IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	No. 10,2012
Plaintiff Below-Appellant,	)	
	)	Superior Court of the State of Delaware in and for New Castle County
v.	)	
	)	
JERMAINE WRIGHT,	)	Cr. ID No. 91004136DI
	)	
Defendant Below-Appellee.	)	
	)	
	)	

MEMORANDUM OPINION

Background

On January 3, 2012 this court entered an opinion and order vacating defendant Wright's murder conviction and death sentence. In a nutshell, this court relied upon two perceived constitutional errors: (1) the warnings given to Wright by the chief investigating officer prior to Wright's interrogation were deficient, and (2) the State withheld potentially exculpatory evidence relating to a similar crime

occurring at Brandywine Valley Liquor Store ("BVLS"). The State appealed, and after briefing and supplemental briefing in the Supreme Court, the high court remanded this matter for a factual determination whether Wright's attorney had actual notice of the events at BVLS because of two contemporaneous newspaper articles discussing the HiWay Inn murder and its possible link to the BVLS events.

After remand this court conducted an evidentiary hearing at which Wright's trial attorney, John Willard, Esq., testified. Following that hearing the court requested testimony from the chief investigating officer who appeared at a second post-remand evidentiary hearing, and thereafter the parties made written submissions. This is the court's finding of fact as required by the Supreme Court's order of remand. This opinion assumes familiarity with the significance of the BVLS events which is discussed at some length in this court's January 3 opinion.

Before addressing two procedural issues and the substance of the remand, the court wishes to explain what might otherwise appear to be a significant omission from its

January 3, 2012 opinion. In that opinion this court found that the undisputed evidence (in the form of testimony from both the prosecutor and defense counsel at Wright's trial) showed that the State never produced any information about BVLS to Defendant. This court did not address, however, the possibility Wright's attorney had actual knowledge of the BVLS events from other sources, specifically the two newspaper articles. This is because the issue was never raised by the State. Although the State vigorously opposed the contention that the information relating to the BVLS events was exculpatory, it never argued that the failure to turn it over to defense counsel was harmless error or that Mr. Willard had actual notice of the BVLS events. Moreover the two newspaper articles which form the basis for the State's present argument were not even part of the record in these Rule 61 proceedings. Hence no discussion about these matters appears in the court's original opinion.

Scope of the Remand

In retrospect this court believes that it improperly expanded the record on remand, and therefore the court will briefly explain its understanding of the scope of the remand and why it believes it erred in expanding the evidentiary record in certain respects. The scope of this remand is quite narrow--this court is limited to making a factual determination whether defendant Wright's trial attorney, John Willard, Esq., had actual knowledge at the time of trial of the events at BVLS. Despite the straightforward scope of this remand, it is important to delineate one issue which is *not* presently before this court. As mentioned earlier, this court found in its January 3 opinion that the State did not advise Defendant of the BVLS events. This court does not view the remand as an invitation to revisit that finding.

The Supreme Court's order remanding the matter as well as the history of the appeal make it clear that this court is not to reconsider its holding that the State did not disclose the BVLS information to Defendant:

- In a post-argument June 19, 2012 letter from the Clerk of the Supreme Court to counsel requesting supplemental briefing, the Court instructed counsel to "[a]ssume[ ] further that the State failed to disclose exculpatory evidence relating to the attempted robbery at Brandywine Village Liquor Store."[1]
- Consistent with the Supreme Court's June 19, 2012 instructions, the State's opening supplemental brief before the Supreme Court did not contain argument challenging this court's factual finding that the State did not disclose the BVLS information to defense counsel.[2] Likewise this court's factual finding was not a topic of discussion in Wright's answering supplemental brief[3] or the State's reply supplemental brief[4] before the Supreme

[1] Supreme Court, D.I. 56.
[2] *Id*., D.I. 57.
[3] *Id*., D.I. 58.
[4] *Id*., D.I. 59.

Court. Rather those arguments focused on the newspaper articles.

- The Supreme Court's order remanding this matter expressly reiterated the underlying assumption that the State failed to disclose the information about BVLS to defense counsel prior to trial. In addition, the Supreme Court was careful to limit the scope of the remand, ordering that "the sole purpose [of the remand is] determining whether the non-disclosure of the BVLS attempted robbery was immaterial"[5]

In sum, the validity of this court's factual determination that the State did not disclose the BVLS information to the defendant falls well outside the scope of this remand.

Despite the obvious care taken by the Supreme Court to limit the scope of the remand, this court improvidently expanded the record when it decided to recall former state police detective Mayfield for additional testimony. Most, if not all, of Detective Mayfield's post-remand testimony related to

[5] *Id*., D.I. 62.

the State's non-disclosure of the BVLS evidence. Although the parties did not object to the recall of the detective this court concludes, upon a more careful examination of the Supreme Court's order and the matters leading to it, it erred when it recalled the detective. Suffice it to say the court finds that Detective Mayfield had nothing of value to offer insofar as the remanded question is concerned, and the court therefore has not considered his latest testimony.

Finally, out of an abundance of caution the court emphasizes that this portion of its opinion should not be read as a thinly veiled message that it no longer harbors the view expressed in its January 3 opinion that the State did not disclose the BVLS events prior to Wright's trial. Consistent with what it believes to be the scope of this remand, the court has given no consideration to that finding.

Burden of Proof

There is a general rule in Rule 61 matters that the defendant bears the burden of proving that his or her conviction results from an error by the trial court. This case is

somewhat unusual in that the defendant has made out a prima facie case that he has been deprived of his constitutional rights as set out in *Brady v. Maryland,*[6] and the State is seeking to defend on the basis that any such error is harmless on the basis of matters (in this case defense counsel's knowledge of the contents of newspaper articles) which do not appear in the record. The cases, insofar as this court can tell, do not address the burden of proof in a Rule 61 proceeding under such circumstances. The court therefore requested the parties to brief that issue.

Having now weighed the evidence the court finds it is unnecessary to decide which side bears the burden of proof. Assuming, but not deciding that the burden rests on Defendant to show his counsel was unaware of the BVLS events, the court finds that he has satisfied that burden. This court is reluctant to decide issues, particularly matters of first impression, when the fair resolution of the case does not

[6] 373 U.S. 83 (1963)

require it to do so.[7] Accordingly it will not reach the issue here.

Analysis

Two articles appearing in the Wilmington *Evening Journal*,[8] a daily newspaper of general circulation throughout Delaware, lie at the center of this aspect of the controversy. Both are about the HiWay Inn murder and both refer to a possible connection between that crime and the attempted robbery at BVLS. The first, published on January 16, 1991 noted that "Wilmington police said [that] about an hour [before the HiWay Inn killing], two men of similar description walked into Brandywine Village Liquors. . . ." The second, published on February 1, 1991 contained a photograph of Wright and

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[7] *See Gatz Properties, LLC v. Auriga Capital Corp.,* 2012 WL 5425227 (Del.).

The court is aware, of course, that in its January 3, 2012 opinion it resolved multiple arguments when it was theoretically not necessary to do so. Having found that Wright was entitled to relief under his *Miranda* and *Brady* arguments it was not necessary to reach Wright's arguments which the court found were lacking in merit. But post-conviction proceedings are a different breed of cat than most litigation. Because of the potential for federal *habeas corpus* proceedings it is in the interest of judicial economy to resolve all arguments presented in a post conviction petition even if it is not necessary to do so in order to dispose of the petition. This does not mean, however, that courts should resolve extraneous legal issues not essential to resolution of an argument.

Out of an abundance of caution, the court adds that its comments in this footnote should not be taken as a suggestion that a trial court should reach the merits of a procedurally barred motion.

[8] The *Evening Journal* and the Wilmington *Morning News* were later combined and published as the Wilmington *News Journal*.

Dixon, the latter of whom was by then a suspect and was still at large. According to the second article

> Police said they were investigating a possible connection between the slaying [at the HiWay Inn] and another liquor store heist that night. That robbery occurred about an hour earlier four miles away, at Brandywine Valley Liquors.

The court finds that these two articles would have provided notice to any reader, let alone an experienced criminal lawyer, that there was a possible link between the HiWay Inn murder and the events at BVLS.

The court also finds that Wright's attorney was aware of the existence of newspaper coverage of the HiWay Inn murder by the time the trial began. The chief investigating officer testified at the proof positive hearing that he interviewed a witness who "had already seen the paper … it was Saturday's paper, that … has [suspected co-perpetrator Dixon's] picture in there." Elsewhere, a statement by Dixon, which was provided to Mr. Willard prior to trial, contains information that Dixon was told by Cathy Green that the newspapers stated he was a suspect in the HiWay Inn murder. Defendant conceded

to the Supreme Court that Mr. Willard was aware of this prior to trial:

> "Mr. Willard knew that Green learned that Dixon was wanted for the HiWay Inn offense when she read it in the newspaper .... Mr. Willard knew this from pretrial interviews with Green herself ...."[9]

In sum, there is no doubt that Wright's trial counsel was aware of the newspaper article prior to trial.

The conclusion that Mr. Willard was aware of the existence of the articles does not end the inquiry. The ultimate issue is not whether Mr. Willard was aware of their existence but whether he was aware of their contents, specifically the references to BVLS. The court finds he was not.

In reaching its conclusion the court relies heavily on its assessment of Mr. Willard's credibility when testifying before it. On two occasions in connection with the present Rule 61 proceedings Mr. Willard adamantly denied knowledge of the

[9] Supreme Court D.I. 58 at 9.

BVLS events.[10] Having had the opportunity to observe Mr. Willard's demeanor while testifying, the court believes him to be credible.

The State argues that it is difficult to believe Mr. Willard did not read the newspaper articles after he became aware of their existence. This argument may have some surface appeal, but in the context of this case it is not persuasive. As evidenced by the transcript of the proof positive hearing and the trial, the State's prosecutor was also aware of the existence of these articles.[11] Yet he too testified that he was unaware of the BVLS events when Wright's trial took place--testimony the State has never challenged during these proceedings. In short, the court cannot agree with the State that Mr. Willard must have read the articles when its own prosecutor apparently did not read them either.

The State also suggests that Mr. Willard's impassioned statements during these proceedings about his belief in Wright's innocence are evidence that he is biased. The court

[10] He has also made similar denials in Wright's federal habeas corpus proceedings and, in addition to his live testimony before this court he has filed affidavits in these proceedings containing the same denials. His testimony and affidavits that he was unaware have been unwavering.

[11] The prosecutor, Ferris Wharton, Esq., did not testify at the post-remand evidentiary hearing. The testimony referred to here was offered during the Rule 61 proceeding.

has taken this into account in assessing Mr. Willard's credibility, albeit it ascribes less weight to this potential bias than does the State. There is no doubt that Mr. Willard fervently believes in Wright's innocence and in his view justice requires that Wright's conviction and sentence be vacated. Having observed Mr. Willard's testimony, however, the court does not believe that his fervor would cause him to put his reputation and future at risk by fabricating testimony which could have easily been undercut by the discovery of some long lost transmittal letter contradicting him.

Lending credence to Mr. Willard is his testimony he would have exploited BVLS evidence had he been aware of it. The value of this evidence seems so great that it would be almost impossible for a lawyer in Mr. Willard's position to overlook it. The record further demonstrates his willingness to pursue helpful evidence. As the court observed in its January 3 opinion, Mr. Willard roamed Wright's former haunts at night alone seeking witnesses or any information of value. In light of Mr. Willard's dogged efforts to find evidence, it is incomprehensible to this court that he would fail to investigate

the potentially significant BVLS lead had he known about it.[12] Under the totality of the circumstances present here, the absence of any such investigation by Mr. Willard strongly suggests to the court that he was simply unaware of the BVLS events.

Finally the court turns to the various transcript extracts relied upon by the State. Although these show that Mr. Willard must have been aware of the existence of the newspaper article, none of the cited passages provide even a hint that Mr. Willard was aware of the BVLS matter. Nowhere in the cited passages is there a reference to BVLS; at most they point to the existence of articles about the HiWay Inn killing.

Conclusion

Assuming, but not deciding, that Defendant bears the burden of proving a negative—his counsel was not given exculpatory information about BVLS—the court finds that he has met that burden. Two key players in Wright's trial, the

[12] The court is aware, of course, that Mr. Willard's assistance to Wright during the penalty phase was ineffective. This does not mean (and the State has not argued) that Mr. Willard would have failed to pursue the BVLS matter even if he had known about it. It is apparent that Mr. Willard's defense of his client was focused on proving he was not guilty, not on saving him from the death penalty.

prosecutor and defense attorney, testified they were unaware of the BVLS matter. The court finds them both to be credible. Further the BVLS matter was so significant and so obvious that the absence of any investigation by defense counsel strongly suggests to the court that he was unaware of it. The State's argument is not much more than a conjecture that because Mr. Willard was aware of the articles he must have read them. On balance the evidence weighs strongly in favor of Defendant, and the court finds that his counsel was unaware of the exculpatory evidence stemming from the BVLS attempted robbery at the time of Defendant's trial.

Dated: November 28, 2012

/s/
John A. Parkins, Jr.
Judge