

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

April 25, 2006

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Re: ***State of Delaware v. Ricky Hicks, Jr.***
ID #0410023146A

Dear Counsel:

Following a three-day trial from April 11 - 13, 2005, the defendant, Ricky Hicks, (hereafter "Hicks") was convicted of Trafficking in Cocaine, Delivery of Cocaine and Possession of Drug Paraphernalia. Hicks was acquitted of charges of Maintaining a Vehicle and Resisting Arrest.

After sentencing on July 8, 2005, Hicks filed a direct appeal to the Supreme Court. On January 31, 2006, the case was remanded back to this Court to permit consideration of a motion for a new trial on the ground of newly discovered evidence. After review, the Motion is denied.

THE LAW

To order a new trial because of newly discovered evidence, three factors must be satisfied:

- (1) The evidence must have been newly discovered; i.e., it must have been discovered since trial, and the circumstances must be such as to indicate that it could not have been discovered before trial with due diligence;
- (2) The new evidence must be of such a nature that it would have probably changed the result if presented to the jury; and
- (3) The evidence must not be merely cumulative or impeaching.¹

THE TRIAL

_____The evidence presented by the State of Delaware (“the State”) included testimony from Lance Skinner of the Delaware State Police (hereafter “Skinner”); Dwight Young, a Milford police officer (hereafter “Young”); Timothy Davis, a co-defendant (hereafter “Davis”); John McColgan, an evidence officer with the Delaware State Police (hereafter “McColgan”); Ronald Brzezicki, an off-duty Department of Correction officer (hereafter “Brzezicki”); and Farnan Daneshgar, a medical examiner (hereafter “Daneshgar”).²

Reviewing this testimony, Skinner saw Hicks in a parking lot at a Royal Farms store in Milford, Delaware.³ Although it was nighttime, the area was well lit, and he knew Hicks.⁴ Hicks was standing on the driver’s side of a Ford Explorer talking with

Davis.⁵ Hicks and Davis are cousins.⁶ Hicks arrived at Royal Farms in an orange Honda driven by his brother, Dennis Hicks (hereafter “Dennis”).⁷ The orange Honda was parked in an odd manner near the Explorer.⁸

As Skinner walked toward the cars, Hicks saw him approach and asked, “What’s up Skinner?”⁹ He observed Hicks reach into his jacket and throw an object into the Explorer.”¹⁰ Skinner asked Hicks what he threw into the Explorer. Although Hicks denied throwing anything, he did not recall Skinner asking this question.¹¹ A bag of cocaine was thrown on Davis’ lap and somewhat shocked, he flipped it off his t-shirt toward the back of the car.¹² A bag of cocaine was found on the floorboard of the backseat.¹³

Skinner arrested Davis and put him into the patrol car.¹⁴ Skinner intended to arrest Hicks, but before this could be accomplished, a female, Juannetta Daniels (hereafter “Daniels”) walked to the car from the Royal Farms Store and appeared to be getting into the driver’s side of the Explorer.¹⁵ She had accompanied Davis to the store.¹⁶ Hicks yelled at her to leave and to pay no attention to Skinner.¹⁷ Skinner restrained Daniels and told her “Don’t even think about it.”¹⁸ Skinner then directed her to return to the store, and noted that he did not see her take anything from the Explorer.¹⁹ Skinner retrieved the bag of cocaine from the backseat of the Explorer and secured it.²⁰ Later that night at the Troop, he gave this and all other evidence seized from the Honda to McColgan.²¹ When analyzed by Daneshgar, the bag was found to contain about 25 grams of crack cocaine.²²

Skinner arrested Hicks and placed him in the patrol car with Davis. Davis was yelling that the cocaine belonged to Hicks.²³ Young and Skinner heard Hicks saying that the cocaine was his and Davis had nothing to do with it.²⁴ While being taken to the Justice of the Peace Court, Hicks told Skinner that selling drugs was the only thing he knew how to do.²⁵ Although Hicks acknowledged Davis was yelling that the cocaine did not belong to him, he denied making any of the incriminating statements attributed to him.²⁶

Hicks testified that Dennis, along with Chris Daniels and a Dale Davis (hereafter “Dale Davis”), were present at the Royal Farms Store. Further, Hicks claimed that Dennis was speaking with Davis and that Dale Davis was in the backseat of the Explorer about the time when Skinner arrived.²⁷ Hicks knew the police were coming because he recognized the type of vehicle, saying “Anybody could tell it was a cop, if that’s what you’re asking.”²⁸

At the scene, Skinner patted Hicks down and did not find contraband.²⁹ The orange Honda and Explorer were searched initially in the parking lot, and later at the Troop, where an inventory was done.³⁰ In the Explorer, aside from the bag of cocaine, there was a coat, cell phone and CD case in the backseat.³¹ A piece of a ripped plastic baggie and another bag of cocaine were seized from the orange Honda and the ripped piece appeared to fit with the bag of cocaine found in the Explorer.³²

Although charged as a co-defendant, Davis’ charges were dismissed without

prejudice at trial in exchange for his testimony.³³ Davis told Skinner that the drugs belonged to Hicks,³⁴ that Daniels was Davis' friend,³⁵ and that the event of the cocaine being thrown into the Explorer was somewhat of a shock.³⁶ Davis further related that two bags were thrown in the car.³⁷ He was not surprised that only one bag was found because, according to him "it wasn't mine,"³⁸ and he, therefore, did not have much information about the cocaine.

THE MOTION

The motion is based upon a typewritten affidavit bearing Daniels' signature which was delivered to defense counsel in December, over seven months after trial. The affidavit does not have a jurat, and it is irregular on its face, as Daniels' name is misspelled. For these reasons, the Court asked that Daniels be subpoenaed to clarify these points. Although served, Daniels did not appear, without explanation to excuse her attendance. Nevertheless, to expedite matters, the assumption is made that Daniels would testify under oath to what is stated.

The essential part of the affidavit is ". . . Also, one of the two bags of crack cocaine that Tim had on him when he arrived at Royal Farms that night was still under the seat. When I received my truck back I gave Timothy Davis the bag of crack cocaine the same day."

Applying the pertinent legal principles, the affidavit was only newly discovered because it was delivered to counsel after trial. However, the information contained in it

could have been discovered before trial with due diligence.

Daniels was known to Hicks because he called out to her at the Royal Farms Store. Her name was read to the jury as a potential witness at jury selection.³⁹ Daniels was subpoenaed by the State and was present throughout the trial. At oral argument, it was also learned that Daniels had given a statement to Skinner which was not remarkable. It had been provided to the defense. Although Daniels' name was redacted, her identity was apparent in the context of the case. In the exhibits accompanying the State's response, the affidavit of probable cause to arrest Hicks revealed Daniels' name. Further, during the first day of testimony, Skinner identified her in open court.⁴⁰

At trial, the defense suggested that Daniels had access to the Explorer, and by inference, to the cocaine. In closing, the defense argued: ". . . Then he [Skinner] sees Ms. Daniels come out of the store. Was she carrying a package? He doesn't recall . . . He has to go to the vehicle . . . Who got into the Explorer? Who was in that vehicle? Who had access? [Were] there two bags of drugs as alleged in Mr. Davis in his testimony yesterday on the videotape and today . . .?"⁴¹ Earlier Hicks had testified that Dennis and Dale Davis were in the Explorer, too.⁴²

Casting suspicion is understandable as a defense strategy. Certainly, there was an opportunity to question Daniels, even if there was no reasonable expectation that the defense would do so or that she would provide helpful information. Additionally, since she was present throughout the proceedings, the information in the affidavit was

technically available.

Nor is it probable that the evidence would have changed the result if it had been presented to the jury. The State had a strong case. Hicks was observed by Skinner throwing an object into the Explorer. The object was immediately apparent as a bag of cocaine to Skinner, upon his first viewing of it. Davis made a reflex motion to get rid of it. He was surprised by Hicks' action, he had just completed drug rehabilitation and he was trying to keep out of trouble.⁴³

Skinner and Young testified that, in response to Davis' strongly expressed concerns, Hicks admitted that the cocaine was his. It reasonably can be inferred that Hicks knew his cousin had recently finished a Court-ordered drug treatment program, and desired to protect Davis from further criminal prosecution. Hicks further admitted, while being presented to a magistrate, that selling drugs was his only means of making a living.

Hicks had a prior criminal record that discounted his credibility.⁴⁴ His version of events was contradictory. His recollection of the people present at the Explorer when Skinner arrived was that “. . . Dale was the only one that got out of the car and went to the Explorer, him, me and the brother. We was all talking in the Explorer. Somehow Carlos noticed that Skinner was at the light. He noticed Skinner was at the light and told Dale and them to come on. But I didn't know that.”⁴⁵ However, Hicks later acknowledged that he knew the approaching vehicle was a police car.⁴⁶ Further, Hicks claims all but he and Dennis left when Skinner arrived. But he was not able to explain

what happened to Dennis; his brother would be expected to have helpful information but he did not testify.⁴⁷ At first, Hicks acknowledged being patted down but later says he was never searched.⁴⁸ Although providing other detailed information, he could not recall an obvious question: “Q: Your testimony is he never asked you if you threw anything? A: I don’t recall.”⁴⁹ Hicks admitted that “Tim was the one yelling, saying that they was my drugs.”⁵⁰ In this context, notwithstanding the affidavit, a jury would likely believe that Hicks incriminated himself in the manner testified to by the State’s witnesses.

Daniels’ statement itself is weak. It is conclusory. It was made over seven months after trial. It is inconsistent with Daniels’ report given to Skinner at the time of the incident. Indeed her failure to appear is suspicious.

It is true that Davis did say two bags were thrown in quick succession. However, being shocked somewhat, he could easily be mistaken about the number of bags. The Explorer was thoroughly searched and inventoried before and after Hicks’ arrest. Daniels did not take anything from the Explorer. A jury could conclude on the basis of common sense that Davis was simply mistaken due to the stress of the event.

The final question is whether the new evidence is merely cumulative or impeaching. Skinner identified Hicks as the person who delivered cocaine to Davis. Davis testified that Hicks threw cocaine onto him. Daniels’ statement impeaches this testimony.

The present case is similar to the facts in *Brittingham v. State*, 608 A.2d 725 (Del.

1991). In *Brittingham*, the defendant was convicted of delivery of cocaine. The police initially arrested his uncle for the crime. After learning of the mistake, the defendant was brought to trial. Before sentencing, the defendant presented his uncle's affidavit, in which his uncle admitted to the crime.

On appeal, *Brittingham* argued that the uncle's confession was newly discovered evidence, and the trial judge wrongly denied his motion. Pertinent to the analysis here, Justice Moore said: "The final requirement is that the evidence *not* be merely cumulative or impeaching. The case presents a perfect example of evidence that would be used for impeachment purposes. The State prosecuted the defendant, Brittingham. During the prosecution, the detective identified Brittingham in a photo and again in the courtroom. Furthermore, the detective denies ever selling drugs to the uncle. In view of this, the introduction of the uncle's confession would merely impeach the detective's identification of Brittingham. The trial judge properly rejected the motion for a new trial (emphasis in original)." *Id.*

Here, Skinner's testimony was positive. There was no misidentification or mistake. At oral argument, defense counsel recognized the impeaching nature of Daniels' statement.

Defendant argued that the acquittals on the Resisting Arrest and Maintaining a Vehicle counts show that the State's case was weak. However, this is not persuasive because the jury was instructed to consider each crime separately.⁵¹ On the state of the

evidence, a reasonable doubt was raised on the Resisting Arrest charge given Hicks' possible misunderstanding of Skinner's words and Hicks' submissive behavior as observed by Brzezicki.⁵² Further, reasonable doubt was raised about Maintaining a Vehicle when Hicks claimed that either Dennis or someone else drove the Honda to the store.⁵³ While Hicks repositioned the Honda after delivering cocaine to Davis, the record evidence was too slim a reed to support a conviction on this charge.

Considering the foregoing, defendant's motion is denied.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv

cc: Prothonotary

Ms. Cathy Howard, Clerk, Supreme Court, No. 360, 2005

ENDNOTES

1. *Lloyd v. State*, 534 A.2d 1262, 1267 (Del. 1987).
2. Their testimony is transcribed in Volumes A, B and C. The references will reflect the appropriate volume and page number.
3. A-30-31.
4. A-30-31.
5. A-36-37; B-12.
6. C-28-29.
7. C-59; C-60.
8. A-31.
9. A-37.
10. A-37.
11. A-38; C-74.
12. B-14-15, 99.
13. A-39.
14. A-40.
15. A-42, 43.
16. B-11,12.
17. A-42.
18. A-43.
19. A-62-63; C-34.
20. A-43.
21. A-77-78.
22. A-121.

23. A-47; B-15; C-65, 67.
24. A-46-47; B-63.
25. A-49.
26. C-65, 67, 85, 86, 90.
27. C-60-62.
28. C-69.
29. A-66; C-61.
30. A-43, 45, 47, 48; C-34-35.
31. A-45.
32. A-45, 48.
33. B-6.
34. B-15.
35. B-11.
36. B-105-106.
37. B-96.
38. B-99; C-24-25.
39. A-4.
40. A-43.
41. C-162-163.
42. C-61, 67.
43. B-97.
44. C-58-59.
45. C-61.
46. C-69, 71.

47. C-72, 87, 89.
48. C-61, 62.
49. C-74.
50. C-67.
51. C-174.
52. B-73-78.
53. C-59.