IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	:
	:
v.	:
	:
GARRETT D. WHEELER,	:
I.D. No. 0506009181	:
	:
Defendant.	:

Non-Jury Trial: January 31, 2006
Verdict Issued: February 7, 2006
Order: February 8, 2006

Order of Final Decision on the Trial.

Jason C. Cohee, Esquire, Deputy Attorney General, for the State of Delaware.

Sandra W. Dean, Esquire, Office of the Public Defender, attorney for the Defendant.

WITHAM, R. J.

State v. Garrett D. Wheeler
I.D. No. 0506009181
February 8, 2006

A non-jury trial was conducted on January 31, 2006, against Defendant, Garrett D. Wheeler. Defendant, who was charged jointly with Shannon Huey ("Huey"), faced seven of nine charges.[1] The charges as tried were: (1) possession of a deadly weapon during the commission of a felony, (2) maintaining a vehicle for keeping controlled substances, (3) possession of a deadly weapon by a person prohibited, (4) conspiracy second degree, (5) possession of a narcotic schedule II controlled substance (cocaine), (6) possession of drug paraphernalia, and (7) possession of a non-narcotic schedule I controlled substance (marijuana). At the close of the State's case, Defendant made a motion for judgment of acquittal. This order will serve as a decision on that motion, as well as a final decision on the trial.

Facts

On June 9, 2005, Defendant and Huey were driving in a green Ford Taurus. Corporal David Hake ("Corporal Hake"), who serves on the Governor's Task Force, was on duty that night. He and two probation officers were driving in an unmarked car and began following Defendant and Huey. At one point, Huey failed to activate her turn signal 300 feet before turning. Corporal Hake then called the Camden Police Department to have an officer assist in pulling over Defendant and Huey, who had been driving for approximately six minutes. Once the car was stopped for the turn signal violation, Corporal Hake approached the vehicle, recognized Defendant, who

[1]For clarification purposes, these charges will be referred to as Counts 1 through 7 and, therefore, will be numbered differently than on the original indictment. The two additional charges were solely against Huey.

he knew had several capiases, and removed him from the car. Corporal Hake also observed a bag of marijuana in the handle of the passenger's door. While conducting a search of the car pursuant to an arrest, Corporal Hake found a small Ziploc baggie, an off-white chalky substance and a razor. The razor was approximately an inch and a half long, had a straight blade, and came down from the top at an angle on both sides. A search of Defendant at the police station also revealed a burnt crack pipe.

After his arrest, Defendant was taken into custody at Troop 3, where he gave a videotaped statement, which was entered into evidence and viewed during the trial. On the tape, Defendant states that the marijuana was his, that he had smoked crack in the car about two to three days prior to the arrest, that the razor was used to fix a mirror in the car, and that he had been using the car for a few days. Defendant further asserted that he was on his way to the store to buy cigarettes and a blunt. Also, he admitted he had smoked marijuana shortly before getting in the car with Huey.

Defendant testified during the trial. He admitted the marijuana was his for the purpose of protecting Huey, his daughter's mother. When questioned by the prosecutor regarding his statement that he was going to buy a blunt, Defendant claimed that he only said that so Huey would not be incriminated. He also admitted that he could easily see the marijuana, but asserted that he used the arm of the door to pull the door shut. Also, he claimed that he did not know what day it was, therefore, he did not really know how long it had been since he smoked crack in the vehicle.

Based on the evidence presented at trial, I find Defendant *not guilty* of Counts

1, 3, 4 and 5. I find Defendant *guilty* of Counts 2, 6 and 7. Each count will be discussed individually below.

Count 1 - Possession of a Deadly Weapon During the Commission of a Felony:

11 *Del. C.* §1447(a) states, "[a] person who is in possession of a deadly weapon during the commission of a felony is guilty of possession of a deadly weapon during commission of a felony." This is a possession crime. Further, 11 *Del. C.* §222(5) includes a razor in its list of deadly weapons.[2] The State's argument is that Defendant was in possession of the razor while he was maintaining a vehicle for keeping controlled substances. However, during the trial, the State conceded that this charge was "tenuous" at best. I agree and, therefore, find Defendant *not guilty* of possession of a deadly weapon during the commission of a felony based on the facts of this case.

Count 2 - Maintaining a Vehicle for Keeping Controlled Substances:

16 *Del. C.* §4755(a)(5) reads, in pertinent part, "(a) it is unlawful for any person: . . . (5) [k]nowingly to keep or maintain any . . . vehicle . . . for the purpose of using [controlled] substances or which is used for keeping or delivering them in violation of this chapter." In *Priest v. State*,[3] the Supreme Court interpreted Section 4755. The Court held, "to sustain a finding of guilt on a Maintaining a Vehicle charge, the State must offer evidence of some affirmative activity by the defendant to utilize the vehicle to facilitate the possession, delivery, or use of controlled

[2]Section 222(5) will be discussed in more detail below.

[3]879 A.2d 575 (Del. 2005).

substances."[4] Additionally, the Court observed:

> Section 4755 requires only that the State prove a single instance of possession or use of a controlled substance in connection with a vehicle. In these cases, the critical benchmark for determining the sufficiency of the evidence in a Maintaining a Vehicle prosecution has been the degree of the defendant's control or use of the vehicle in connection with the possession of drugs.[5]

In the case *sub judice*, Defendant possessed marijuana in the vehicle. He had been driving the car for a few days prior to the arrest. He had fixed the mirror in the car. He even admitted smoking crack in the car a few days earlier. Therefore, even though he was only in the car for six minutes before it was stopped by the police, this conduct is more than sufficient to prove a single instance of possessing a controlled substance in a vehicle and establishing that Defendant had a high degree of control over the vehicle. Thus, Defendant is *guilty* of maintaining a vehicle for keeping a controlled substance.

Count 3 - Possession of a Deadly Weapon by a Person Prohibited:

11 *Del. C.* §1448(a)(1) prohibits any person convicted of a felony from purchasing, owning, possessing or controlling a deadly weapon. 11 *Del. C.* §222(5) explains that "'deadly weapon' includes a firearm, as defined in subdivision (11) of this section, a bomb, a knife of any sort (other than an ordinary pocketknife carried in a closed position), switchblade knife, billy, blackjack, bludgeon, metal knuckles,

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[4] *Id*. at 575.

[5] *Id*. at 579-80.

slingshot, razor, bicycle chain or ice pick or any dangerous instrument, as defined in subdivision (4), which is used, or attempted to be used, to cause death or serious physical injury."[6] *Taylor v. State*[7] further clarified Section 222(5). In *Taylor*, the Supreme Court explained that the last clause of Section 222(5), which mentions any dangerous instrument that is used or attempted to be used to cause death or serious physical injury, was intended to include as deadly weapons items that had previously fallen within the designation of a dangerous instrument. Unfortunately, there is no case law that further elucidates what constitutes a razor. Therefore, because the "which is used, or attempted to be used, to cause death or serious physical injury" language applies to the preceding phrase "any dangerous instrument," this Court is forced to decide whether the razor blade located in the vehicle is in fact a razor pursuant to Section 222(5).

It should be noted that my findings with regard to this charge are strictly confined to the facts of this case. To that end, I find that the razor in this case is not a deadly weapon. First, the razor clearly looks as if it was at some point part of a tool. It has two notches or indentations on the flat end of it. Second, the only testimony regarding the razor was that it was used to fix a mirror in the car. As a result, I find that the State did not prove beyond a reasonable doubt that the razor was a deadly weapon, so I find the Defendant *not guilty* of possessing a deadly weapon

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[6]Defendant conceded at trial that he is a convicted felon.

[7]679 A.2d 449 (Del. 1996).

while being a person prohibited.

Count 4 - Conspiracy Second Degree:

During the trial, the State decided to *nolle prosequi* the conspiracy charge, so no further discussion is necessary.

Count 5 - Possession of a Schedule II Controlled Substance (Cocaine):

16 *Del. C.* §4753 says, in relevant part, "[i]t is unlawful for any person knowingly or intentionally to possess, use or consume a controlled substance . . . which is a narcotic drug unless the substance was obtained directly from, or pursuant to, a valid prescription . . . ." 16 *Del. C.* §4716(b)(4) names cocaine as a schedule II controlled substance.

In the case at bar, there was no admissible evidence capable of proving that the off-white chalky substance found on the front seat of the car was in fact cocaine. As a result, I find Defendant *not guilty* of possessing a schedule II controlled substance.

Count 6 - Possession of Drug Paraphernalia:

16 *Del. C.* §4771(a) states, "[i]t is unlawful for any person to use, or possess with intent to use, drug paraphernalia." During the trial, Defendant conceded that he was in possession of a burnt crack pipe, which constitutes drug paraphernalia.[8] Consequently, I find Defendant *guilty* of possession of drug paraphernalia.

Count 7 - Possession of a Non-narcotic Schedule I Controlled Substance:

16 *Del. C.* §4754(a) reads, in pertinent part, "[i]t is unlawful for any person knowingly or intentionally to possess, use or consume any controlled substance . . .

[8] *See* 16 *Del. C.* §4771(c)(12)a.

classified in Schedule I . . . not a narcotic drug unless the substance was obtained directly from, or pursuant to, a valid prescription . . . ." 16 *Del. C.* §4714(d)(19) lists marijuana as a schedule I controlled substance.

In his taped interview at the police station, Defendant admitted possessing marijuana. During his testimony at trial, he attempted to recant that admission, alleging that he only claimed the marijuana was his to protect his daughter's mother. However, I find the taped confession at the police station to be more credible and, therefore, accept that evidence as true. Thus, I find Defendant *guilty* of possessing a schedule I non-narcotic controlled substance.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution