

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

1 The Circle, Suite 2
GEORGETOWN, DE 19947

August 27, 2014

Adam D. Gelof, Esquire
Department of Justice
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James E. Liguori, Esquire
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RE: *State v. Marvin T. Burton*
ID No: 0410003743

Dear Counsel:

This is my decision on Marvin T. Burton's Motion for Postconviction Relief. Burton was convicted of Rape in the First Degree, Rape in the Second Degree and Unlawful Sexual Contact in the Second Degree in 2005. The victim was Burton's 11-year-old daughter, Carlesha Burton. Carlesha was born in 1993. Her mother is Kesha Davis. Burton and Kesha were not married at the time of Carlesha's birth. Carlesha did not meet Burton until she was 10-years-old. Burton was incarcerated from 1992 until 2003 for raping two teenage girls. Burton and Kesha renewed their relationship in 2003. They eventually moved into a trailer behind Burton's parents' house. The trailer was used mostly for storage and did not have running water. Carlesha stayed in Burton's parents' house while her parents stayed in the trailer.

The first incident of sexual abuse occurred one night while Burton, Kesha and Carlesha were at Burton's parents' house. Burton, who was standing behind Carlesha, put his arms around Carlesha and started rubbing his body against her buttocks. When Kesha saw this, Burton moved away. The second incident of sexual abuse occurred one morning while Carlesha was sleeping in Burton's parents' house. Carlesha awoke when Burton put his fingers in her vagina. The third incident of sexual abuse occurred in the morning while Carlesha was getting ready to take a shower in Burton's parents' house. Burton came into Carlesha's bedroom, pushed her down on the bed and placed his penis in her vagina. Carlesha did not immediately report these incidents to anyone because she did not want to get Burton in trouble.

Burton and Kesha got married on September 1, 2004. However, the marriage soon unraveled as Burton began spending time with his ex-wife and "counseling" a teenage girl from church. Kesha and Carlesha moved to North Carolina. The incidents of sexual abuse came to light when Kesha and Carlesha were coming back to Delaware for a visit. On the way back, Carlesha became upset when Kesha told her they were going to visit Burton. When Kesha asked Carlesha why was she upset, Carlesha told Kesha that Burton had sexually abused her.

Burton argues that his convictions should be vacated and that he should get a new trial because Carlesha has recanted her allegations of sexual abuse. At trial,

Carlesha testified convincingly that Burton sexually abused her. However, Carlesha has, both before Burton's trial and afterwards, denied that Burton sexually abused her. On January 22, 2010, while being interviewed at the Child Advocacy Center, Carlesha told her interviewer, Ralph "Buster" Richardson, that the whole thing with Burton had been a fraud. The Attorney General's Office turned this video interview over to Burton's lawyers, who then filed this Motion for Postconviction Relief on May 2, 2013. An evidentiary hearing was held on January 27, 2014. Carlesha was the only witness. She testified that Burton did not have sexual intercourse with her.

Standard of Review

The test to be applied when addressing recanted testimony is set forth in *Larrison v. United States*.¹ The Court in *Larrison* held that a motion for a new trial based upon recanted testimony should be granted if: (i) the trial court is reasonably well satisfied that the testimony given by a material witness is false; (ii) without the testimony, the jury might have reached a different verdict; and (iii) the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after trial.²

¹ 24 F.2d 82 (7th Cir. 1928).

² *Id.* at 87-88.

Discussion

Carlesha's statements during the evidentiary hearing and at other times raise considerable doubt about her recantation. After considering everything, I have concluded that Carlesha's recantation is not reliable because (1) Carlesha's foster mother pressured her to recant, (2) Carlesha recanted because she felt that Burton had served enough time for what he had done, (3) Carlesha could not remember if Burton had sexual intercourse with her or not, (4) Carlesha's concerns about her son's safety influenced her testimony, (5) Carlesha has made conflicting statements about what Burton did to her, (6) Carlesha is an admitted liar, (7) Burton's family pressured Carlesha to recant, and (8) Carlesha recently told the Honorable T. Henley Graves that Burton repeatedly raped her.

1. Pressure From Carlesha's Foster Mother

Carlesha testified at the evidentiary hearing that she was pressured by her foster mother to say that she was lying when she testified at trial that Burton had sexually abused her. It appears that it was Carlesha's foster mother that made the arrangements for her to go to the Child Advocacy Center in 2010 so that she could recant. The following are the applicable excerpts of Carlesha's testimony at the evidentiary hearing.

Q. Okay. Did you have occasion in 2010 to go to the Child

Advocacy Center for an interview?

A. Yes.

Q. About four years ago?

A. Yeah.

Q. Okay. And during that time, were you interviewed by the person at the Child Advocacy Center about issues that you brought up to your foster mother and child advocate at the time?

A. Yes.

Q. And do you recall telling that interviewer at the Child Advocacy Center in 2010 that you falsely accused Marvin Burton of having sex with you?

A. Yes.

Q. Okay. And did anybody force you to say that?

A. No.

Q. Okay. You said it because it was the truth?

A. I said it because I felt as though it was right at the time, I guess.

Q. Well, I don't know what you mean by, I guess, young lady. So why don't you just explain to me or to Judge Bradley what you mean, I guess.

A. I was living with my foster mom. And I felt like I was being pressured. So I said what I felt I needed to say at that time.

Q. Okay. Who was pressuring you?

A. Felicia Ennols [ph].

Q. Felicia - -

A. Ennols.

Q. - - Ennols? And who is Felicia Ennols?

A. My foster mom.

Q. And how was she pressuring you?

A. She was telling me that I was lying; everybody knew that I was lying; that I might as well just come out and tell the truth; that he didn't do it; and just making me feel uncomfortable staying there.

Q. And you were with this foster mother, Felicia, for how long?

A. I don't know. A couple months - - a few months - - six months, maybe. I don't know.

Q. And what is Felicia's relationship with Marvin Burton?

A. I don't know if she knows him, but her sister is married to his uncle or something. I - -

Q. Okay. So what you're telling Judge Bradley and me today is that you felt pressure from Felicia, your foster mother, concerning that you were telling the truth or you were lying?

A. That I was lying

Q. That you were lying? They were pressuring you to say that you were lying?

A. Yes.

Q. All right. So you then - - Felicia, then, set up an interview with the Child Advocacy Center; is that right?

A. I guess so.³

2. Burton Had Served Enough Time

Carlesha was interviewed by the prosecutor shortly before the evidentiary hearing was to be held in August 2013. Carlesha told the prosecutor that Burton did not have sex with her. When asked about this at the evidentiary hearing, Carlesha acknowledged that she had told the prosecutor that Burton did not have sex with her. However, when asked if this was the truth, Carlesha said no. When asked why she said it, Carlesha said that she said it because Burton had served enough time for what he had done and that she just wanted to help him come home. The following are the applicable excerpts of Carlesha's testimony at the evidentiary hearing.

Q. Do you remember having an interview with Mr. Gelof in August of 2013 two days before we were supposed to have this hearing - - August 5th, I think it was - - do you remember that?

A. Yes.

Q. Okay. Did you tell Mr. Gelof at that meeting - - and you were there with a nice young lady by the name of Laurel Braunstein. Do you remember Ms. Braunstein?

A. Yes.

³ *State of Delaware v. Marvin T. Burton*, Crim. Act. Nos. 04-10-0231, 0645 and 0646, at 17-19 (Del. Super. January 27, 2014) (TRANSCRIPT).

Q. Did you tell Mr. Gelof and Ms. Braunstein that Marvin Burton did not have sex with you?

A. Yes.

Q. Okay. And was that the truth?

A. Was it - - no.

Q. It was not the truth?

A. Yes.

Q. Okay. And why did you say that, then?

A. Because I felt - - I feel as though it's been a long time and he served his time for what he did and I thought I could help him come home.

Q. All right. And this was just spontaneous on your part. You wanted to help your father?

A. Yes.⁴

3. The Truth And Carlesha's Memory

Carlesha made some bewildering statements during the evidentiary hearing. Carlesha told the Child Advocacy Center interviewer in 2010 that the whole thing with Burton was a fraud. When asked at the evidentiary hearing if she told the truth at the CAC interview, she said that she partially told the truth. When asked what the

⁴ *Id.* at 22-23.

partial truth was that she didn't tell, Carlesha said "that he had sex with me." She added that the "he" was Burton. When asked if she was now saying that Burton did have sexual intercourse with her, Carlesha said that she did not remember if Burton did or did not. Ultimately, Carlesha said that Burton did not have sexual intercourse with her. This exchange is troubling because Carlesha did not tell the CAC interviewer in 2010 that Burton had sexual intercourse with her. Thus, it remains unclear what was partially true and partially untrue about her statements in 2010. It is also troubling that, at least initially, Carlesha could not remember in 2014 whether Burton had sexual intercourse with her or not when she was 11-years-old. The following are the applicable excerpts of Carlesha's testimony at the evidentiary hearing.

Q. When you spoke to the individual at the Child Advocacy Center, the interviewer - - we've seen that video - - were you being threatened in any way?

A. No.

Q. Okay. And were you talking voluntarily at that time?

A. Yes.

Q. And you were telling the truth at that time?

A. Partially, yes.

Q. What's the partial that you didn't tell?

A. That he had sex with me.

Q. That - - who is "he"?

A. Marvin.

Q. Marvin. You're now saying that Marvin Burton had sex with you?

A. That he didn't.

Q. That he didn't? Right. So Marvin - - let me just - - Marvin Burton has never had sex with you, has he?

A. I don't remember now. I don't remember.

Q. You don't remember whether your father, Marvin Burton, had sexual intercourse with you?

A. Yes.

Q. Yes, you don't remember, or yes, he did?

A. Yes, I don't remember.

MS. WOLOSHIN: Do you want to talk to me? Do you want a minute to talk to me?

THE WITNESS: Uh-un.

MS. WOLOSHIN: Okay.

BY MR. LIGUORI:

Q. You have said here this morning before Judge Bradley and everyone else that Marvin Burton did not have sexual intercourse with you; is that right?

A. Yes.

Q. Okay. Do you want to change that now?

A. No.

Q. I can't hear you, ma'am.

A. No.⁵

4. Carlesha's Concerns About Her Son

Carlesha has a three-year-old son who is being raised by his father and aunt. Carlesha is concerned about his safety. Carlesha is afraid that if things do not go well in Court for Burton that something might happen to her son. The following are the applicable excerpts of Carlesha's testimony from the evidentiary hearing.

Q. Do you have any concern for the safety of your child?

A. Yes, I do.

Q. Can you explain that.

A. I feel as though that if - - okay. I don't know how people know all of what they know about my son. My son doesn't go anywhere and he doesn't have any contact with anybody other than his dad and his aunt. So I feel as though that if, maybe, things don't go right in court, I don't know, something might happen to my son.

Q. And does Marvin Burton, your father - - do you know - - how would you describe how many relatives he has or friends in the

⁵ *Id.* at 39-41.

community?

A. I don't know.

Q. You don't know? Did you have some concern about who was going to be in the courtroom today?

A. Yes, I did.

Q. How come?

A. Because I'm scared of the outcome and I don't know what - - how the reaction is going to be.⁶

5. Carlesha's Conflicting Statements About What Burton Did To Her

Carlesha has made conflicting statements after Burton's trial about what Burton did to her. At Carlesha's CAC interview in 2010, she stated that the only thing that Burton did was that he hugged her and that her mother saw him do it. At the evidentiary hearing, Carlesha said that Burton used his hands to touch her vagina and breasts and that his hands went inside her vagina. She added that the touching occurred at Burton's parents' house. This is consistent with her trial testimony, but inconsistent with her statements during the CAC interview. The following are the applicable excerpts of Carlesha's testimony at the evidentiary hearing.

Q. Okay. Did he touch you?

A. Yes.

⁶ *Id.* at 43-44.

Q. Okay. What do you remember about that?

A. He used his hands to touch my body.

Q. What parts of your body?

A. My vagina.

Q. Do you remember that as actually happening?

A. Yes.⁷

- - - - -

Q. Where do you remember this - - the touching that Marvin Burton did starting?

A. When did it start?

Q. Yeah.

A. Probably, like, when I was 11.

Q. Okay. Do you remember where you were?

A. At his parents' house.⁸

- - - - -

Q. Did he touch you?

A. Yes.

⁷ *State of Delaware v. Marvin T. Burton*, Crim. Act. Nos. 04-10-0231, 0645 and 0646, at 45(Del. Super. January 27, 2014) (TRANSCRIPT).

⁸ *Id.* at 49.

Q. And he touched your vagina?

MS. WOLOSHIN: Hold on one moment.

(Whereupon, a discussion was held off the record between the witness and her attorney, Ms. Woloshin.)

THE COURT: Why don't you be more - -

MR. GELOF: Okay

THE COURT: - - specific, Mr. Gelof.

MS. WOLOSHIN: Yeah.

BY MR. GELOF:

Q. Did - - your father did touch your vagina?

A. Yes.

Q. And he did touch your breasts?

A. Yes.

Q. And - -

THE COURT: With what?

THE WITNESS: His - -

MR. GELOF: With what?

THE WITNESS: - - hand.

BY MR. GELOF:

Q. Did you - -

MS. WOLOSHIN: Wait just one second.

(Whereupon, a discussion was held off the record between the witness and her attorney, Ms. Woloshin.)

THE WITNESS: He did not use his penis. He used his hands inside of my vagina.⁹

6. Carlesha Is An Admitted Liar

When Carlesha was asked why she had told various counselors that Burton had sexually abused her, she said that she has told so many lies that she can't keep up with them. The following are the applicable excerpts of Carlesha's testimony at the evidentiary hearing.

Q. And why did you tell your counselors that your dad sexually abused you?

A. Okay. Honestly, I've told a lot of lies to cover up other lies that I've told for whoever behalf and I can't even keep up with my own lies. So I said what I thought I'd said before.

Q. Okay. But you had treatment people that were looking after your well-being was?

A. Yes.

Q. Okay. And you've told those treatment people many times over the years that your dad sexually abused you?

⁹ *Id.* at 56-58.

A. My story changes a lot.¹⁰

7. Pressure From Burton's Family

Carlesha pled guilty to Assault in the First Degree and Possession of a Deadly Weapon During the Commission of a Felony on June 5, 2012. The charges arose out of an incident where Carlesha stabbed a young woman a number of times because she was talking to the father of Carlesha's son. A pre-sentence investigation was done and a report prepared. The pre-sentence officer noted the following in his report:

It should also be noted that during her initial interview for this report the offender commented that she has constantly been under pressure from Marvin Burton's family for her to recant her claim that her father raped her.

Thus, at least as of June 5, 2012, it was Carlesha's position that she had been under constant pressure by Burton's family to recant. The Honorable T. Henley Graves sentenced Carlesha to serve eight years in jail followed by a lengthy period of probation.

8. Carlesha Told Judge Graves That Burton Raped Her

Carlesha filed a Motion to Modify Sentence on April 7, 2014 and an Amended Motion to Modify Sentence on June 2, 2014. Attached to the Amended Motion is a

¹⁰ *Id.* at 45-46.

five-page handwritten letter that Carlesha wrote to Judge Graves in an effort to get her sentence reduced. In it she states that Burton raped and molested her every chance he got. This letter was written approximately four months after the evidentiary hearing where Carlesha recanted and said that Burton had never had sexual intercourse with her. The applicable portions of Carlesha's letter to Judge Graves are excerpted here:

I have been physically abuse[d] and sexually abused.

- - - -

I ask that you continue reading as I take you on a short trip down memory lane so you can understand who I am, where I come from [,] where I plan to go and most important my day to day struggles. For ten years my life I felt whole. I had a mother, father, a brother and 2 sisters. There was a respectable relation ship. My mom and dad weren't together but between the two homes I felt so much love. The age of eleven everything was stolen from me. I found out my dad really wasn't my dad. I met my boilogakal [sic] father. My life changed forever. There was a father daughter bond being broken. I felted cheated, lied to and sad. I soon found myself depressed, lonely and lost. After 6 months of living with my new dad I started getting raped. Every chance he got I was molasested. [sic]

- - - - -

My family got together and start[ed] talking about how my grades went down, how I try to kill myself and how I was acting different. Well somebody figured out I was more than likely being raped. My mom asked If I was touched inapproretily [sic]. Of course being brain washed I lied and said no. All in the same breath I cried. I cried for help because I wanted and needed someone to help me. My mom started acting evil towards me. She felt like I was the reason my dad touched me or that I destroyed her life.

Conclusion

I am not reasonably satisfied that Carlesha's testimony at trial was false. Carlesha's recantation is simply not credible. Burton's family and Carlesha's foster mother have pressured her to recant. Moreover, Carlesha is fearful for her son's safety if these proceedings do not go well for Burton. The State has long believed that Burton's family has pressured Carlesha to recant. Carlesha has established that the State's beliefs are well-founded. Thus, it appears that Carlesha's recantation is not motivated by her desire to tell the truth, but by pressure brought on her by others and by her desire to protect her son. Indeed, Carlesha has acknowledged that her recantation was not motivated by her desire to tell the truth, but instead by her feeling that Burton had served enough time for what he did to her. Carlesha, even when she says that Burton did not have sexual intercourse with her, cannot consistently say exactly what Burton did to her. At the Child Advocacy Center interview in 2010, Carlesha told the interviewer that Burton only hugged her. At the evidentiary hearing Carlesha said that Burton also touched her breasts and vagina with his hands. There is simply no way to reconcile her testimony, leaving me with serious doubts about her credibility. Lastly, approximately five months after the evidentiary hearing, Carlesha told Judge Graves that Burton raped her, leaving me to believe that Carlesha will say whatever best suits her needs or concerns at the time. Carlesha is just not a credible

witness at this time. Marvin T. Burton's Motion for Postconviction Relief is DENIED.

IT IS SO ORDERED.

/s/ E. Scott Bradley

E. Scott Bradley

oc: Prothonotary
cc: Counsel