

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE :
 :
 v. :
 :
 MARVIN BURTON :
 ID No: 0410003743 :

Decision on Remand

I have concluded that the State made no representations to the victim’s counsel regarding the victim’s request for postconviction relief in exchange for the victim’s testimony at Marvin Burton’s January 27, 2014, evidentiary hearing.¹ I held evidentiary hearings on August 31, 2015, and September 9, 2015. The victim, victim’s counsel, and prosecutor testified at the evidentiary hearing held on August 31, 2015. The prosecutor’s assistant testified at the evidentiary hearing held on September 9, 2015. I have summarized their testimony below.

The Victim’s Counsel

The victim’s counsel was appointed to represent the victim at Marvin Burton’s evidentiary hearing on or about August 8, 2013. The victim’s counsel testified that she had a single phone conversation with the prosecutor shortly after she was appointed where she and the prosecutor reached a tacit agreement regarding the

¹ Question posed to me in the Supreme Court Order dated June 29, 2015.

victim's testimony. The tacit agreement was that if the victim testified at Marvin Burton's postconviction evidentiary hearing consistently with the way the victim testified at Marvin Burton's trial, then the State would help the victim get a lesser sentence. The victim's counsel testified that the tacit agreement was not a formal agreement. Instead, it was just an understanding between two people – her and the prosecutor – who had been in the criminal justice system a long time. The victim's counsel testified that at the time of this phone conversation she knew very little about the victim's testimony at Marvin Burton's trial. However, the victim's counsel did know that the victim had been convicted of charges of Assault in the First Degree and Possession of a Deadly Weapon During the Commission of a Felony and had been sentenced by the Honorable T. Henley Graves to serve eight years in jail even though the State – with a different prosecutor – had only recommended four years. The victim's counsel testified that the prosecutor told her he would “go to bat for the victim.” There were no details of the tacit agreement and the victim had nothing pending with the Court at the time. The victim's counsel testified that after this phone conversation she never discussed the matter again with the prosecutor because she was not sure how the victim would testify at Marvin Burton's evidentiary hearing. The victim's counsel testified that the prosecutor firmly believed that the victim had testified truthfully at Marvin Burton's trial and that her recantation was false and the

result of pressure put on her by Marvin Burton's family. The victim's counsel testified that the prosecutor was sympathetic to the victim and believed that the victim truly was a rape victim and had been treated poorly by her mother and the social service system. The victim's counsel and prosecutor exchanged two e-mails in August 2013. The victim's counsel sent an e-mail to the prosecutor on August 19, 2013, discussing records she had reviewed and asking the prosecutor if he had any other records. The prosecutor sent an e-mail to the victim's counsel on August 20, 2013, stating that the victim's mitigation package was not available to him when he reviewed her presentence investigation report and if it had not been submitted to the Court by the victim's trial counsel before her sentencing, then the victim's counsel might be able to use that as a basis for a resentencing. Neither e-mail mentioned the tacit agreement. The victim filed a *pro se* motion for postconviction relief on September 5, 2013. There was an office conference before me on November 6, 2013, involving the victim's counsel, the prosecutor, and Marvin Burton's counsel. The victim's counsel told everyone that the victim would testify at Marvin Burton's evidentiary hearing consistently with how she had testified at Marvin Burton's trial. The hearing was, at that time, scheduled for November 13, 2013. The victim's counsel said that the victim did not want to testify, but if she did, then she would stand by her trial testimony. The victim's counsel did not mention the tacit agreement

at this office conference. The victim's counsel was, at her request, appointed to represent the victim on her postconviction matters on September 26, 2013. The victim's counsel sent e-mails to the prosecutor on January 8, 2014, January 10, 2014,² and January 17, 2014. The prosecutor did not respond by e-mail. None of these e-mails mentioned the tacit agreement. However, in the e-mail dated January 17, 2014, the victim's counsel told the prosecutor that the victim would testify at Marvin Burton's evidentiary hearing consistently with how she had testified at Marvin Burton's trial. This was ten days before Marvin Burton's evidentiary hearing. The victim's counsel filed a motion for postconviction relief on February 17, 2014. This motion did not mention the tacit agreement. The victim's counsel filed a motion for sentence modification on April 7, 2014. This motion did not mention the tacit agreement.

The victim withdrew her motion for postconviction relief because Judge Graves told her it was not appropriate to have two motions of this nature pending at the same time. Judge Graves considered the victim's motion for sentence modification and reduced her sentence to six and one-half years in jail. The victim's counsel never told me, Marvin Burton's counsel, the prosecutor handling the victim's

² In this e-mail from the victim's counsel to the prosecutor, the victim's counsel told the prosecutor that the victim had told Dr. Janice Stevenson that Marvin Burton had raped her.

charges, or Judge Graves that there was a tacit agreement regarding the victim's testimony at Marvin Burton's evidentiary hearing. The victim's counsel testified that she did not do so because she believed the victim had not honored the tacit agreement. The victim's counsel also testified that it was the prosecutor's responsibility to do this, not her's. The victim's counsel sent an e-mail on April 2, 2014, to the prosecutor handling the victim's charges and copied it to the prosecutor who prosecuted Marvin Burton. The victim's counsel copied the prosecutor because she hoped he would help the victim even though the victim did not honor the tacit agreement. The prosecutor handling the victim's charges responded by e-mail the next day. The e-mails discussed the State's position at the victim's resentencing. The prosecutor handling the victim's charges stated that she would recommend four years, noting that it was what she and the victim's trial counsel had agreed to in the victim's plea agreement. The tacit agreement is not mentioned in either e-mail.

The Victim

I had the Department of Correction bring the victim to the Sussex County Courthouse on August 6 and August 7, 2013, so that she could be interviewed by Marvin Burton's attorney and the prosecutor. The victim was unrepresented at the time. The prosecutor and his assistant met the victim in the cellblock. The victim testified that the prosecutor told her that he knew that she wanted to be with her son

and that if she testified at Marvin Burton's hearing the same way she did at Marvin Burton's trial, then he would help her. The victim testified that, based on what she was told by her counsel, after her counsel had talked to the prosecutor and Judge Graves, the victim would get her sentence reduced to four years if she testified at Marvin Burton's evidentiary hearing consistently with the way she testified at Marvin Burton's trial. The victim also testified that her counsel told her that the prosecutor would help her get her sentence reduced to four years. The victim wrote a letter, dated November 7, 2014, to the prosecutor because she did not get her promised four years.

The Prosecutor

The prosecutor testified that he and his assistant met the victim in the cellblock at the Sussex County Courthouse on August 6 or August 7, 2013. The prosecutor testified that the meeting lasted 10 to 15 minutes and that the victim repeated her recantation. The prosecutor testified that he thought the recantation was ridiculous given the number of times the victim had told a number of different people that Marvin Burton had raped her. The prosecutor testified that he did not say anything to the victim or do anything to give her the impression he would help her in exchange for her testimony at Marvin Burton's evidentiary hearing. The prosecutor testified that the only thing he told the victim to do was to tell the truth. The prosecutor

testified that he did recall having at least one phone conversation with victim's counsel. The prosecutor remembers telling the victim's counsel that, after the victim had recanted, he had reviewed the victim's presentence investigation report to see what she had said about the incident with Marvin Burton. The prosecutor testified that he did not find the "mitigation package" and told the victim's counsel that if the victim's trial counsel did not submit it, then it might give her an argument to have the victim resentenced. This is reflected in the following e-mails:

August 19, 2013 (Victim's counsel to prosecutor)

I have had an opportunity to review the PSI and the court file as well as the sentencing transcript (which I have attached for your review). In addition, I received a copy of the mitigation portion of the PD file which includes records/reports from Dover Behavioral Health, Aquila and Child Mental Health. You indicated to me that you had additional counseling records and DFS records. I would like to get copies of those sooner rather than later. You can email them to me or else I can get them from you later this week or early next week. Please let me know. I am meeting with Carlesha tomorrow. I will let you know if anything changes.

August 20, 2013 (Prosecutor to victim's counsel)

Would it be possible to supply me with the mitigation packet...as an fyi that mitigation packet was not available to me when I reviewed the PSI. Seems like it should have been if it was submitted. You may have a window to request resentencing for her if in fact PD dropped the ball and didn't submit it to PSI. Either way I would appreciate being provided a copy of all that material.

The prosecutor testified that most of his dealings with the victim's counsel involved issues regarding the conditions under which the victim would testify at Marvin Burton's evidentiary hearing. The victim was afraid of Marvin Burton's relatives and did not want them present when she testified. The prosecutor testified that, while he was sympathetic to the victim, he had made no promises of assistance to the victim or the victim's counsel in exchange for her testimony at Marvin Burton's evidentiary hearing. The prosecutor testified that he did not tell the victim's counsel that he would "go to bat" for the victim. The prosecutor testified that he had no reason to promise the victim anything for her testimony. The prosecutor testified that if there had been an agreement regarding the victim's testimony, then he would have disclosed the agreement to Marvin Burton's counsel and would have not sat idly by in court while Marvin Burton's attorney asked the victim about matters that could have influenced her testimony. Lastly, the prosecutor testified he was not involved in the victim's efforts to have her sentenced reduced.

The Prosecutor's Assistant

The prosecutor's assistant is a social worker who has worked with the Department of Justice for 33 years. The prosecutor's assistant spends a large portion of her time working with victims of crime. The prosecutor's assistant also regularly attends meetings with prosecutors and witnesses and takes notes. The prosecutor's

assistant has worked with the prosecutor on hundreds of cases. The prosecutor's assistant testified that she and the prosecutor met with the victim on or about August 5, 2013, before Marvin Burton's evidentiary hearing. The prosecutor's assistant took notes during the meeting, which she produced at the evidentiary hearing. The prosecutor's assistant testified that the prosecutor explained the purpose of Marvin Burton's evidentiary hearing to the victim and told the victim to just tell the truth. The prosecutor's assistant testified that the victim repeated her recantation. The prosecutor's assistant testified that the prosecutor made no promises or threats to the victim regarding her testimony. The prosecutor's assistant testified that she had worked on hundreds of cases with the prosecutor and that he has never promised anything in exchange for the testimony of a witness.

Conclusion

I have concluded that the State made no representations to the victim's counsel regarding the victim's request for postconviction relief in exchange for the victim's testimony at Marvin Burton's January 27, 2014, evidentiary hearing for the following reasons:

1. **The Nature of a Tacit Agreement**

_____The victim's counsel testified that she had a "tacit agreement" with the prosecutor providing that if the victim testified at Marvin Burton's evidentiary

hearing consistently with the way she testified at Marvin Burton's trial, then the State would help the victim get a lesser sentence. A tacit agreement is defined as an agreement that is "not expressed or declared openly, but implied or understood."³ Such agreements are by their nature easily misunderstood. I believe that is what happened here. I believe, and find, that the victim's counsel misinterpreted the prosecutor's sympathy for the victim as an indication that he would help the victim if the victim testified in a certain way at Marvin Burton's evidentiary hearing. Having said this, I do not find that the prosecutor did anything to give the victim's counsel this impression. Instead, I find that the victim's counsel simply read too much into what the prosecutor said about his sympathy for the victim even though she now stands convicted of serious felonies.

2. The Tacit Agreement is Never Mentioned Anywhere

The tacit agreement, and its terms, are never mentioned in any of the e-mails between the prosecutor and victim's counsel. The tacit agreement is not mentioned even though, at the time of the evidentiary hearing, the victim's counsel believed that the victim would testify at Marvin Burton's evidentiary hearing consistently with how she had testified at Marvin Burton's trial. The tacit agreement is not mentioned in the victim's motion for postconviction relief or motion for sentence modification. The

³ Webster's New World Dictionary 1447 (2nd ed. 1982).

tacit agreement was not mentioned to the prosecutor handling the victim's re-sentencing. The tacit agreement was not mentioned to Judge Graves. The tacit agreement was not mentioned to me. The tacit agreement was not mentioned to Marvin Burton's attorney. The tacit agreement was not mentioned during Marvin Burton's evidentiary hearing even though Marvin Burton's attorney questioned the victim about things that would have influenced her testimony. I would have thought that if such an agreement actually existed, then it would have been mentioned somewhere along the way even though it was not performed or was only partially performed.⁴

3. Timing

At the time of the tacit agreement, the victim had nothing pending with the Court. I find it odd that there was supposedly a tacit agreement to get her a lesser sentence when she had nothing pending before the Court seeking a lesser sentence. I also find it odd that there was no discussion about how the prosecutor would help the victim get a lesser sentence.

4. The Nature of the Agreement

The tacit agreement arguably would be unethical. It would have been unethical

⁴ The victim's testimony at Marvin Burton's evidentiary hearing still implicated him in inappropriate sexual conduct with the victim.

for the prosecutor and victim's counsel to agree to anything other than that the victim would testify truthfully at Marvin Burton's evidentiary hearing. An agreement for her to testify in a certain way would be unethical if the prosecutor and victim's counsel believed that her testimony would be false. I do not believe that the prosecutor and victim's counsel would agree to such an agreement.

5. Credibility

_____The victim, victim's counsel, prosecutor and prosecutor's assistant testified at the evidentiary hearing on this matter. The victim is not credible at all now. The victim has told so many different accounts of what Marvin Burton did or did not do to her that she can no longer be believed. Moreover, the victim denied at Marvin Burton's evidentiary hearing that she and the prosecutor had a discussion about how her testimony at the hearing would affect her sentence. The following is an excerpt of that exchange:

Q. So did you, in fact, in August of 2013, discuss with Mr. Gelof how this would impact your sentence that you had already been sentenced by Judge Graves?

A. No.

I have very little personal experience with the victim's counsel and can make no judgment about her credibility other than to say that I expect all Delaware lawyers to be candid with the Court. Having said that, the reality is that some lawyers are

more candid than others and some lawyers more aggressively argue the law and facts than others.

The prosecutor has appeared before me many times over the last 15 years. The prosecutor has not, in my view, ever misstated the law or facts. I find him to be very credible. If the prosecutor says he made no promise to the victim and/or the victim's counsel in exchange for the victim's testimony, then my inclination is to believe him. I also note that the prosecutor's testimony at the evidentiary hearing about his meeting with the victim before Marvin Burton's evidentiary hearing is consistent with the prosecutor's assistant's testimony about that meeting. The prosecutor testified that during the meeting with the victim that the victim repeated her recantation and that he just told her to tell the truth. The prosecutor's assistant testified that this is what happened at the meeting. The prosecutor's assistant's notes reflect that, particularly the part where the prosecutor told the victim to just tell the truth. The following are the two applicable excerpts from the prosecutor's assistant's notes:

“DAG – told V he just wants her to tell the truth”

“DAG – again – just told V to tell truth”

The prosecutor's assistant's notes do not reflect that there was any agreement between the prosecutor and victim for the victim to testify in any particular way. Moreover, the prosecutor had no reason to offer anything to the victim in exchange

for her testimony because he was not concerned about her testimony. The prosecutor believed that the victim's recantation was false and that I would not believe it. The prosecutor's belief was well-founded. I did not find the victim's recantation to be credible. I do find, for the reasons that I have just discussed, that there was not an agreement between the prosecutor and victim's counsel for the victim to testify in any particular way at Marvin Burton's evidentiary hearing.

IT IS SO ORDERED this 28th day of October, 2015.

/s/ E. Scott Bradley

E. Scott Bradley

oc: Prothonotary
cc: Delaware Supreme Court (522,2014)
John R. Garey, Esquire
Kathryn J. Garrison, Esquire