CRIMINAL LAW: 2010 DELAWARE SUPREME COURT DECISIONS

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This article reviews and summarizes some of the forty-three criminal law opinions issued by the Delaware Supreme Court in 2010. This article addresses the court's search and seizure decisions, trial evidentiary decisions, and decisions of significance or issues of first impression.

I. TRIAL EVIDENCE DECISIONS

A. Section 3507 Statements—*Blake v. State, Stevens v. State, Woodlin v. State*

In a trilogy of cases that were consolidated for *en banc* oral argument and decided on the same day, the Court addressed "recurring problems with regard to the admission of evidence under 11 *Del. C.* § 3507 ("Section 3507").

1. Stevens v. State

In *Stevens v. State*,[1] the defendant argued that the State improperly admitted irrelevant evidence from the testifying detective regarding his opinion that Stevens was involved in other robberies and his opinion about the credibility of the State's key witnesses. The DVD evidence was presented as part of a Section 3507 statement of the police interrogation of the juvenile co-defendant, Boyd.[2]

Stevens and his co-defendant were arrested for a robbery at the China King restaurant in Dover on August 14, 2008. Boyd was arrested on August 22, 2008, and he gave a statement to the Dover Police. In the recorded statement, he told the police where he and Stevens had left a cash register drawer from the restaurant. At trial, the statement was admitted as Section 3507 evidence. The recorded Section 3507 statement contained police questioning of Boyd, during which the police officer stated his belief that the two suspects were involved in other crimes.[3] When this part of the statement was played at trial, Stevens' defense counsel objected on the ground of relevance. After a sidebar at which the prosecutor represented that a later reference to a gun and drugs in the suspects' vehicle had been redacted, defense counsel withdrew his objection and indicated that a curative jury instruction would not be necessary.[4]

The court first noted that, under Section 3507, it is only "the voluntary out-of-court statement of a witness who is present and subject to cross-examination" that is admissible.[5] The portions of the Section 3507 statements that contain

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1. 3 A.3d 1070 (Del. 2010).

2. *Id.* at 1071.

3. *Id.* at 1071-72, 1075.

4. *Id.* at 1075.

5. *Id*. at 1072 (quoting Morgan v. State, 922 A.2d 395, 399 (Del. 2007) (quoting 11 *Del. C.* § 3507)).

both witness statements and inadmissible third party statements are required to be redacted.[6] The court further noted that the best practice for admission of a Section 3507 statement is to present the statement in writing or by audio recording.[7]

The court declared that "at some reasonable time before trial, the State must provide defense counsel with the entire recorded exchange between a witness and a third party, together with a copy of its proposed redacted version of that recording that it intends to introduce under section 3507."[8] In the event that parties cannot reach an agreement regarding redactions, the court stated that the issue should be presented to the trial court in a motion *in limine*.[9] The court held that "any substantive comments of a third party embedded in a section 3507 statement are inadmissible under section 3507 because they are not prior statements of the witness."[10]

The court noted that Stevens' trial counsel had decided not to move for a mistrial when the portion of the Section 3507 statement referring to other crimes was played and had declined the trial court's offer of a curative jury instruction.[11] The court held that the decisions of Stevens' counsel precluded plain error review. The court found that the police officer's reference to other crimes was inadmissible and should have been redacted *sua sponte* by the State.[12] The court affirmed the judgment of the Superior Court.

2. Woodlin v. State

In *Woodlin v. State*,[13] the defendant was convicted of rape in the first degree and related charges for crimes committed against his seven year old daughter. The defendant and his wife were also charged with engaging in sex acts in front of their daughter. The daughter had disclosed the crimes while living with her aunt during a temporary stay. The aunt took the victim to the Child Advocacy Center ("CAC") in Kent County, and she gave a recorded statement. At her father's trial, the defendant's daughter was called as a witness. She admitted to speaking to the CAC forensic interviewer about her father "[b]ecause he did something wrong to me." She refused to describe what her father did "[b]ecause it's nasty." The taped statement was played at the conclusion of the daughter's testimony. There was no cross-examination.[14]

Prior to trial, defense counsel had moved *in limine* for the exclusion of the taped statement on the ground that the statement was involuntary due to impermissible questioning by the forensic interviewer. The trial court ruled that the

6. *Id*. at 1073.

7. *Id*. at 1073 (citing *Morgan*, 922 A.2d at 399).

8. *Id.* at 1073-74.

9. *Id*. at 1074.

10. *Id.* The court also noted that "any alleged technical or contextual difficulties for the State in redacting inadmissible third-party comments are not relevant factors to be considered." *Id.* (citing Miles v. State, No. 257, 2009, 2009 WL 4114385 (Del. Nov. 23, 2009)).

11. *Id.* at 1077.

12. *Id.* The court cited to *Miller v. State*, 893 A.2d 937, 951 (Del. 2006), in which the prosecutor's failure to redact a police reference to prior criminal acts was not made an issue until the videotape was played at trial. The court in *Miller* held that the admission of such evidence "created the risk that the defendant's conviction would be overturned and, since its admissibility was so clear, result[] in an unnecessary expenditure of judicial, prosecutorial and defense resources." *Id.* (citing *Miller*, 893 A.2d at 951-52). The court concluded the opinion by stating that "[n]evertheless, the same impropriety was repeated in Stevens' case. With guidance provided by this opinion, it should not happen again." *Id.*

13. 3 A.3d 1084 (Del. 2010).

14. *Id.* at 1084-85.

statement was voluntary, and that the witness testified that the events perceived were true. On appeal, Woodlin argued for the first time that the daughter's testimony did not touch upon the events described in the CAC interview, and that she did not affirm the truthfulness of the prior recorded statement. As this was a new argument raised on appeal, the court reviewed the issue for plain error.[15]

The court reviewed the procedure for admission of a Section 3507 statement set forth in *Keys v. State*,[16] decided five years after enactment of Section 3507. The *Keys* court held that "[i]n order to offer the out-of-court statement of a witness, the Statute requires the direct examination of the declarant by the party offering the statement, as to both the events perceived or heard and the out-of-court statement itself."[17] The Section 3507 foundation requirements were expanded three weeks later, when the court, in *Hatcher v. State,*[18] ruled that the State must establish that the witness' statement was voluntary. Also, in *Johnson v. State*,[19] the court held that "a witness' statement may be introduced [under Section 3507] only if the two-part foundation [identified in *Keys*] is first established: [by having] the witness testif[y] about both events and whether or not they are true."[20]

The court ratified and reaffirmed its earlier rulings in *Keys*, *Hatcher*, and *Johnson*.[21] Applying these principles in *Woodlin*, the court ruled that the victim did testify to remembering the interview with the CAC interviewer, and that she spoke about her father.[22] She also testified that she spoke to the interviewer because her father "did something wrong to me." She also stated that no one forced her to talk to the CAC interviewer.[23] The court found no error in the trial court's ruling that the witness at least "implicitly" affirmed that her CAC statements were true and touched upon the events described in the CAC interview.[24] The court found that there was no plain error in the admission of the Section 3507 statement and affirmed the convictions.[25]

3. Blake v. State

In *Blake v. State*,[26] the court held that the trial court committed reversible error in admitting the prior statements of five witnesses under Section 3507 due to the lack of a proper foundation.[27]

15. *Id.* at 1085-87.

16. 337 A.2d 18 (Del. 1975).

17. *Id.* at 20 n.1.

18. 337 A.2d 30, 32 (Del. 1975).

19. 338 A.2d 124 (Del. 1975).

20. *Woodlin,* 3 A.3d at 1088.

21. *Id.* (citing Smith v. State, 669 A.2d 1, 7 (Del. 1995) (Section 3507 "requires not just the opportunity to cross-examine the declarant, but the opportunity to cross-examine the declarant about the out-of-court statement").

22. *Id.* at 1088.

23. *Id.*

24. *Id.* at 1089.

25. *Id.*

26. 3 A.3d 1077 (Del. 2010).

27. *Id.* at 1079.

Blake was tried and convicted of murder in the first degree, attempted murder in the first degree, and related charges. He was convicted after a ten day jury trial and was sentenced to life on the murder charge and to various terms of incarceration on the other charges. The charges arose out of an early morning shooting in Dover on September 1, 2007. There had been a series of fights between a number of female residents around North New Street. At approximately 12:45 a.m., a police officer observed four cars that appeared to be headed to the New Street area. When one of the cars stopped, there was a series of gunshots from a vacant lot. One of the passengers in one car, Kenneth Riddick, was shot and killed. The police later found four spent shell casings in the vacant lot and a 9mm Ruger semi-automatic pistol. The bullet recovered from the victim was determined to have been fired from the Ruger pistol, as were all four shell casings. The police obtained statements from five occupants of the various vehicles, each of whom implicated the defendant as the shooter. There was no physical evidence tying the defendant to the shooting.[28]

The court considered the sufficiency of the foundation for the admission of the Section 3507 statements in light of its ruling in *Woodlin*. Again relying on *Keys v. State*,[29] the court stated that a Section 3507 statement may only be admitted "*if the two-part foundation is first established: the witness testifies about both the events and whether or not they are true*."[30] The court also stated that the Sixth Amendment requires that the witness be subject to cross-examination regarding the content of the statement and its truthfulness.[31]

At Blake's trial, the court found that the direct examination of the five Section 3507 witnesses was inadequate.[32] With respect to three of the witnesses, the State conceded that the Section 3507 foundation was insufficient.[33] Regarding the other two witnesses, the State asserted that there was confusion as to whether a witness must testify to the truthfulness of a Section 3507 statement. The court found that it was clear, under both *Johnson v. State*[34] and *Ray v. State*,[35] that the witness must testify "*whether or not*" the prior statement is true.[36] The court's decision in *Moore v. State*[37] similarly held that, under *Ray*, the witness must testify about the events of the incident and "*whether or not they are true*."[38] The court also stated that the foundational requirements of Section 3507 must be met in order to comply with the Sixth Amendment's requirements for the admission of the statement as substantive evidence.[39] In Blake's trial, the court concluded that none of the Section 3507 witnesses was asked if his prior statement was true, and the statements were, therefore, improperly

28. *Id.* at 1079-80.

29. 337 A.2d 18 (Del. 1975).

30. *Id*. at 20 n.1 (emphasis added).

31. *Blake*, 3 A.3d at 1081 (quoting *Keys*, 337 A.2d at 20 n.1).

32. *Id.*

33. *Id.*

34. 338 A.2d 124 (Del. 1975).

35. 587 A.2d 439 (Del. 1991).

36. *Blake*, 3 A.3d at 1082 (quoting *Johnson*, 338 A.2d at 127).

37. No. 63, 1994, 1995 WL 67104 (Del. Feb. 17, 1995).

38. *Id*. at *2.

39. *Blake*, 3 A.3d at 1082-83 (citing *Ray*, 587 A.2d 443; *Johnson*, 338 A.2d at 127, 128).

admitted into evidence.[40] The court further ruled that the error was not harmless because there was no physical evidence presented at trial and because the five witness statements were the only evidence linking the defendant to the crimes.[41] The court reversed the judgments and remanded the case to the Superior Court.[42]

B. Excited Utterances Hearsay Exception—*Dixon v. State*

In *Dixon v. State*,[43] the court held that a witness' 911 call about the defendant's crimes was admissible as an excited utterance, and that the admission of the evidence did not violate the Confrontation Clause of the Sixth Amendment.[44]

Dixon was charged with a shooting that occurred at 24th and Lamotte Streets, in Wilmington, at 2:00 a.m. on March 28, 2008. Dixon shot the victim in the leg; the victim staggered home and was transported to Wilmington Hospital. The 911 center received a call shortly after the shooting, but the individual hung up before speaking. The 911 dispatcher was able to return the call after two unsuccessful attempts, whereupon the witness described the shooting and identified the shooter by his first name. At trial, the State admitted the 911 call into evidence as an excited utterance. The 911 caller did not appear as a witness at trial. Dixon challenged the ruling on appeal.[45]

The court first reviewed the three foundation requirements for the admission of an excited utterance under Rule 803(b)(2):

> (1) the excitement of the declarant must have been precipitated by an event; (2) the statement being offered as evidence must have been made during the time period while the excitement of the event was continuing; and (3) the statement must be related to the startling event.[46]

The court explained that the amount of time between the event and the statement is not determinative; it is a factor.[47] The court stated that, in order to admit a statement as an excited utterance, the declarant need only be "under the 'stress of excitement' caused by the startling event or condition at the time of the statement's making."[48] Dixon's 911 call was made only fifteen minutes after the shooting. The trial court found that the caller sounded excited and upset during the 911 call. The court therefore found that all of the elements of an excited utterance were present, and that the statement was properly admitted under Rule 803(2).[49]

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40. *Id*. at 1083.

41. *Id*.

42. *Id.*

43. 996 A.2d 1271 (Del. 2010).

44. *Id.* at 1273.

45. *Id.* at 1273-75.

46. *Id.* at 1276 (citing D.R.E. 803(2)).

47. *Id.* at 1276 (citing Warren v. State, 774 A.2d 246, 253 (Del. 2001); D.R.E. 803(1)).

48. *Id.* (quoting Culp v. State, 766 A.2d 486, 490 (Del. 2001)).

49. *Id.* at 1276-77.

The court also found that the admission of the 911 call as an excited utterance did not violate the Sixth Amendment Confrontation Clause.[50] The court noted that *Crawford v. Washington*[51] barred the admission of testimonial statements of witnesses who do not appear for trial and are not subject to cross-examination by the defense.[52] In considering the Sixth Amendment question, the *Dixon* court relied on *Davis v. Washington,*[53] which also considered the admissibility of a reverse 911 call that identified the perpetrator of an alleged crime. The *Davis* Court held that a 911 call was not testimonial in nature and was "ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance."[54] The court found the facts in *Dixon* to resemble closely the facts in *Davis*: the 911 callers were describing an event actually happening; the callers were asking for help against a legitimate physical threat; and the callers were describing a present emergency while in an unsafe setting.[55] The court concluded that "the circumstances of the 911 caller's interrogation 'objectively indicate[d] its primary purpose was to enable police assistance to meet an ongoing emergency. [The 911 caller] simply was not acting as a *witness*; she was not *testifying*. What she said was not 'a weaker substitute for live testimony' at trial.'"[56]

C. Admission of Police Photographs—*McNair v. State*

In *McNair v. State*,[57] the court held that the admission of a prior photo of the defendant that was displayed in the office of a business was admissible and did not constitute evidence of prior bad acts.[58]

Defendant McNair was observed going through the passenger side of a car in a Wilmington parking garage. A garage security officer saw McNair move from the front to the back of the car, and he recognized McNair from a photo posted in the garage office. The security officer observed broken glass and items that were scattered around the car and the garage floor. McNair claimed someone had broken into his car, but he refused to file a report. McNair fled before ad-

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50. *Id.* at 1279.

51. 541 U.S. 36 (2004).

52. *Id.* at 53-54.

53. 547 U.S. 813 (2006).

54. *Id.* at 827. The *Davis* Court also drew a precise determination of which police interrogations produce testimony in ruling:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions.

Id. at 822.

55. *Dixon*, 996 A.2d at 1278-79 (citing *Davis*, 547 U.S. at 827).

56. *Id.* at 1279 (quoting *Davis*, 547 U.S. at 828 (quoting United States v. Inadi, 475 U.S. 387 (1986)).

57. 990 A.2d 398 (Del. 2010).

58. *Id*. at 402.

ditional security could arrive. A police officer who responded to the scene obtained the garage surveillance tape, but the tape was of poor quality and did not show the crime.[59]

McNair was arrested and tried on charges of third degree burglary, theft, offensive touching, and criminal mischief. At trial, McNair was convicted on all charges, and he appealed the evidentiary rulings by the trial court.[60]

On appeal, McNair first argued that the photo and testimony about the photo should have been excluded from the trial. The trial court had ruled that the photo was admissible but had ordered that the photo be cropped to remove any writing that suggested prior criminal acts by McNair. The trial court also ruled that the security officer could testify that he had seen the photo several times, but the court precluded the officer from testifying as to where he had seen it.[61] During the trial, the security officer had testified that he saw McNair's photo every day at work. The trial court gave a curative instruction in response to this testimony.

The Supreme Court rejected McNair's argument that admission of the photograph required a full *Getz* analysis. The court reasoned that McNair's picture did not implicate D.R.E. 404(b) or *Getz* because the evidence did not relate to prior bad acts.[62] The State did not offer evidence as to why McNair's photo was posted in the garage, nor did it offer any testimony suggesting prior misconduct by McNair. The court also found that the trial judge had taken several steps, in an abundance of caution, to prevent the jury from inferring from the photo that McNair had committed prior crimes.[63]

The court ruled that the admission of a police photograph is subject to three prerequisites: "(1) the prosecution must show a demonstrable need to introduce the photographs; and (2) the photographs, if shown to the jury, must not imply that the defendant has a prior criminal record; and (3) the introduction at trial [must] not draw particular attention to the source or implications of the photographs."[64] The court found that the State had met all three requirements, as the photo touched on a central issue; the trial court had ordered the photo cropped; and the trial court had placed limitations on the testimony about the photo. The court also ruled that any error in the testimony of the security officer about viewing the photo on a daily basis was cured by the trial court's prompt instruction.[65]

McNair also argued that the trial court erred in declining to give a *Lolly* instruction regarding the surveillance tape. The Supreme Court disagreed and held that a *Lolly* instruction was not required because there was no basis to conclude that the State had failed to gather or preserve material evidence.[66] Instead, the court explained, the trial court correctly found that the surveillance tape had no evidentiary value because the State's witnesses testified that the tape was blurry.

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59. *Id.* at 399-400.

60. *Id*. at 400.

61. *Id.*

62. *Id.* at 402 (citing Howard v. State, 704 A.2d 278, 281 (Del. 1998)).

63. *Id.* at 402.

64. *Id.* (quoting Brookins v. State, 354 A.2d 422, 422-23 (Del. 1976) (citing United States v. Harrington, 490 F.2d 487 (2d Cir. 1973)).

65. *Id.* at 402-03.

66. *Id*. at 403 (citing Lolly v. State, 611 A.2d 956, 961 (Del. 1992)).

II. SEARCH AND SEIZURE DECISIONS

A. Community Caretaker Doctrine—*Moore v. State*

In *Moore v. State*,[67] the court held that a police officer's stop of two persons walking away from an area where gunshots and a stabbing had been reported, and where one of the individuals appeared to be holding his side as if he had been stabbed, was reasonable under the community caretaker doctrine.[68]

On June 18, 2008, at 11:15 p.m., the police received reports about a large group of disorderly black males near a townhouse development. At 11:25 p.m., RECOM[69] received a report that one person in the group had been stabbed and had fled the area. One minute later, there was a police broadcast of shots fired near the location. A number of police officers responded to the area. Upon approach, one officer observed two black males walking 1,000 feet away from the intersection where the shots had been reported. One of the men had his hands at his waist and appeared to be possibly protecting his abdomen. This individual was also observed fidgeting around his waist. The other man had his hands in his pockets. The officer believed the first individual may have been the stabbing victim who was leaving the area of the disorderly crowd. The officer first drove past the two men; then she activated her lights and drove up to them. The police officer conducted a pedestrian stop. The officer asked both men to show their hands and then patted them down. During the pat down of defendant Moore, the police officer felt an object that was discovered to be an ammunition magazine to a .380 caliber pistol. Moore was handcuffed. As he sat on the roadway, a .380 caliber pistol fell out of Moore's pants.[70]

Moore appealed from the trial court's denial of his suppression motion and conviction after a bench trial. The Supreme Court first considered the question of when the stop occurred.[71] The court found that the actions of the police officer in driving her car around in the middle of the street, flashing her lights, pulling up in front of Moore and his companion and asking them to show their hands constituted a seizure.[72] Relying on *Quarles v. State*,[73] the court ruled that a reasonable person in Moore's position would not have believed he could ignore the police presence.[74]

The court next declared that the police officer's stop was reasonable under the community caretaker doctrine.[75] The police officer observed the defendant and his companion walking from the area at which gunshots and a stabbing had

67. 997 A.2d 656 (Del. 2010).

68. *Id.* at 655.

69. RECOM is the New Castle County Police Regional Communication Center. *Id.* at 659.

70. *Id.* at 658-63.

71. *Id.* at 664.

72. *Id.*

73. 696 A.2d 1334 (Del. 1997).

74. *Moore*, 997 A.2d at 664.

75. *Id*. at 664-65 (citing Williams v. State, 962 A.2d 210 (Del. 2008)). The court noted the three elements of the community caretaker doctrine:

> First, if there are objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in apparent peril, distress or need of assistance, *the police officer may stop and investigate* for the purpose

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been reported. The officer saw one person put his hands near his abdomen, and the officer believed this person was possibly the stabbing victim. The court concluded that police had a sufficient basis to determine that Moore was in apparent peril, distress, or need of assistance and could stop Moore for that reason.[76] The court held that the initial stop was proper under the community caretaker doctrine and that the stop did not have to be supported by reasonable articulable suspicion.[77]

The court found that the community caretaker function concluded, however, once the officer illuminated the defendant with her car's headlights and saw that the defendant had his hands in his waistband and was not a stabbing victim.[78] The court held that the continued seizure of the defendant and his companion was supported, in part, by the fact that the police observed one person concealing his hands and the other fidgeting at his mid-section.[79] Thus, the court concluded, the officer had sufficient reason to pat down the defendant under the totality of the circumstances.[80] Once the officer found the ammunition magazine on Moore, she was entitled to seize the pistol that fell out of Moore's pocket and was in plain view.[81] The court therefore affirmed the judgments of the Superior Court.[82]

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> of assisting the person. Second, if the citizen is in need of aid, then the officer may take appropriate action to render assistance or mitigate the peril. Third, once, however, the officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, the caretaking function is over and any *further detention constitutes an unreasonable seizure unless the officer has a warrant, or some exception to the warrant requirement applies, such as a reasonable, articulable suspicion of criminal activity.*

Id. (quoting *Williams*, 962 A.2d at 219) (emphasis added).

76. *Id*. at 665.

77. *Id*. (citing *Williams*, 962 A.2d at 219).

78. *Id.*

79. *Id.* at 666 (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)).

80. *Id*. at 667. The court detailed a number of factors that provided justification for the *Terry* patdown:

> (1) [the police officer] was in a high crime area that was the source of numerous complaints involving guns and drugs;
>
> (2) she was responding to citizen complaints about a large group of disorderly men;
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> (3) within a few minutes of her first contact with [Moore] a person allegedly was stabbed and fled the scene;
>
> (4) within a few minutes of her first contact with [Moore] another police officer reported hearing multiple gun shots;
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> (5) [Moore] and his companion were the first pedestrians she observed near the scene of the reported gunfire;
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> (6) [the police officer] observed [Moore] and his companion approximately 1000 feet away from Cathy Court only a few minutes after the report of shots fired;
>
> (7) she saw that one of the men had his hands in his pockets and the other [Moore] was fidgeting with something in his waistband; and
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> (8) [the police officer's] training and experience alerted her that the waistband area is a common place to conceal weapons.

Id.

81. *Id.* at 668.

82. *Id.*

B. Reverse *Franks* Claim—*Rivera v. State*

In *Rivera v. State*,[83] the court held that exculpatory facts that police failed to insert into a search warrant application were immaterial under a reverse-*Franks* analysis and affirmed the trial court's denial of the defendant's suppression motion.[84]

Defendant Rivera was convicted at trial on the charge of murder first degree for the killing of Christine Pate. Pate's body had been found in the Leipsic River on October 8, 2007. The victim's mud-covered body was located about ten miles from her home in Pinewood Acres in Dover. She was living with her friend Deanna Hall, who had previously lived in the house with the defendant, then Hall's husband. The medical examiner determined that the cause of death was asphyxiation due to drowning, complicated by multiple blunt force trauma to the head. The medical examiner's report identified significant bruising on the victim's right side of her face, a number of damaged teeth, and a hemorrhage covering the right side of her head.[85]

During the police investigation, Pate's boyfriend stated that he had last seen Pate on the night before her body was discovered, after the two had returned from a weekend at the beach. He also advised that the defendant had made sexual advances toward the victim. One of Pate's neighbors told the police that he awoke on October 7th, around 1:00 a.m., to the sound of loud banging and saw a man carrying a small woman in a bear hug out of Hall's trailer. This neighbor could not identify Rivera from a photo lineup, but he stated that he believed the man he saw was Rivera.[86]

The police interviewed the defendant at his home. Rivera had a 1997 Grand Am at the residence, which he insisted was his car. The police confirmed that the car was registered to Hall. The police also observed several fresh lacerations on the defendant's left hand. A search of the victim's trailer uncovered blood spots, part of a tooth, and hair clumps on the trailer steps. A DNA analysis matched the blood spots to the victim. Police believed that the victim struggled with the assailant and did not die from her head wounds.

The police obtained a warrant to search Rivera's car on October 11, 2007. The search revealed dirt and mud on the passenger side of the vehicle, along with blood samples matching the victim's DNA profile. Rivera was arrested on the charge of murder first degree.[87]

At trial, the defendant sought to introduce expert testimony that he suffered from parasomnias at the time of the killing. The defense expert, Dr. Mark, reviewed a Christiana Hospital sleep study of the defendant that did not reveal any sleep terror episodes. Nevertheless, Dr. Mark formed an opinion that the defendant was suffering from sleep terrors based on statements from witnesses who lived near Rivera, Rivera's cellmate and Rivera's ex-wife, and from Rivera's own statement. The trial court ruled that Dr. Mark, who had never examined the defendant, could not testify about whether the defendant was suffering a sleep terror at the time of the killing.[88]

On appeal, the Supreme Court first reviewed the trial court's denial of the motion to suppress the fruits of the search warrant. Rivera claimed, under *Franks v. Delaware,*[89] that the police recklessly omitted several exculpatory facts

83. 7 A.3d 961 (Del. 2010).

84. *Id*. at 969-71.

85. *Id*. at 964.

86. *Id.*

87. *Id.* at 965.

88. *Id.* at 966.

89. 438 U.S. 154 (1978).

from the affidavit in the search warrant for the vehicle. Specifically, the defendant asserted that the police should have included the following facts: (1) the neighbor saw two men drag the female body out of the trailer; (2) the neighbor was unable to identify Rivera in a photo lineup; (3) the statement from the victim's boyfriend about Rivera's sexual advances toward the victim referred to conduct that had occurred months prior; and (4) the victim's boyfriend was the last person seen with the victim mere hours before her death.[90] The court described the claim as a "reverse-*Franks* situation," which required the defendant to show by a preponderance of the evidence that the police knowingly and intentionally, or with reckless disregard for the truth, omitted material information from the search warrant affidavit.[91] The court adopted a Third Circuit, two-part test for the analysis: first, whether the omissions were made with reckless disregard, and second, whether the omissions were material or necessary to establish probable cause.[92] Rather than employ the sequential two-step approach of the Third Circuit, however, the court declared that there was no meaningful difference between the information that a magistrate would want to know under the first prong and information that would be material under the second prong.[93]

The court did not find that the omitted facts cited by the defendant undermined the finding of probable cause.[94] The police did not rely solely on the neighbor's statement to procure the warrant and, instead, swore to multiple independent facts to support the probable cause finding.[95] The court did find that the case presented a "close call" and warned that "a police officer cannot make unilateral decisions about the materiality of information, or, after satisfying him or herself that probable cause exists, merely inform the magistrate or judge of inculpatory evidence."[96]

The court also ruled that the trial judge did not err in restricting the testimony of the defense expert at trial. The trial court allowed the expert to testify about the defendant's history of sleep terrors but not on the issue of whether the defendant suffered from a sleep terror on the night of the killing. The medical evidence was that the defendant did not suffer any sleep terrors during a sleep study, and the defendant was never examined by the expert. Dr. Mark based

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90. *Rivera*, 7 A.3d at 968.

91. *Id*. (citing Sisson v. State, 903 A.2d 288, 300 (Del. 2006) (quoting Smith v. State, 887 A.2d 470, 472 (Del. 2005)); Blount v. State, 511 A.2d 1030, 1034 (Del. 1986) ("Although the *Franks* decision dealt with misstatements included in probable cause affidavits, the Superior Court … and several other courts have concluded that the *Franks* rationale is also to be applied to omissions of facts which are material to a finding of probable cause.")).

92. *Id*. at 969 (citing Reddy v. Evanson, 615 F.3d 197, 213 (3d Cir. 2010); Wilson v. Russo, 212 F.3d 781, 783, 787-88 (3d Cir. 2000)).

93. *Id*. (citing United States v. Eberle, 266 Fed. App'x 200, 204-06 (3d Cir. 2008); *Reddy*, 615 F.2d 213; *Wilson*, 212 F.3d at 789).

94. *Id.* at 970.

95. *Id*. The court noted the following "multiple independent facts" contained in the search warrant affidavit:

> Rivera being left-handed and the injuries to his left hand, Pate's injuries to her right side that were consistent with an attack by a left-handed person, evidence of a struggle at Pinewood Acres, the distance from Pate's Pinewood Acres trailer to where her body was recovered, and Rivera's possession of Hall's car … [were] facts … sufficient to establish a fair probability that police would recover evidence of the crime during a search of the Grand Am, because Pate's attacker most likely used a vehicle to move her body from Pinewood Acres to the river.

Id. at 969.

96. *Id.* at 970 (citing Illinois v. Gates, 462 U.S. 213, 285 n.6 (1983) (Brennan, J., dissenting); Franks v. Delaware, 438 U.S. 154, 163-64 (1978)).

his opinion solely on the statements of lay witnesses, including the defendant, none of whom were medical experts.[97] The methodology was not of the type "reasonably relied upon by experts in the field."[98] Dr. Mark was also permitted to testify as to the defendant's version of events, namely, that he woke from a sleep terror episode believing that the victim was already dead, panicked when he realized that he had attacked the victim, and then dumped her body to conceal his actions.[99] The court found no error in the rulings of the Superior Court and affirmed the judgment.

C. Probable Cause To Arrest For DUI—*Miller v. State*

In *Miller v. State*,[100] the court held that a police officer possessed probable cause to arrest a suspect for DUI based on the defendant's odor of alcohol, her failed performance tests, her glassy watery eyes, and her admission of drinking two beers within two hours of her accident with another vehicle stopped at a red light.[101]

Miller was arrested by police for DUI and following too closely after she collided with the rear of a vehicle that was stopped at a red light. The investigating officer detected a strong odor of alcohol from Miller, who had glassy, watery eyes. Miller admitted to drinking two beers approximately two hours earlier. Miller subsequently failed a series of field tests, as well as the horizontal gaze nystagmus ("HGN") test and a portable breath test ("PBT"). After failing the field tests, Miller began to cry to the officer and stated that she had multiple previous DUI convictions. Miller was arrested and later failed a blood alcohol test. The trial court denied the defendant's motion to suppress the arrest or the results of the blood alcohol test. Miller was convicted at trial and appealed the suppression ruling.[102]

The Supreme Court first ruled that the trial court should not have considered the results of the PBT in assessing probable cause. The State failed at trial to prove that the PBT was properly calibrated or that the officer was trained to administer the test.[103] The court also found that the police officer should not have been permitted to testify at trial about the results of the HGN test because the State did not establish a foundation that the officer was an expert in HGN testing and in its underlying principles.[104] Nevertheless, the court found that even absent the PBT and HGN tests, the police officer possessed probable cause based on the odor of alcohol from the defendant, her glassy, watery eyes, her failed walk-and-turn and one-legged standing tests, and her admission of consuming two beers within two hours of the stop.[105] The court affirmed the judgment of the Superior Court.

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97. *Id.* at 971 (citing D.R.E. 702).

98. *Id*. at 972 (citing Santiago v. State, 510 A.2d 488, 490 (Del. 1986); D.R.E. 703).

99. *Id*. at 973.

100. 4 A.3d 371 (Del. 2010).

101. *Id.* at 374-75.

102. *Id.* at 372-73.

103. *Id.* at 374 (citing State v. Clay, No. IK01-10-0010, 2002 WL 1162300, at *3 (Del. Super. May 28, 2002); State v. Caputo, Cr. A. Nos. 99-01-1310, 99-01-1311, 99-02-1312, 1999 WL 1847363, at *2 (Del. Com. Pl. June 10, 1999)).

104. *Id.* (citing Zimmerman v. State, 693 A.2d 311, 314 (Del. 1997) (citing State v. Ruthardt, 680 A.2d 349, 351-52 (Del. Super. 1996)). The officer did testify about the principles of the HGN testing but did not testify about the NHSTA training manual or whether his testing complied with NHSTA standards.

105. *Id.* at 374-75 (citing Bease v. State, 884 A.2d 495 (Del. 2005); State v. Maxwell, 624 A.2d 926 (Del. 1993)).

D. Probation Officers' Administrative Searches—*Pendleton v. State*

In *Pendleton v. State,*[106] the court upheld the admissibility of evidence obtained during an administrative search conducted by probation officers who substantially complied with departmental guidelines.[107]

On October 7, 2008, Probation Officer McClure and the Governor's Task Force conducted curfew checks in the Milford area. Defendant Pendleton was on probation, and the probation records showed that he had (i) tested positive for marijuana and cocaine on four prior screens, (ii) was a career criminal and (iii) missed a curfew on August 21, 2008. Officer McClure believed that Pendleton was a consistent drug user based on the positive drug tests and sought approval from his supervisor for an administrative search. Neither McClure nor his supervisor completed a pre-search checklist but, instead, analyzed the information available to probation officers. After obtaining approval, probation and police officers conducted the administrative search and seized crack cocaine.[108]

Penndleton's appeal challenged the probation officers' failure to comply with their departmental rules. The Supreme Court noted that, under 11 *Del. C.* § 4321(d), probation officers have authority to conduct warrantless searches, but that authority is predicated upon a showing of reasonable suspicion.[109] The court also stated that probation officers must substantially comply with their departmental regulations in order for any administrative search to be reasonable.[110] Pendleton claimed that the probation officers violated Delaware Department of Corrections Bureau of Community Corrections Probation and Parole Procedure No. 7.19, sections VI.A.6, VI.E. This regulation requires probation officers to conduct a case conference and complete a pre-search checklist.[111] The court found that the probation officers held a telephone conference and analyzed each of the five factors on the pre-search checklist. The court characterized Pendleton's argument, that the probation officers violated the regulation because they did not fill out the paper form, as an attempt to "elevate form over substance."[112] The court ruled that the search would not be invalidated based on a technical deficiency.[113] As a final note, the court stated:

> All probation officers [are reminded] to pursue the rehabilitation of their probationers as fervently as they pursue compliance, curfew checks, spontaneous searches, and deterrence. Delaware law places the responsibility upon probation officers of reintegrating probationers into society by creating treatment plans to "alleviate [the] conditions which brought about the criminal behavior," "securing employment", and "us[ing] all suitable methods to aid and encourage them to bring about improvement in their conduct and conditions and to meet their probation or parole obligations." Any neglect of these important responsibilities only denigrates society's trust and confidence in the corrections system.[114]

106. 990 A.2d 417 (Del. 2010).

107. *Id*. at 418-19.

108. *Id*. at 419.

109. *Id.* at 419-20.

110. *Id*. (citing Griffin v. Wisconsin, 483 U.S. 868 (1987); Fuller v. State, 844 A.2d 290 (Del. 2004)).

111. *Id.* at 420.

112. *Id.*

113. *Id.* (citing King v. State, 984 A.2d 1205 (Del. 2009); Culver v. State, 956 A.2d 5 (Del. 2008); *Fuller*, 844 A.2d at 292).

114. *Id*. at 421 (quoting 11 *Del. C.* § 4321(b)(2)(3)).

III. OTHER SIGNIFICANT CASES

A. Decision In *Allen v. State* Not Applied Retroactively—*Richardson v. State*

In *Richardson v. State*,[115] the court held that its prior decision in *Allen v. State*,[116] regarding accomplice liability under11 *Del. C.* § 274, did not constitute a "new rule," was "not implicit in the concept of ordered liberty" and would not be retroactively applied.[117]

Defendant Richardson was convicted in the Superior Court on charges of attempted murder first degree, robbery first degree, burglary first degree, conspiracy second degree, and four counts of possession of a firearm during the commission of a felony. The defendant appealed the Superior Court's denial of his motion for postconviction relief. On appeal, Richardson sought a new trial on the ground that the trial court did not instruct the jury on the issue of Section 274 liability pursuant to the decision in *Allen*.[118]

Richardson and Steven Norwood burglarized a home in Elsmere in 2005, and located a set of keys to enter the house. Once inside the house, the two burglars stole the victim's checkbook from the kitchen. Richardson went upstairs, which woke the resident of the house, who grabbed a loaded gun and shot and injured both intruders. Norwood and the homeowner exchanged gunfire in the dining room. The suspects then fled and were located a short distance from the house. Norwood died from his bullet wounds. The police found Richardson's blood on the victim's checkbook in the dining room of the house, along with a flashlight. In Richardson's pants, the police found two sets of keys to the house, one set taken from the garage and one taken from the kitchen.[119]

Relying on *Allen*, Richardson claimed that he was entitled to a jury instruction that would require the jury to make an "individualized determination of the defendant's mental state and culpability for any aggravating factor or circumstance."[120] Richardson asserted that *Allen* set forth a new substantive rule regarding the applicability of Section 274 and must be applied retroactively.

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115. 3 A.3d 233 (Del. 2010).

116. 970 A.2d 203 (Del. 2009).

117. *Richardson*, 3 A.3d at 240.

118. *Id*. at 235. At Richardson's trial, the court instructed the jury as follows on state of mind:

> If the only element of robbery first degree about which you have a reasonable doubt is whether it was reasonably foreseeable that Norwood would display a deadly weapon during the robbery, then you should find defendant guilty of the lesser included offense of robbery second degree.
>
> In order to find defendant guilty of possession of a firearm during the commission of a felony, you must find that all the following elements have been established:
>
> And three, defendant acted knowingly. Defendant acted knowingly if he was aware that he was committing a burglary with Steven Norwood and it was reasonably foreseeable that Norwood possessed a firearm or that Norwood, defendant, or both of them would possess a firearm during the felony.

Id. at 236.

119. *Id.*

120. *Id.* at 237 (citing *Allen*, 970 A.2d at 213; 11 *Del. C.* § 274).

The Supreme Court considered Richardson's argument in light of *Teague v. Lane,*[121] which "adopt[ed] a general rule of non-retroactivity for cases on collateral review."[122] The *Richardson* court noted the two exceptions to the *Teague* rule: first, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe;'" and second, "a rule may apply retroactively if 'it requires the observance of those procedures that are implicit in the concept of ordered liberty.'"[123]

In regards to the first *Teague* exception, the *Richardson* court found that the decision in *Allen* did not declare a "new rule."[124] In *Allen*, the court agreed with the defendant's argument that under *Johnson v. State*,[125] "the jury is required to make an individualized determination regarding both his mental state and his culpability for any aggravating fact or circumstance."[126] The court concluded that *Allen* did not create a new rule but rather relied on the earlier decision in *Johnson*, and, therefore, the first *Teague* exception was inapplicable.[127]

To satisfy the second *Teague* exception, the court noted that the rule "must be necessary to prevent 'an impermissibly large risk' of an inaccurate conviction" and "the rule must 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'"[128] The court noted that the United States Supreme Court has only retroactively applied one decision, namely, *Gideon v. Wainwright*.[129] The *Richardson* court determined that the retroactive application of *Allen* was not needed to prevent a large risk of inaccurate convictions, and the decision did not rise to the level of *Gideon*'s bedrock- altering nature.[130]

The court also stated that, under *Chao v. State*,[131] a new substantive decision will be given retroactive effect when the decision determines that the defendant was convicted of acts which are not criminal.[132] The decision in *Allen* did not alter the fact that Richardson's actions constituted crimes under the Delaware Code, and the court found the *Chao* ruling

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121. 489 U.S. 288 (1989).

122. *Richardson*, 3 A.3d at 238 (citing Flamer v. State, 585 A.2d 736, 749 (Del. 1990)).

123. *Id.* (citing *Flamer*, 585 A.2d at 749 (quoting *Teague*, 489 U.S. at 311, 313)).

124. *Id.* at 238-39.

125. 711 A.2d 18 (Del. 1998).

126. 970 A.2d at 213.

127. 3 A.3d 238-39 (citing Younger v. State, 547 A.2d 948 (Del. 1988)).

128. *Id.* (citing Whorton v. Bockting, 549 U.S. 406 (2007) (quoting Schriro v. Summerlin, 542 U.S. 348 (2004)).

129. 372 U.S. 335 (1963). The *Richardson* court also noted that the United States Supreme Court held that the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), on the Confrontation Clause was not a "watershed rule." *Richardson*, 3 A.3d at 239 (citing *Whorton*, 549 U.S. at 416).

130. *Richardson*, 3 A.3d at 239.

131. 931 A.2d 1000 (Del. 2007).

132. *Richardson*, 3 A.3d at 239-40.

inapplicable.[133] The court concluded that neither of the *Teague* exceptions applied and that the *Allen* decision would not be applied retroactively.[134]

B. Mandatory Sentencing Provision In Possession Of A Firearm By A Person Prohibited Statute—*Ross v. State*

In *Ross v. State*,[135] the court ruled that under the Possession of a Firearm During the Commission of a Felony statute, 11 *Del. C*. § 1448(e)(1)c, an offender is subject to the enhanced sentencing provision if convicted of two or more prior violent felonies, even if the convictions would not satisfy the definition of a predicate offense under the habitual offender statute.[136]

In 2008, Defendant Ross was present in a Dover townhouse at the time the police executed a search warrant. The police saw Ross holding a handgun and took Ross into custody. Ross had been convicted in 1993 for Possession with Intent to Deliver Cocaine. He was arrested for that offense on December 10, 1993, and he pled guilty on March 8, 1994. While awaiting sentencing, Ross was arrested, on April 25, 1994, on new drug charges. On May 13, 1994, Ross was sentenced on the 1993 drug charge. He received a sentence of thirty months at Level V suspended for one year at Level IV halfway house, and Level III supervision. Ross later pled guilty, on July 26, 1994, to the charge of Possession with Intent to Deliver Cocaine. He was sentenced on September 23, 1994. On the second drug charge, Ross received a sentence of five years incarceration, suspended after three years for eighteen months Level IV halfway house, followed by Level III probation.[137]

As a result of the 2008 arrest, Ross pled guilty to the charge of Possession of a Firearm by a Person Prohibited ("PFBPP"), Possession of Ammunition by a Person Prohibited and other drug offenses. With regard to the defendant's sentence, the parties agreed that Ross was subject to the penalty provisions of 11 *Del. C*. § 1448(e)(1) because of his prior drug convictions. The State contended that Ross had "been convicted on 2 or more separate occasions of a violent felony" and was subject to the minimum five year sentence of incarceration under 11 *Del. C*. § 1448(e)(1)c. The defense contended that the sequencing of the convictions for the PFBPP statute was the same as required under the habitual offender statute, 11 *Del. C*. § 4214. The trial court adopted the position advanced by the State and sentenced Ross to the minimum five year sentence for a defendant with two or more violent felony convictions.[138]

Ross appealed the sentence to the Supreme Court. In reviewing the PFBPP statute, the court noted that Section 1448(e)(1)c requires a five year minimum prison term if the defendant "has been convicted on 2 or more separate occasions of a violent felony."[139] The court found, under 11 *Del. C*. § 222(3), the word "conviction" is defined as "a verdict of

133. *Id.* at 240.

134. *Id.* The court also rejected the defendant's claim of ineffective assistance of counsel based on trial counsel's failure to present an alleged plea offer. *Id*. at 240-41. The court noted that the alleged failure of counsel to present a plea offer to the defendant does not constitute prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). *Richardson*, 3 A.3d at 241 (citing Hill v. Lockhart, 474 U.S. 52, 58 (1985)). The court also cited to the Superior Court's findings that the defendant never claimed that he would have accepted a plea offer or that any such plea was ever actually made. *Id.*

135. 990 A.2d 424 (Del. 2010).

136. *Id*. at 431.

137. *Id*. at 426.

138. *Id*. at 425-27.

139. *Id*. at 429.

guilty by the trier of fact, whether judge or jury, or a plea of guilty or a plea of nolo contendere accepted by the court."[140] The court declared that the definition of "conviction" in Section 222(3) contains the word "means" which limits the term to the definition contained in the statute.[141] The court therefore found that Section 1448(e)(1) was unambiguous.[142] In Ross' case, the court ruled that he had two prior violent felony convictions and fell within the unambiguous terms of the minimum sentence provision in Section 1448(e)(1)c.

The defendant had argued that the habitual offender statute required "some period of time … between sentencing on the earlier conviction and the commission of the offense resulting in the later felony conviction."[143] In *Hall v. State*,[144] the court had ruled that the habitual offender statute was unambiguous regarding the phrase "2 times convicted." The *Hall* court had interpreted Section 4214(b) as "applying only to those offenders who have been twice convicted of the specified felonies in prior proceedings where the second conviction took place on account of an offense which occurred after sentencing had been imposed for the first offense."[145] Similarly in *Buckingham v. State*,[146] in interpreting the phrase "3 times convicted" in Section 4214(a) the court held that "three separate convictions are required, each successive to the other, with some chance for rehabilitation after each sentencing…."[147] The *Ross* court noted that a literal interpretation of "2 times convicted" or "3 times convicted" under the habitual offender statute would have led to an unreasonable result contrary to the purpose of the statute, namely, that "a defendant who was convicted for multiple felonies at one time [would receive] a life sentence without having distinct opportunities to reform…."[148]

The court ruled that no such considerations applied to Ross' sentence under the PFBPP statute. The PFBPP statute requires imposition of the enhanced sentence for a defendant with a prior felony, without mention of any opportunity for rehabilitation of the offender. The court also noted that, when the statute was amended in 1994, the synopsis of the bill provided that the legislature's intent was to:

> [H]elp protect society from armed crime committed by drug dealers and previously-convicted violent felons by increasing the punishment for their illegal possession of a firearm…. By making it a certainty

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140. *Id*. (quoting 11 *Del. C*. § 222(3)).

141. *Id*. The court noted that in the Delaware Criminal Code, "when the word 'means' is employed in defining a word or term, the definition is limited to the meaning given." *Id*. at n.15 (quoting 11 *Del. C*. § 221(a)).

142. The court cited prior precedent, which applied the definition of "conviction" in Section 222(3) "in its general and popular sense, that is, the establishment of guilt independent of judgment and sentence." *Id*. at n.14 (citing Lis v. State, 327 A.2d 746, 748 (Del. 1974); Pryor v. State, 453 A.2d 98, 100 (Del. 1982)).

143. *Id*. at 427 (citing Johnson v. Butler, No. 423, 1994, 1995 WL 48368, at *1 (Del. Jan. 30, 1995)).

144. 473 A.2d 352 (Del. 1984).

145. *Id*. at 356-57.

146. 482 A.2d 327 (Del. 1984).

147. *Id*. at 330.

148. *Ross*, 990 A.2d at 430-31 (citing State v. Cooper, 575 A.2d 1074, 1075 (Del. 1990) ("Literal or perceived interpretations, which yield illogical or absurd results, should be avoided in favor of interpretations which are consistent with the intent of the legislature.")).

> that they will be incarcerated if found to be in possession of a gun, the amendment seeks to deter violent criminals and drug dealers from carrying or possessing firearms.[149]

The court indicated that its literal interpretation of Section 1448(e)(1)c did not yield an unreasonable result and held that Ross was properly sentenced to the five year minimum sentence.[150]

C. Party Autonomy Rule Applies To Bench Trials; Party Must Make A Specific Request For Consideration Of Lesser-Included Offense — *Ramsey v. State*

In *Ramsey v. State*,[151] the court held that the "party autonomy" rule, which requires a party to request that a lesser-included offense be considered in a jury trial, also applies to bench trials.[152]

In 2008, Defendant Ramsey and three co-conspirators robbed a New Castle pizza shop. Ramsey and another robber, Harry Bodine, who was armed, entered the store and demanded money. The restaurant owner and one of the employees were present near the register. The owner opened the register and handed over the store's money while the employee stood frozen with his hands in the air. Ramsey grabbed the money from the owner, and the suspects fled. Ramsey was charged with multiple offenses, including the robbery at the pizza shop. At his bench trial, Ramsey moved for judgment of acquittal on the first degree robbery charge that named the pizza store employee as a robbery victim. The Superior Court denied the motion. In closing arguments, the trial judge suggested that Ramsey should be convicted of attempted first degree robbery for the robbery of the store employee. During closing, neither party argued for conviction of attempted robbery. At the conclusion of the evidence, the court convicted Ramsey on the lesser-included charge of attempted first degree robbery for the robbery charge against the store employee.[153]

On appeal, Ramsey contended that the trial court erred by *sua sponte* convicting him of an uncharged offense. The court noted that, while 11 *Del. C.* § 206(c) allows a trial court to instruct the jury on a lesser-included offense, Delaware follows the "party autonomy" rule, which places the initial burden on a party to request an instruction on a lesser-included offense.[154] The court declared that the rationale of the "party autonomy" rule applies to bench trials and held that a trial judge in a bench trial should not consider uncharged lesser-included offenses unless there is a specific request by a party.[155]

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149. *Id*. at 431 (citing H.B. No. 524, 137th Gen. Assem. (1994) (Synopsis)).

150. *Id*. (quoting State v. Robinson, 251 A.2d 552 (Del. 1969)). In a dissenting opinion, Justice Ridgely stated that the decisions in *Hall* and *Buckingham* were consistent with the express intent of the General Assembly in amending the Mandatory Sentencing Act in 1980 to "require that an offender has an opportunity to mend his ways after an initial confrontation with the courts before he is sentenced as a second offender." *Id*. at 432 (quoting 62 Del. Laws 331 (emphasis added)).

151. 996 A.2d 782 (Del. 2010).

152. *Id*. at 783.

153. *Id*. at 783-84.

154. *Id*. at 784-85 (citing State v. Brower, 971 A.2d 102, 107 (Del. 2009)).

155. *Id*. at 785 (citing Chao v. State, 604 A.2d 1351, 1358 (Del. 1992) (trial counsel "determine trial tactics and presumably act in accordance with a formulated strategy")).

In Ramsey's trial, the Supreme Court found that neither side explicitly requested that the Superior Court actually consider conviction on the lesser-included offense of attempted robbery.[156] Therefore, the court vacated Ramsey's conviction on that charge. The court indicated that in future bench trials, the judge should hold a conference with counsel prior to closing arguments to allow each side to make specific requests for any lesser-included offenses. A failure by a party to request a lesser-included offense will be deemed a knowing and intentional decision.[157]

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156. *Id*. at 785 (citing Perkins v. State, 920 A.2d 391, 399 (Del. 2007) ("The burden falls on defense counsel to request the instruction; otherwise, the trial court cannot 'discount the possibility that such a position [to decline the instruction] is a tactical decision by defense counsel.'") (citing Keyser v. State, 893 A.2d 956, 961 (Del. 2006))).

157. *Id*. at 785-86.

APPENDIX

DELAWARE SUPREME COURT CRIMINAL LAW OPINIONS — 2010

Black v. State, 3 A.3d 218, 219 (Del. 2010) (defendant was denied his right to a fair trial where juror had discussed facts of drug case with his son (a recovering drug addict) and other jurors).

Blake v. State, 3 A.3d 1077, 1079 (Del. 2010) (trial court erred in admitting five prior statements of witnesses under Section 3507 because the State did not establish the proper foundational requirements).

Bohan v. State, 990 A.2d 421, 423 (Del. 2010) (trial judge did not commit error in declining to order a mistrial after a defense witness invoked his Fifth Amendment privilege; court issued three curative instructions).

Burroughs v. State, 988 A.2d 445, 451 (Del. 2010) (prosecutor's remarks in closing were invited by defense arguments and did not constitute prosecutorial misconduct).

Cruz v. State, 990 A.2d 409, 415-16 (Del. 2010) (defendant could be found to be in violation of probation based on evidence presented at trial that resulted in his acquittal).

Dickinson v. State, 8 A.3d 1166, 1168 (Del. 2010) (under the "party autonomy" rule, the trial court is not required to give an accomplice liability instruction unless requested by a party).

Dixon v. State, 996 A.2d 1271, 1276, 1279 (Del. 2010) (witness' 911 call describing shooting and identity of suspect was admissible as excited utterance; call was nontestimonial and admission of out-of-court statement did not violate the Confrontation Clause).

Erskine v. State, 4 A.3d 391, 392 (Del. 2010) (the accomplice "level of liability" jury instruction should only be given if there is a rational basis in the record to support the instruction).

Forehand v. State, 997 A.2d 673, 674-75 (Del. 2010) (statute constitutionally classified all escapes as violent felonies).

Guy v. State, 999 A.2d 863, 865 (Del. 2010) (defendant's post-conviction claims were procedurally barred and lacked substantive merit).

Hall v. State, 12 A.3d 1123, 1125 (Del. 2010) (trial court committed plain error in failing to remove juror who was correctional officer in same institution as the defendant).

Harris v. State, 991 A.2d 1135, 1140, 1144 (Del. 2010) (defendant could not be convicted of tampering with physical evidence when he momentarily attempted to hide a baggie in his mouth; police observed the attempt to hide and retrieved the evidence; LIDAR device was sufficiently reliable to calculate defendant's distance from church).

Hill v. State, 3 A.3d 269, 271 (Del. 2010) (police officer had reasonable suspicion to support search of vehicle where suspect was driving without proper license or registration, was "armed and dangerous" according to police dispatch, acted nervous, and had $390 in cash and multiple cell phones).

Hoennicke v. State, 13 A.3d 744, 746-47 (Del. 2010) (defendant's prosecution for multiple counts of unlawful sexual contact second degree was not barred by the statute of limitations because State indicted the case under 11 *Del. C.* § 205(e), which provides for an unlimited limitations period and was amended before the limitations period had expired under the former version of the statute).

Jenkins v. State, 8 A.3d 1147, 1152-54 (Del. 2010) (State presented sufficient evidence from probation officer and investigating detective to establish violation of probation and hearing complied with due process requirements).

Johnson v. State, 5 A.3d 617, 619 (Del. 2010) (defendant's convictions for burglary second degree and possession of a firearm during the commission of a felony did not violate double jeopardy protection under the federal or state constitutions).

Loper v. State, 8 A.3d 1169, 1172-73 (Del. 2010) (police did not exceed scope of valid traffic stop when they asked passenger for his name and identification, and detention of driver while passenger was arrested for outstanding warrant did not unreasonably extend duration of the stop).

McNair v. State, 990 A.2d 398, 402-03 (Del. 2010) (State was properly permitted to admit photo of defendant that had been displayed in parking garage where defendant was observed breaking into a car; defendant was not entitled to a *Lolly* instruction where garage surveillance tape had no evidentiary value).

Miller v. State, 4 A.3d 371, 374-75 (Del. 2010) (police officer had sufficient evidence to arrest defendant for DUI and following too close, even after excluding improperly calibrated PBT test).

Moody v. State, 988 A.2d 451, 454 (Del. 2010) (trial court properly found defendant in violation of probation; violation occurred during new period of probation that began after prior violation of probation).

Moore v. State, 997 A.2d 656, 665 (Del. 2010) (police officer's stop of two persons walking away from area where gunshots and a stabbing were reported, with one of the individuals appearing to be holding his side as if a stabbing victim, was reasonable under the community caretaker doctrine).

Mott v. State, 9 A.3d 464, 466-67 (Del. 2010) (indictment for charge of new home construction fraud tracked the language in the statute and was not defective for failing to list the amount of the actual loss).

Neal v. State, 3 A.3d 222, 224 (Del. 2010) (two co-owners of business who were ordered to hand over the business's cash and property were victims of robbery).

Pendleton v. State, 990 A.2d 417, 420-21 (Del. 2010) (evidence seized by probation officers during administrative search would not be suppressed based on technical violation of probation procedure involving completion of pre-search checklist).

Ramsey v. State, 996 A.2d 782, 785-86 (Del. 2010) (the "party autonomy" rule applies to bench trials; trial court incorrectly convicted defendant of the lesser included offense of attempted first degree robbery where neither side requested consideration of a lesser included offense).

Richardson v. State, 3 A.3d 233, 235 (Del. 2010) (court's prior decision in *Allen v. State* was not entitled to be applied retroactively).

Rivera v. State, 7 A.3d 961, 969-71 (Del. 2010) (exculpatory facts that police did not insert into search warrant application were not material).

Robinson v. State, 3 A.3d 257, 262 (Del. 2010) (defense was correctly limited at trial from introducing prior statement of witness who was never confronted with the actual statement).

Ross v. State, 990 A.2d 424, 425 (Del. 2010) (trial court properly sentenced defendant to five year minimum mandatory sentence for Possession of a Firearm During the Commission of a Felony based on his two prior felony convictions, as enhanced sentencing provision did not use the same definition of "conviction" used in the habitual offender statute).

Russell v. State, 5 A.3d 622, 627-28 (Del. 2010) (defendant's argument on appeal challenging basis for admission of statement of child witness was never fairly presented to the trial court and was barred from consideration by Supreme Court Rule 8).

Sahin v. State, 7 A.3d 450, 451 (Del. 2010) (Supreme Court would not consider claims of ineffective assistance of counsel on direct appeal).

Scott v. State, 7 A.3d 471, 475 (Del. 2010) (defendant's twelve claims of ineffective assistance of counsel lacked merit and trial court properly denied petition for post-conviction relief).

Michael Smith v. State, 991 A.2d 1169, 1172 (Del. 2010) (defendant suffered prejudice due to his trial attorneys' ineffective assistance of counsel in failing to request a specific jury instruction on the credibility of accomplice testimony).

Shawn Smith v. State, 996 A.2d 786, 791 (Del. 2010) (defendant did not knowingly and intelligently waive his Sixth Amendment right to counsel when trial judge did not conduct a comprehensive evidentiary hearing before allowing the defendant to proceed *pro se* at trial).

State v. Clayton, 988 A.2d 935, 936 (Del. 2010) (the phrase "intended to guide the destiny of the gun" is not a required element of the charge of possession of a firearm by a person prohibited, which is charged on a constructive possession theory).

Stevens v. State, 3 A.3d 1070, 1071 (Del. 2010) (admission of police officer's improper opinion statements and reference to other crimes in improperly redacted section 3507 statement did not constitute plain error).

Thomas v. State, 8 A.3d 1195, 1197-98 (Del. 2010) (police had probable cause to arrest suspect for drug offenses based on corroborated tip from past proven reliable informant; second officer could rely on information from initial officer to stop and frisk the suspect).

Turner v. State, 5 A.3d 612, 616-17 (Del. 2010) (State laid a proper foundation for admission of Section 3507 statement but the trial court should have followed the timing requirements for admission of the statement even in a bench trial).

Velasquez v. State, 993 A.2d 1066, 1070 (Del. 2010) (record of defendant's plea showed that defendant did understand the minimum sentence for a *no contest* plea to a charge of rape and plea was properly taken by the trial court).

Vincent v. State, 996 A.2d 777, 779 (Del. 2010) (sufficient circumstantial evidence supported defendant's conviction for criminal mischief).

Washington v. State, 4 A.3d 375, 376 (Del. 2010) (motion for judgment of acquittal should have been granted where victim denied defendant was at the scene and there was no corroboration for the testimony of an accomplice).

Woodlin v. State, 3 A.3d 1084, 1089 (Del. 2010) (rape victim's Section 3507 statement was properly admitted at trial where the victim's testimony implicitly affirmed the truthfulness of the statement and touched upon the events described in the interview).

Zebroski v. State, 12 A.3d 1115, 1121-23 (Del. 2010) (case remanded to trial court to determine if defendant's ineffective assistance of counsel claims satisfy the Rule 61 procedural bars; reversal of felony murder conviction did not require a new hearing).