IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY FOGG,	§	No. 506, 2010
Defendant-Below, Appellant,	§	Court Below: Superior Court of the State of Delaware, in and for New Castle County
v.	§	Cr. I.D. No. 9504002666
STATE OF DELAWARE,	§	
Plaintiff-Below, Appellee.	§	

Submitted: December 7, 2012
Decided: December 13, 2012

Before **HOLLAND**, **BERGER** and **JACOBS**, Justices.

O R D E R

This 13th day of December 2012, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Jeffrey Fogg, the defendant-below ("Fogg"), appeals from a Superior Court July 22, 2010 order denying his motion for postconviction relief.[1] That order denied Fogg's *Brady v. Maryland*[2] claim relating to the testimony of a witness, Robert Richmond. Before we decided Fogg's appeal, however, we remanded the case for the Superior Court to address another of his *Brady* claims

[1] *State v. Fogg*, 2010 WL 2891500 (Del. Super. July 22, 2010).

[2] 373 U.S. 83 (1963).

relating to the State's alleged failure to disclose evidence of a single "black boot" recovered at the crime scene.[3] In a June 6, 2012 order, the Superior Court denied Fogg's "black boot" *Brady* claim on remand.[4] Fogg appeals from that order as well. We AFFIRM the Superior Court order of July 22, 2010 and the Superior Court order of June 6, 2012, on the basis of our affirming Order in a related case, *Andrus v. State*.[5]

2. In 1996, Fogg and Daryl Andrus were convicted of First Degree Murder and Conspiracy for beating James Dilley to death. Fogg received a life sentence for his murder conviction without the possibility of parole or probation.[6] This Court affirmed Fogg's convictions on direct appeal in 1998.[7]

3. The State recovered five boots from the crime scene: one pair of Fogg's boots, one pair of Andrus' boots, and one single black boot. The State had a podiatrist complete foot impressions of the defendants and draft a report of the "boot examination." Days before trial in April 1996, Fogg's counsel, *in limine*, claimed that the State had failed to provide him with the foot impressions or the podiatrist's report. The State responded by disclosing that "Fogg's feet fit one set

[3] *Fogg v. State*, No. 506, 2010 (Feb. 13, 2012) (Order).

[4] *State v. Fogg*, 2012 WL 2356466 (Del. Super. June 6, 2012).

[5] *Andrus v. State*, 11 A.3d 226, 2011 WL 135780 (Del. Jan. 13, 2011) (TABLE).

[6] He also received a five-year sentence on the conspiracy conviction.

[7] *Fogg v. State*, 719 A.2d 947, 1998 WL 736331 (Del. Oct. 1, 1998) (TABLE).

of boots," and that the foot impression and the boots "were available for defense inspection." The State also told Fogg's defense counsel that "it only intended to argue [that one pair of boots] were worn by Fogg," and that the "single black boot [was] never directly attributed to Fogg." Defense counsel's *in limine* motion was thus resolved and withdrawn at the pretrial conference. All of the boots, including the single black boot, were introduced into evidence at trial and were available for jury review during deliberations. Although the State apparently later argued the contrary,[8] the medical report admitted into evidence at trial found that Dilley's death was inflicted by the black boot.[9]

4. In 1999, Fogg filed his first motion for postconviction relief, which the Superior Court denied in 2000.[10] In 2001, Fogg joined a postconviction motion by Daryl Andrus which raised a *Brady* claim that the State had failed to disclose a sentence reduction agreement between the State and a trial witness, Robert Richmond. Richmond testified that Andrus had told him about the murder and had

[8] The Superior Court order on remand states that "the State argues that the medical examiner did not conclude the boot delivered the fatal blow, but rather that the black boot left a pattern injury, causing some of the victim's many physical injuries." *State v. Fogg*, 2012 WL 2356466, at *5 (Del. Super. June 6, 2012).

[9] *See State v. Fogg*, 2002 WL 31053868, at *7 (Del. Super. Sept. 10, 2002), *aff'd*, 817 A.2d 804 (Del. 2002) (quoting the medical report providing that Dilley's injuries "within a reasonable degree of medical certainty, were caused by the [single black] boot . . . .").

[10] *State v. Fogg*, 2000 WL 1211510 (Del. Super. Aug. 1, 2000).

implicated Fogg. Andrus claimed that the State violated *Brady v. Maryland*[11] by not disclosing Richmond's sentence reduction agreement, or alternatively, that the State knew that Richmond had an expectation of leniency.

5. At the time of the 2002 postconviction relief hearing, Richmond was an out-of-state prisoner and, therefore, unavailable. Accordingly, the Superior Court deferred deciding Andrus' (and Fogg's) *Brady* claim until the State obtained custody of Richmond. The trial court denied Fogg's (second) motion for postconviction relief in all other respects,[12] and we affirmed.[13]

6. Later, Richmond was again incarcerated in Delaware. A hearing was scheduled in 2009 to consider Fogg's and Andrus' deferred *Brady* claim. At that hearing, Richmond testified that he and the State did, in fact, have an agreement that after he testified in Fogg's and Andrus' case, his sentence would be reduced. Both the prosecutor and Richmond's lawyer denied that any such agreement had been made, although they acknowledged that Richmond did have an expectation that if he testified, his sentence would be reduced.

7. After that hearing, the Superior Court requested briefing from Fogg and Andrus on their "Richmond" *Brady* claim. Although Andrus filed a brief, Fogg's

[11] 373 U.S. 83 (1963).

[12] *State v. Fogg*, 2002 WL 31053868 (Del. Super. Sept. 10, 2002).

[13] *Fogg v. State*, 817 A.2d 804, 2002 WL 31873705 (Del. Dec. 23, 2002) (TABLE).

counsel requested to withdraw from his case on the ground that Fogg's contentions were meritless. In opposition to his counsel's motion to withdraw, Fogg filed a submission that advanced several grounds for postconviction relief—none of which addressed the "Richmond" *Brady* claim at issue. On June 28, 2010, the trial court simultaneously granted counsel's motion to withdraw and informed Fogg that it would treat his submission as a (third) motion for postconviction relief.[14]

8. The Superior Court then denied Fogg's (third) postconviction motion, which included his deferred "Richmond" *Brady* claim, because Fogg "asserts multiple grounds for relief, none of which appear to address any potential *Brady* violation."[15] The court held that Fogg waived his *Brady* claim by "fail[ing] to establish a colorable claim for relief" in his *sua sponte*-converted motion.[16] Alternatively, the trial court held that "[t]o the extent . . . [Fogg] does have a claim based on *Brady*, that claim was denied today by separate opinion in *State v. Andrus*."[17] This Court later affirmed *Andrus*.[18]

---

[14] *State v. Fogg*, 2010 WL 2653328 (Del. Super. June 28, 2010).

[15] *State v. Fogg*, 2010 WL 2891500, at *1 (Del. Super. July 22, 2010).

[16] *Id.* at *2.

[17] *Id.* In *Andrus*, the Superior Court held that the evidence was insufficient to establish that a sentence reduction agreement (either implicit or explicit) existed between Richmond and the State, notwithstanding Richmond's contrary testimony. *State v. Andrus*, 2010 WL 2878871, at *8 (Del. Super. July 22, 2010). The court held that Richmond's mere expectation of leniency, without further action by the State, was insufficient to establish a *Brady* violation. *Id.* at *12. In the alternative, the court concluded that Andrus had not been prejudiced. *Id.*

9. Fogg then appealed from the July 22, 2010 order denying his "Richmond" *Brady* claim. After the initial briefs were filed, we requested additional briefing, asking Fogg: (i) to identify all *Brady* issues that he would have raised on appeal, and (ii) to show why his claim was not controlled by our decision in *Andrus v. State*.[19] Rather than respond to that request, Fogg's appellate counsel moved to withdraw, stating that no arguable *Brady* claim existed.

10. We granted appellate counsel's motion to withdraw, after which Fogg submitted a "motion to proceed *pro se*." In that motion, Fogg asserted numerous substantive claims and identified *Brady* violations that (he argued) were distinguishable from those raised and decided in *Andrus*.[20] Specifically, he claimed that the State had suppressed evidence of a "black boot" before his trial. Because the Superior Court did not have an opportunity to address Fogg's "black boot" *Brady* claim, we remanded the matter to that court for a decision on that issue.[21]

---

[18] *Andrus v. State*, 11 A.3d 226, 2011 WL 135780 (Del. Jan. 13, 2011) (TABLE).

[19] *Id.*

[20] *State v. Andrus*, 2010 WL 2878871, at *8 (Del. Super. July 22, 2010), *aff'd*, 11 A.3d 226, 2011 WL 135780 (Del. Jan. 13, 2011) (TABLE).

[21] *Fogg v. State*, No. 506, 2010 (Feb. 13, 2012) (Order) (retaining jurisdiction).

11. In an order dated June 6, 2012, the Superior Court rejected Fogg's "black boot" *Brady* claim on multiple grounds.[22] *First*, the trial court held that Fogg's postconviction motion was procedurally barred under Superior Court Criminal Rules ("Rules") 61(i)(1) and (i)(2). *Second*, the court held that Fogg's motion was procedurally defaulted under Rule 61(i)(3), because Fogg had never raised the "black boot" *Brady* claim in any of his earlier pleadings at trial or on direct appeal, and that his claim did not warrant consideration under Rule 61(i)(5)'s "manifest injustice" exception.

12. *Third*, the Superior Court found that Fogg had failed to satisfy the requirements of *Brady v. Maryland*[23] and its progeny[24] on the merits. Specifically, the court held that Fogg had failed to show that: (a) the State had suppressed the "black boot" evidence, because Fogg's counsel had acknowledged at the pretrial conference that the evidence was accessible; or (b) Fogg had suffered prejudice, because the State had never argued at trial that Fogg wore the single black boot.[25] Moreover, the black boot had been admitted into evidence, making it subject to "[l]ay juror comparison [which] would have easily revealed what Fogg argues is

---

[22] *State v. Fogg*, 2012 WL 2356466 (Del. Super. June 6, 2012).

[23] 373 U.S. 83 (1963).

[24] *See State v. Fogg*, 2012 WL 2356466, at *7 & nn.32-33, 35 (Del. Super. June 6, 2012) (citing some relevant cases that followed *Brady*, 373 U.S. at 83).

[25] *Id.*

significant—that his feet are larger than the single black boot."[26] Accordingly, the Superior Court denied Fogg's "black boot" *Brady* claim.[27] This appeal followed.

13. This Court reviews a Superior Court order denying a motion for postconviction relief for abuse of discretion.[28] On appeal, Fogg asks this Court "to change [his] first degree homicide [conviction] to manslaughter" and to hold that his "black boot" claim constituted a *Brady* violation. Specifically, he argues that the State's delayed disclosure of the "black boot" evidence was equivalent to an impermissible suppression of evidence under *Brady v. Maryland*.[29] This "delayed disclosure" argument was never raised in the court below, and therefore is waived.[30]

14. Fogg does not convincingly argue why any of the procedural bars that his "black boot" *Brady* claim currently faces are inapplicable. As the Superior

---

[26] *Id.* The Superior Court also clarified its statement in an earlier 2002 postconviction proceeding that "[a]lthough that single black boot was never positively identified as having been worn by Fogg, an inference could be made that Fogg in fact wore the boot while kicking and stomping Dilley to death, particularly in light of the fact that Andrus was partially paralyzed and possibly would not have been able to kick with any real force." *State v. Fogg*, 2002 WL 31053868, at *31 (Del. Super. Sept. 10, 2002), *aff'd*, 817 A.2d 804, 2002 WL 31873705 (Del. Dec. 23, 2002) (TABLE). The court clarified that its 2002 statement was "a possible inference drawn from Andrus' medical condition; however, it is rebuttable by Fogg's foot size disparity." *State v. Fogg*, 2012 WL 2356466, at *9 (Del. Super. June 6, 2012).

[27] *State v. Fogg*, 2012 WL 2356466 (Del. Super. June 6, 2012).

[28] *Claudio v. State*, 958 A.2d 846, 850 (Del. 2008); *Coles v. State*, 959 A.2d 18, 22 (Del. 2008).

[29] 373 U.S. 83 (1963).

[30] *See* SUPR. CT. R. 8.

Court properly held, Fogg's "black boot" *Brady* claim is procedurally barred by Rules 61(i)(1) and (i)(2), is procedurally defaulted under Rule 61(i)(3), and does not fall under Rule 61(i)(5)'s "manifest injustice" exception. Moreover, although Fogg claims that he was prejudiced by the State's alleged misconduct, his arguments are unpersuasive. We conclude that the well-reasoned Superior Court June 6, 2012 decision is correct in all respects.

15. On this most recent appeal, Fogg also raises another new, alleged *Brady* violation regarding the State's crime scene reconstruction report. That "crime scene reconstruction report" claim, which has no support in the record,[31] is also waived.[32] To the extent that Fogg advances any other arguments for the first time on appeal for why this Court should "change [his] first degree homicide [conviction] to manslaughter," those arguments are also waived.[33]

[31] *See State v. Fogg*, 2012 WL 2356466, at *9 n.57 (Del. Super. June 6, 2012) (noting that the crime scene reconstruction report was not admitted into the trial record).

[32] *See* SUPR. CT. R. 8.

[33] *See id.*

NOW, THEREFORE, IT IS ORDERED that the July 22, 2010 judgment of the Superior Court is **AFFIRMED** on the basis of this Court's affirming Order in *Andrus v. State*,[34] and that the June 6, 2012 judgment of the Superior Court is also **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[34] 11 A.3d 226, 2011 WL 135780 (Del. Jan. 13, 2011) (TABLE).