

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE)	
)	
v.)	Cr. A. No. 88001915DI
)	
TZE POONG LIU,)	
)	
Defendant.)	

Upon Defendant's Motion for a New Trial – DENIED

Submitted: November 12, 2013

Decided: February 14, 2014

ORDER

Defendant Tze Poong Liu has filed a Motion for a New Trial contending that the interest of justice militates in favor of a new trial. Defendant Liu was charged with several counts of murder, along with co-defendant Vicki Chao. The victims were the wife, daughter, and mother of William Chen. Liu was charged with the intentional murder of the three victims, as well as felony murder of the three victims whose deaths occurred from an intentionally set fire at Chen's home in Claymont, Delaware on March 9, 1988. Liu was also charged with the attempted murder of Chen, as well as arson, burglary in the first degree and conspiracy first degree and second degree.

Chao's trial took place first, in 1989. At Chao's trial, William Chen testified in the State's case-in-chief that his intimate relationship with Chao was limited to one sexual encounter

after Chen married his wife. Chao was convicted on August 14, 1989 of three counts of intentional murder and three counts of felony murder, among other charges.¹

Liu's trial took place almost two years later, from March 11, 1991 to May 28, 1991. William Chen also testified as a witness as part of the State's case-in-chief. However, as discussed below, Chen's testimony changed from the testimony he offered at Chao's trial to the testimony he offered at Liu's trial. Ultimately, Liu was convicted of three counts of murder, three counts of felony murder, and arson, attempted murder, conspiracy and burglary.

Liu's trial began on March 11, 1991. After the second day of trial on March 12, 1991, the State met with Chen to prepare for Chen's testimony the following week. The State learned that Chen intended to testify differently at Liu's trial than he had testified at Chao's trial. Specifically, Chen intended to testify that he had sexual relations with Chao on more than one occasion since Chen's marriage. The next day of trial was March 18, 1991. Chen was sworn as a witness and began testifying.

At some point on or prior to Tuesday, March 19, 1991, the State disclosed to defense counsel that Chen's testimony would be different than it had been at Chao's trial. The record does not reveal the date on which the State disclosed to Liu's counsel that Chen would testify differently than he had previously testified about Chen's relationship with Chao. Nevertheless, on March 19, before Chen testified about his relationship with Chao after Chen's wedding, the State notified the Court that the State had learned about the expected changed testimony and had revealed the information to the defense. Chen was still on the witness stand when the State notified the Court on the record, and Chen had not yet testified inconsistently with his prior testimony.

¹ Chao was later re-tried and acquitted of the three intentional murder counts and convicted of the three felony murder charges.

Defense counsel for Liu did not seek a continuance and did not raise any concerns that Chen's changed testimony would alter Liu's trial strategy or disrupt his defense.

Before the direct examination of Chen continued, the Court recessed so that a lawyer for Chen could be secured. Once a lawyer was present to represent Chen's interests, the direct examination continued and Chen testified that his intimate relationship with Chao had continued after Chen's marriage. Chen testified that he had sexual relations with Chao on more than one occasion since Chen's marriage. Chen acknowledged that Chen was testifying on this subject contrary to his prior testimony at Chao's trial when Chen said he only had sex with Chao once after Chen was married.

Liu seeks a new trial.² As grounds, Liu argues that the late disclosure by the State of witness Chen's intention to testify differently at Liu's trial than Chen had testified at Chao's trial should have prompted the Court to continue Liu's trial and allow Liu additional time to investigate. The State responds that a new trial is not mandated in the interest of justice because Liu did not request a continuance at the time of the disclosure; Liu had full opportunity to question Chen on the stand; and Liu has not articulated how his trial strategy would have changed if the trial was continued. Indeed, according to the State, Chen's conflicting testimony was actually consistent with Liu's trial strategy that Chen's testimony should be disregarded by the jury as not credible.

In consideration of Liu's Motion for New Trial, THE COURT FINDS AS FOLLOWS:

1. When testifying as a witness during Chao's trial in 1989, Chen testified that he had only one sexual encounter with Chao after his marriage.

² On remand, the Delaware Supreme Court directed this Court to consider Liu's motion for new trial on its merits and without regard to procedural deficiencies. *Liu v. State*, 61 A.3d 619, at *2 (Table) (Del. 2013).

2. Liu's trial began on Monday, March 11, 1991.
3. On or about Tuesday, March 12, 1991, after the trial had recessed for the day, the State met with Chen to prepare his testimony for the next trial day. The State became aware that Chen would testify that Chen had more than one sexual encounter with Chao after Chen's marriage.
4. The next trial day was Monday, March 18, 1991. Chen was called as the second witness on that trial day.
5. On Tuesday, March 19, 1991, while Chen was still subject to direct examination, but before Chen began testifying about the frequency of Chen's sexual encounters with Chao after Chen's marriage, the State notified the Court that Chen's testimony on this subject would be different than it had been at Chao's trial. Furthermore, the State made a record that the State had since disclosed the anticipated change in Chen's testimony to Liu's defense counsel. This colloquy took place on the record, outside the presence of the jury, and after Chen was removed from the courtroom.
6. Defense counsel for Liu did not seek a continuance or make any comment whatsoever about needing to perform additional investigation.
7. Court recessed to secure counsel for Chen because there were concerns that Chen's changed testimony might subject him to prosecution for perjury.
8. Once counsel was secured for Chen, Chen's direct examination continued on March 19, 1991.
9. Liu's counsel attacked Chen's credibility in a vigorous cross-examination. Indeed, in his closing argument, Liu's defense counsel stated that Chen's testimony at Chao's trial had

not been credible when Chen stated he had only had sex with Chao on one occasion after Chen got married.

10. A Motion for New Trial may be granted upon a motion by the defendant “if required in the interest of justice.”³
11. The United States Supreme Court held in *Brady v. Maryland* that due process is violated when evidence favorable to the defendant that is material to guilt or punishment is suppressed by the prosecution.⁴ In order to determine if a *Brady* violation exists, the Court uses a three-prong test: (1) whether favorable evidence exists that is either exculpatory or impeaching; (2) the favorable evidence is withheld by the State; and (3) there is a reasonable probability that the result of the trial would be different if the information was disclosed to the defendant.⁵ In analyzing the third prong of the test, a “reasonable probability” includes “a probability sufficient to undermine confidence in the outcome” such that prejudice to the defendant has resulted from the State’s failure to disclose the evidence.⁶
12. Three recent Delaware Supreme Court decisions have examined a motion for a new trial in the context of a delayed disclosure by the prosecution to the defense or an alleged *Brady* violation.
13. In *State v. Wright*, the Supreme Court reversed the Superior Court’s finding that there was a *Brady* violation. The defendant was convicted of first degree murder arising out of a robbery at the Hi-Way Inn bar and liquor store.⁷ Forty minutes before the Hi-Way Inn

³ Super. Ct. Crim. R. 33.

⁴ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁵ *Saunders v. State*, 2013 WL 6157181, at *2 (Del. 2013) (slip copy).

⁶ *State v. Wright*, 67 A.3d 319, 325 (Del. 2013).

⁷ *Id.* at 321.

robbery, another liquor store 1.5 miles away was robbed and witnesses' descriptions for the perpetrators were similar to the descriptions of those responsible for the Hi-Way Inn robbery and murder.⁸ The State did not disclose this evidence to the defendant and the defendant filed a motion for postconviction relief, which was granted by the Superior Court.⁹ In reviewing the third prong of the *Brady* analysis, the Supreme Court found that no prejudice to the defendant was demonstrated.¹⁰ Although the information of the similar robbery could have been exculpatory, the police investigated and decided that there was no connection between the two robberies. Moreover, the evidence of the similar robbery did not bolster the defendant's defense, that he was somewhere else with friends, nor did it create any other reasonable probability of a different outcome.

14. The Supreme Court also reversed the Superior Court's decision on appeal in *Valentin v. State* on the grounds of a *Brady* violation.¹¹ A jury found the defendant guilty of various offenses including failure to stop at the command of a police officer and reckless driving.¹² During trial preparation, the defendant's counsel requested discovery from the State which included requests of statements relating to the credibility of prosecution witnesses and an opportunity to review reports and statements of trial witnesses.¹³ At trial, an officer testified to the existence of a recording made during the officers' pursuit of the defendant between the officers and a dispatcher regarding the movements of the defendant's car.¹⁴ The recording was not disclosed to the defendant's trial counsel prior

⁸ *Id.*

⁹ *Id.* at 324.

¹⁰ *Id.* at 325.

¹¹ 74 A. 3d 645 (2013).

¹² *Id.* at 646.

¹³ *Id.* at 647.

¹⁴ *Id.* at 648.

to trial.¹⁵ The defendant testified that he did not know that the truck that approached him was a police truck because no emergency lights were on and, once the lights were on, the defendant testified that he thought the officers were going to hit him.¹⁶ After the defendant was convicted, he appealed to the Supreme Court arguing that although the dispatch recording was consistent with the officer's testimony, no sirens could be heard in the background of the recording, which is consistent with the defendant's defense.¹⁷ In reviewing the third prong of the *Brady* test, the Supreme Court determined that the State's failure to produce the recording prejudiced the defendant.¹⁸ The State's case was based on the officers' testimony and the pursuit of the defendant and, therefore, the failure to disclose the recording deprived the defendant of an opportunity to impeach the officers' testimony regarding the pursuit.¹⁹

15. Finally, in *Saunders v. State*, the Supreme Court affirmed the Superior Court's denial of the defendant's motion for a mistrial after the State made a delayed disclosure of a recorded statement by one of the State's witnesses.²⁰ The defendant was arrested for purchasing cocaine from a confidential informant.²¹ During trial, a Drug Enforcement Agency agent testified about a conversation that occurred between the agent and the confidential informant and stated that a recording of the conversation existed.²² Prior to the second day of trial, the State made the recording available to the defendant. The defendant moved for a mistrial on the ground that the withholding of the recorded

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 651.

¹⁹ *Id.* at 652.

²⁰ *Saunders*, 2103 WL 6517181, at *1.

²¹ *Id.* at *1.

²² *Id.*

statement constituted a *Brady* violation.²³ The trial judge denied the request and allowed defense counsel time to review the recorded statement and an opportunity to cross-examine the witness.²⁴ The Supreme Court found that the defendant was not prejudiced by the delay in disclosure because the confidential informant was cross-examined extensively by the defendant's counsel and counsel declined to recall the agent after reviewing the recording.²⁵ Moreover, the Supreme Court held that there was sufficient evidence to sustain the conviction independent of the evidence contained in the recording that otherwise would have been challenged.²⁶

16. Liu's motion fails under the third prong of the *Brady* violation analysis.

17. The State met with Chen on March 12, 1991, before Chen was sworn as a witness, to prepare Chen for his testimony. Chen disclosed to the State that he had sex with Chao on more than one occasion following Chen's marriage, which was contrary to how Chen testified in Chao's trial.

18. The State disclosed Chen's changed testimony with respect to this information to Liu's counsel prior to March 19, 1991.

19. When the State disclosed to Liu's defense counsel that Chen would testify differently than he had testified at Chao's trial, defense counsel did not request a continuance.

20. After Chen took the stand and began his testimony but before Chen testified about whether he continued his intimate relationship with Chao after Chen's marriage, the State disclosed the anticipated changed testimony to the Court and also informed the Court that the State had already disclosed this information to defense counsel.

²³ *Id.* at *2.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at *3

21. The Court recessed to secure a lawyer to represent Chen before he testified since Chen's sworn testimony would be different from sworn testimony Chen had offered previously in Chao's trial.
22. Liu's trial continued that same day.
23. Chen testified that he and Chao had sex on more than one occasion after Chen married.
24. Although the disclosure of the change in Chen's testimony regarding the continuation of Chen's intimate relationship with Chao was delayed, Liu suffered no prejudice. Liu's counsel had the opportunity to cross-examine Chen and counsel explored the changed testimony fully.
25. The delayed disclosure of the relationship between Chen and Chao did not cause Liu to change his defense or trial strategy. In fact, the extent of the relationship between Chen and Chao also was consistent with Liu's strategy and defense. Chen's change in testimony was consistent with Liu's strategy that Chen's credibility should be rejected by the jury. In closing argument, Liu's counsel challenged Chen's credibility, relying heavily upon Chen's changed testimony to discredit Chen.
26. Although the relationship between Chen and Chao was material to the case, all parties were already well aware of the relationship that existed between Chen and Chao. Disclosure of the relationship between Chen and Chao after Chen's marriage was essential to the State's case, but it also bolstered Liu's defense.
27. Moreover, the delayed disclosure of the information did not create a reasonable probability of a different outcome. The State presented sufficient evidence for Liu's conviction independent of Chen's testimony. Liu was a New York City taxicab driver. Liu had rearranged his schedule with the driver with whom he shared his taxicab so that

Liu could have the cab for the night on which the murders took place. A neighbor of Chen's testified at Liu's trial that the neighbor saw a yellow taxicab early on the morning of the murders on the street adjacent to Compass Drive, the street on which Chen lived and where the crimes occurred. The neighbor testified that he observed the taxicab driving slowly down the cul-de-sac and saw the lights of the taxicab being extinguished. The neighbor testified that the occupants of the taxicab seemed to be looking for a specific house. The neighbor saw the taxicab turn onto Compass Drive and drive up to Chen's house. A forensic chemist testified that traces of gasoline were found in Liu's taxicab, on Liu's pants, and on Liu's shoes. A toll collector for the Delaware Memorial Bridge who was working on the morning of the arson and murders stated that he saw Liu driving a taxicab with a passenger after they crossed the bridge.

28. Although Liu can satisfy the first two prongs of the *Brady* analysis, his claim fails under the third prong. The first prong is met, as Chen's testimony regarding the recency of his relationship with Chao is at least impeaching and possibly exculpatory. With respect to the second prong, it is unclear for how long the fact of Chen's changed testimony was withheld by the State. Regarding the third prong, however, Liu cannot demonstrate that there is a reasonable probability that the result of his trial would have been different had the change in testimony been disclosed earlier or if a continuance had been sought and granted. Indeed, the change in Chen's testimony was consistent with Liu's trial strategy. Also, Liu had an opportunity to cross-examine Chen regarding the testimony and challenge Chen's credibility as a witness.

29. The interest of justice does not require a new trial. Defendant Liu was not prejudiced by the timing of the disclosure by the State. There is no reasonable probability that the

outcome of the trial would have been different if Liu's defense counsel had been informed of Chen's changed trial testimony at an earlier date. There was overwhelming evidence of Liu's guilt separate and apart from Chen's testimony.

NOW, THEREFORE, this 14th day of February, 2014, Defendant Tze Poong Liu's Motion for a New Trial is hereby DENIED.

IT IS SO ORDERED.

Andrea L. Rocanelli

Honorable Andrea L. Rocanelli