SUPERIOR COURT
OF THE STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: October 11, 2005
Transcript Received: November 21, 2006
Decided: February 28, 2006

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Re: *State v. Robert C. Wood, ID# 0503014528*
Upon Defendant's Post-Trial Motion – ***DENIED***

Dear Counsel:

This decides Defendant's Motion for Judgment Notwithstanding the Verdict, or In the Alternative, A New Trial. As you recall, during Defendant's jury trial for Driving Under the Influence[1] and Inattentive Driving[2] a discovery dispute broke out concerning the State forensic chemist's testimony about Defendant's blood

[1] 21 *Del. C. §* 4177.

[2] 21 *Del. C. §* 4176.

alcohol content.

The court became aware of the problem during a scheduling sidebar, while the trial was underway when Defendant, for the first time, mentioned it. Shortly after the scheduling sidebar, the State called the chemist and Defendant, as he promised during the sidebar, objected. That prompted a substantive sidebar, at which the court attempted to get to the bottom of the dispute.

As the jury waited, out of earshot, Defendant protested that the State's automatic discovery response had informed Defendant: "Joy Tengonciang of the Delaware State Police crime laboratory may testify as to the defendant's B.A.C." The State also provided the "BLOOD ALCOHOL REPORT AND CERTIFICATE OF ANALYSIS," which included Defendant's blood alcohol reading: " .32." The response did not, however, include Tengonciang's qualifications. As the sidebar conference evolved, the court pressed Defendant to explain the actual problem with the State's discovery.

What it boiled down to was that although Mr. Ferrara is one of the most experienced defense attorneys doing Driving Under the Influence cases in Delaware, he had never seen Tengonciang testify before. That was because she had only recently transferred to the Delaware State Police as its chemist, from the State Medical Examiner's Office, where she did toxicology. At the sidebar, the court learned that Ms. Tengonciang had moved into David Sockrider's position. Sockrider and his credentials were well-known to the court and everyone doing DUI work in Delaware. Thus, in effect, Defendant's argument was that due to the State's incomplete discovery response concerning her credentials, Defendant was unable to thoroughly prepare to cross-examine Tengonciang.

Initially, the court regarded Defendant's objection, based on the State's alleged discovery violation, as untimely. Relying on Mr. Ferrara's memory of

Clawson v. State,[3] Mr. Ferrara argued at sidebar that because his objection was evidentiary, he was allowed to wait until trial in order to raise the issue. Taking everything into account, including the time of day, the court recessed the trial and ordered the State to produce further discovery concerning Tengonciang.

In other words, in response to Defendant's objection to Tengonciang's qualifications, raised for the first time during trial, the court gave Defendant an evening to prepare for cross-examination. Furthermore, in an exercise of caution, the court gave Defendant leave to file a further submission, in the event that the jury found Defendant guilty.

Defendant was convicted and he filed a supplemental submission. The State filed an answer and Defendant replied. Even if *Clawson* applied, which it does not, the court addressed Defendant's objection properly. The discovery rules are a means to an end. The problem with the State's discovery response, from Defendant's viewpoint, was that it did not include more information about Tengonciang. As soon as Defendant revealed his concern about that, the court ordered that the information be provided, and it gave Defendant time to consider it.

Moreover, by allowing Defendant an opportunity to supplement the record after trial, the court provided for the possibility that upon more thorough analysis, such as a post-trial background check, Defendant might uncover new evidence about Tengonciang that would justify giving him another crack at her, in a new trial. As it stands, based on the court's approach to Defendant's last-minute objection, Defendant has utterly failed to demonstrate any prejudice associated with the State's pretrial approach to discovery.

The court further observes that Defendant has twisted *Clawson*. While *Clawson* unequivocally establishes that Wood was entitled to object at trial to

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[3] *Clawson v. State*, 867 A.2d 187 (Del. 2005).

Tengonciang's testimony about his blood alcohol content, *Clawson* does not allow defendant to spring an alleged discovery violation on the State and the court in the middle of a jury trial. The same goes for the cases on which *Clawson* relies.[4] *Clawson* does not turn the discovery process into a game of "Gotcha!"

It is one thing for a defendant to wait until trial in order to point out that an Intoxilyzer test was administered improperly, as in *Clawson*. It is something quite different for Defendant to wait several weeks, or months, to raise a discovery violation that could be rectified overnight, if it had been revealed. Defendant's objection here was not "evidentiary" in the sense that *Clawson* uses that word. It was tactical. That conclusion is bolstered by the State's supplemental response. The State contends there, and Defendant in his reply does not deny, that the State had previously provided Tengonciang's curriculum vitae to Mr. Ferrara in another case. Defendant's approach was also highly disruptive.

In order to establish that the State's discovery response was inadequate, Defendant also relies on *Johnson v. State*.[5] Like *Clawson*, *Johnson* also is not controlling. Here, the State provided the expert's name and the blood alcohol content she derived. If the chemist had been Dave Sockrider, Defendant would have been prepared for cross-examination. The rub was that a new chemist was involved.

Under the circumstances, including the way driving under the influence cases are customarily litigated in New Castle County and Mr. Ferrara's experience, the court is unwilling to call what happened a discovery violation. In its initial response, the State told Defendant that Sockrider was out and Tengonciang was in.

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[4] *See, e.g.. Dawson v. State*, 581 A.2d 1078, 1085-88 (Del. 1990), *rev'd* on other grounds, 503 U.S. 159 (1992), *enforced*, 608 A.2d 1201, 1206 (Del. 1992); *Hatcher v. State*, 337 A.2d 30, 32 (Del. 1975).

[5] *Johnson v. State*, 550 A.2nd 903 (Del. 1988).

If Mr. Ferrara were truly troubled by the prospect of cross-examining an unknown chemist, he only had to mention it and, in the unlikely event that the State would not have responded with the chemist's curriculum vitae, the court would have ordered its production. Again, Defendant maneuvered to create an issue. Defendant's demand for an acquittal, or even a new trial, is not justified by what happened here.

For the foregoing reasons, Defendant is not entitled to an acquittal or a new trial and his post-trial motions are ***DENIED***.

IT IS SO ORDERED.

Very truly yours,

FSS/lah
oc: Prothonotary (Criminal Division)