#### IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

#### IN AND FOR KENT COUNTY

STATE OF DELAWARE	)	
	)	I.D. No. 076025356
V.	)	
	)	
GEORGE P. JOHNSON	)	
	)	
Defendant	)	

Submitted: July 16, 2012 Decided: October 12, 2012

Upon Defendant's Motion for a New Trial or to Vacate Sentence Based on New Evidence.

### DENIED.

Upon Defendant's Motion for Appointment of Counsel. **DENIED.** 

# **ORDER**

Nicole S. Hartman, Esquire, Deputy Attorney General, Department of Justice, Dover, Delaware, Attorney for the State.

George P. Johnson, Smyrna, Delaware, pro se.

COOCH, R.J.

This 12th day of October, 2012, upon consideration of Defendant's Motion for a New Trial or to Vacate Sentence Based on New Evidence, it appears to the Court that:

1. *Pro Se* Defendant George P. Johnson filed this Motion for a New Trial or to Vacate Sentence Based on alleged new evidence.

Defendant claims a new trial is required because new evidence allegedly demonstrates that a police officer perjured himself. The Court finds that a new trial is not merited because the new evidence underlying Defendant's Motion was merely non-substantive impeachment evidence because it merely questioned the officer's ability to witness the crime. Therefore, Defendant's Motion for a New Trial or to Vacate Sentence Based on New Evidence is **DENIED**.

- 2. Defendant was convicted after trial of Delivering Cocaine to a Minor, Delivery of Cocaine Within 300 Feet of a Park, and Criminal Trespass in the Third Degree, in Kent County Superior Court on April 10, 2008. Defendant was represented at trial by Deborah L. Carey, Esquire.
- During trial, Corporal Digirolomo testified that he witnessed Defendant selling narcotics to a minor without any visual obstruction. On cross examination, Digirolomo was asked approximately how far he was from the narcotics transaction. Digirolomo testified he was approximately 450 feet away from the transaction, but utilized "extremely large binoculars." However, when speaking with suspects, Digirolomo claimed he was only 15 feet away from the transaction. Digirolomo testified he told the suspects he was only 15 feet away because, "I wouldn't tell him the exact distance because I didn't want him to know where I was."
- 4. Defendant alleges that after trial, he looked at a map and now believes that Corporal Digirolomo's view was blocked by an apartment complex at the time he claims he witnessed the narcotics sale.
- 5. Defendant contends that he was "blindsided" by Digirolomo's testimony because he testified he was 450 feet away from the crime despite earlier stating he was only 15 feet away. Defendant asserts that the increased distance necessitated that he view a map to plot out Digirolomo's perspective, and that at trial his attorney was only prepared to rebut testimony from a witness perspective of 15 feet. Defendant argues he could not prepare an adequate defense because Digirolomo purposely did not tell him the correct distance because he did not want Defendant to know his prior location.

- 6. Defendant relies upon *U.S. v. McLaughlin*<sup>1</sup> for the assertion that perjured testimony necessitates a new trial because of its prejudicial impact upon a jury's verdict. *McLaughlin* reasoned that a new trial was required in part because the false testimony surprised the defendant, and defendant never had opportunity to prepare impeachment testimony.<sup>2</sup>
- 7. The State responds that Defendant's Motion is unpersuasive because Defendant was aware of Digirolomo's testimony in advance, was not unfairly surprised, and cross examined Digirolomo about his line of sight. The State asserts that Defendant could have utilized a map during cross examination but did not exercise due diligence. Lastly, the State argues that the evidence Defendant presently attempts to introduce is merely impeachment evidence rather than substantive evidence, and does not merit a new trial.
- 8. In *Hicks v. State*, the Delaware Supreme Court created a three factor test for determining whether a new trial is warranted based upon newly discovered evidence. Under *Hicks*, a new trial is merited when: "(1) The new evidence is of such a nature that it would have probably changed the result if presented to the jury; (2) The evidence was newly discovered . . .; and (3) The evidence must not be merely cumulative or impeaching."<sup>3</sup>
- 9. The Court need not reach *Hicks*' first two factors because the third factor is dispositive. *Hicks* last requires that the evidence not be cumulative and add substance to a defendant's case, rather than merely impeach a witness. Defendant seeks to utilize new evidence, presumably a map and photographs of the scene to impeach Digirolomo's testimony by imputing he was unable to witness the crime as he testified. This evidence falls squarely within *Hicks*' third factor. If proffered the evidence would simply question Digirolomo's veracity, line of sight, and perspective, it would offer no independent substantive evidence meriting a new trial under *Hicks*.

<sup>&</sup>lt;sup>1</sup> 89 F. Supp 2d 617 (E.D. Pa. 2000).

<sup>&</sup>lt;sup>2</sup> Id. at 623-24.

<sup>&</sup>lt;sup>3</sup> Hicks v. State, 913 A.2d 1189, 1194 (Del. 2006).

<sup>&</sup>lt;sup>4</sup> Hicks, 923 A.2d at 1194 (citing Lloyd v. State, 534 A.2d 1262, 1267 (Del. 1987)).

10. Defendant's Motion is not saved by his reliance upon *McLaughlin*. In *McLaughlin*, the Court required a new trial because confirmed perjured testimony prejudiced a jury such that the verdict was indefensible.<sup>5</sup> The *McLaughlin* court reasoned that

To grant a new trial on this ground, this court must be satisfied that: 1) the testimony given by a material witness was false; 2) the jury might have reached a different conclusion; and 3) the party seeking a new trial was surprised by the false testimony and unable to meet it, or did not know of its falsity until after trial.<sup>6</sup>

11. This Court is not "satisfied" that Digirolomo's testimony was false based upon Defendant's arguments in his Motion and in his attachments.

Therefore, Defendant's Motion for a New Trial or to Vacate Sentence Based on New Evidence is **DENIED**.

## IT IS SO ORDERED.

Richard R. Cooch, R.J.	

oc: Prothonotary

cc: Investigative Services

<sup>&</sup>lt;sup>5</sup> McLaughlin, 89 F. Supp 2d at 622.

<sup>&</sup>lt;sup>6</sup> *Id*.