a residence and was attempting to steal a large television when he was confronted by the homeowner. Defendant was eventually charged with and convicted of Burglary in the Second Degree, Robbery in the Second Degree, and Criminal Mischief. After completion of a presentence report, the trial court granted the State's motion to declare Sammons an habitual offender and he was sentenced to life in prison.[51]

Defendant conceded on appeal that he was convicted in 1991 of Burglary in the Second Degree. He contended that the trial judge erred in counting his prior Florida conviction as a prior Burglary conviction for purposes of the Habitual Offender statute, 11 *Del. C.* § 4214(b). In 1994, Sammons had been convicted in Florida for the burglary of a structure/conveyance/dwelling. The Court found that the unambiguous language of the Florida burglary statute is substantively

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45. *Id*. at 1115.

46. *Id*. (citing Cooper v. State, 32 A.3d 988, 2011 WL 6039613, at *6 (Del. Dec. 5, 2011); Tolson v. State, 900 A.2d 639, 643 (Del. 2006); Miller v. State, 25 A.3d 768, 771-73 (Del. 2011)).

47. *Id*. at 1116 (quoting Illinois v. Gates, 462 U.S. 213, 238-39 (1983)).

48. *Id*.

49. 68 A.3d 192 (Del. 2013).

50. *Id*. at 195-96.

51. *Id*. at 194.

similar as a matter of law to the Delaware burglary statute.[52] The Florida statute was entered into the record as part of supplemental briefing in the trial court. The Court ruled that it was not necessary for the trial court to consider the underlying facts and circumstances involved in the defendant's Florida conviction.[53]

The Court also found from the record that the State showed there was a sufficient period to permit rehabilitation between each conviction.[54] There was nine months between the completion of the defendant's 1991 sentence and his arraignment on the 1994 Florida charge. Sammons was released for some significant period of time prior to the final burglary conviction. The defendant's habitual life sentence was affirmed.[55]

B. Collateral Estoppel-*Peterson v. State*

In *Peterson v. State*,[56] the Court held that a defendant's acquittal on an Assault First Degree and related weapon charge did not preclude his conviction under collateral estoppel principles for the charge of Possession of a Firearm by a Person Prohibited.[57]

The defendant Peterson was tried for shooting at an individual, Brown, who was planning to buy crack cocaine in Wilmington. Brown saw a person turn the corner and walk toward him. Brown admitted that he had been using crack cocaine for "maybe two days" leading up to the date of the incident. Brown, seeing that the suspect had a gun, began to walk away. Brown saw "fire" in his peripheral vision and testified that he had been shot in the back. Brown initially told the responding police officers that he did not know the shooter. Two weeks after the shooting, Brown identified the shooter as "Kal" and was able to identify him from a photo array.[58]

Peterson was arrested and tried first on the charges of Assault First Degree and Possession of a Firearm During Commission of a Felony. The defendant relied on an alibi defense at trial and the jury acquitted him on both charges. After the jury trial, the trial judge issued a bench ruling convicting the defendant on the charge of Possession of a Firearm by a Person Prohibited.[59]

Peterson appealed his conviction and contended that the trial judge's ruling was barred by 11 *Del. C.* § 208 and the double jeopardy protections of the State and Federal Constitutions.[60] The Court ruled that the jury's acquittal did not necessarily rest on a finding that Peterson did not possess a weapon on the date in question. The Court noted that

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52. *Id.* at 195 (citing 11 *Del. C.* § 825(a); FLA. STAT. ANN. § 810.02).

53. *Id.* at 195-96 (citing Stewart v. State, 930 A.2d 923, 926 (Del. 2007)).

54. *Id.* at 196 (citing Ross v. State, 990 A.2d 424, 431 (Del. 2010); Stanley v. State, 30 A.3d 782, 2011 WL 2183712, at *3 (Del. Mar. 15, 2011)).

55. *Id.*

56. 81 A.3d 1244 (Del. 2013).

57. *Id.* at 1247-48.

58. *Id.* at 1245.

59. *Id.* at 1245-46.

60. *Id.* at 1246.

identity was not the only factual issue before the jury, as the jury could have found that: i) Peterson unintentionally injured Brown; ii) Peterson did not injure Brown; iii) Peterson did not possess the firearm; or iv) Peterson was not present at the shooting.[61] The prior decisions of the Court have held consistently that a jury's acquittal of PFDCF and the underlying felony did not bar a conviction of PFBPP.[62] The Court affirmed the defendant's conviction.

C. Lesser-Included Instruction-*Mays v. State*

In *Mays v. State*,[63] the Court held that the defendant, who was found with a prohibited cell phone in prison, possessed the *mens rea* for the felony crime of Promoting Prison Contraband and was not entitled to a lesser included instruction for the misdemeanor offense.[64]

Defendant Mays was tried for the charge of Promoting Prison Contraband after a Correctional Officer found Mays hiding a knotted sock containing a cell phone in his underwear. Mays was charged with a single count in violation of 11 *Del.* C. § 1256. Under this statute, the offense is a misdemeanor unless the prison contraband is a deadly weapon or mobile phone, cell phone, or other electronic device which raises the crime to a class F felony.[65]

At trial, defendant requested an instruction on the lesser-included instruction for the misdemeanor charge. The trial judge denied the request and the defendant was convicted. Mays contended on appeal that the trial presented a fact question about whether he possessed the *mens rea* to commit the felony offense. Mays asserted that the State was required to prove that "he knew he was in possession of the specific contraband, namely a cell phone."[66]

The Court rejected the defendant's argument regarding the *mens rea* necessary to commit the offense.[67] Mays admitted to hiding an object in the sock that was found by prison officials in his underwear. This evidence proved that Mays was knowingly in possession of prison contraband.[68] The Court also found that the trial judge properly denied the defense request for a lesser-included instruction. The trial judge correctly found that the *mens rea* was identical for the misdemeanor and felony crime of Promoting Prison Contraband. The Court found sufficient evidence in the record to support the ruling of the trial judge and the defendant's conviction was affirmed.[69]

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61. *Id*. at 1247.

62. *Id*. (citing Tucker v. State, 2012 WL 4512900, at *1; Westcott v. State, 2009 WL 3282707, at *3-5; Goodwin v. State, 2006 WL 1805876, at *3-4 (Del. June 29, 2006), *abrogated by* Lecates v. State, 975 A.2d 799 (Del. 2009) *and abrogated by* Lecates v. State, 987 A.2d 413 (Del. 2009); Register v. State, 2013 WL 497991, at *1 (Del. Feb. 9, 2013) (TABLE).

63. 76 A.3d 778 (Del. 2013).

64. *Id.* at 779-80.

65. *Id.* at 778-79.

66. *Id*. at 779.

67. *Id*.

68. *Id.* The Court noted that the crime of Promoting Prison Contraband, 11 *Del. C*. § 1256, prohibits the possession of any contraband, and the *mens rea* for both the felony and the misdemeanor charge is "knowingly."

69. *Id.* at 780.