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IN THE SUPREME COURT OF THE STATE OF DELAWARE

NICOLE HANSLEY, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	)))))))))))	No. 586, 2013

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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DATED: February 12, 2014

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NATURE AND STAGE OF THE PROCEEDINGS

The Defendant was arrested in November 2012 and later indicted for the offenses of drug dealing – aggravated possession of heroin (2 counts), possession of cocaine, and possession of drug paraphernalia. (A1, A6-7).

After a jury trial, she was convicted of the all offenses. The State filed a motion to have her sentenced as an habitual offender under 11 *Del. C.* § 4214(a), which was granted. [D.I. 19].

She was sentenced to, *inter alia*, to five years imprisonment at Level 5 on the first count of drug dealing – aggravated possession, four years imprisonment at Level 5 suspended after two years on the second count of drug dealing – aggravated possession of heroin, and probated terms on each of the possession of cocaine and possession of drug paraphernalia offenses. Exhibit B attached to Opening Brief.

A notice of appeal was docketed for the Defendant. This is the Defendant's opening brief on appeal.

SUMMARY OF THE ARGUMENTS

1. The Defendant wanted to present evidence from a retired police officer that the Defendant was a known crack addict and prostitute in order to support her defense that a drug addict and prostitute would not have possessed the quantity of cocaine with which the Defendant was charged and that a drug dealer would not trust a known drug addict and prostitute to have access to and control of his large inventory of heroin. The Superior Court excluded the proffered testimony on the ground that the Defendant must first testify that she was an addict and prostitute as a threshold to being permitted to offer testimony from another witness that she was an addict and prostitute. The Superior Court's ruling was an abuse of discretion and violated the Defendant's Constitutional right to present a complete defense because evidence that the Defendant was a drug addict and prostitute was relevant to showing that another person, not her, had committed the offense and would have been in control of the drugs in question.

2. The Defendant was charged with two counts of drug dealing – aggravated possession of heroin based on her alleged possession of a small amount of heroin in a nightstand aggregated with a larger amount of heroin contained in a plastic container underneath a hotel bed and a second count based on her alleged possession of the cocaine found in a small locked safe

found adjacent to the plastic container underneath the bed. This multiplicitous charging – dividing a single offense of drug dealing – aggravated possession of heroin into two offenses – violated the protection against double jeopardy under the Constitutions of Delaware and the United States.

STATEMENT OF FACTS

Corporal Eric Huston, Delaware State Police ("DSP"), and his partners from the Governor's Task Force were conducting surveillance inside and outside of the Riverview Motel on the Governor Printz Boulevard near Claymont on November 28, 2012, at about 1:30 a.m. They detained two persons outside, later identified as Derrick Tann and Michelle Bloothfood. As Tann and Bloothfood were being questioned by police officers in the parking lot outside, the Defendant approached the group and said that she was there to get a ride from them. Cpl. Huston testified that he noticed a smell of burnt marijuana on the Defendant. Officers had noticed a smell of burnt marijuana emanating from a room in the hotel. The suspects were detained and officers obtained a search warrant for the room where they had smelled the burnt marijuana. The Defendant was personally searched and officers found a small bag containing .01 grams of cocaine on her and two pipes used to ingest crack cocaine were later found concealed on her body. A13-16 (D.I. 24. 7/24/13, pp. 27-43).

When officers searched the room, they found numerous items in a nightstand between the beds. In a drawer in the nightstand, six small packets containing heroin were found concealed in an empty cigarette pack. Numerous documents were found in the base of the nightstand, including

documents in the name of the Defendant and an individual named Marquis Brown. Concealed underneath one of the beds, police found a plastic container containing 755 small packets of heroin within a quantity of rice.[1] Next to that container, police found a small locked safe which they later forcibly opened. Inside the safe, police found an additional 1,298 small individually wrapped glassine bags of heroin packaged for redistribution. The 755 small packets of heroin in the plastic container and the 6 small packets of cocaine found in the cigarette pack from the nightstand were later weighed by the Office of the Medical Examiner and determined to weigh a total of 7.04 grams. The 1,298 packets of heroin in the safe were determined to weigh 13.7 grams. St. Ex. #7. A receipt issued to the Defendant and Abigail Robbins, $700 dollars in currency, packages of unused hypodermic needles, library cards, gift cards, a prepaid credit card to Ezra Brown, and a check for $300 from Pabian Properties to the Defendant were also found in the safe. The evidence was examined for latent fingerprints but no fingerprints comparisons or DNA connected the Defendant to any of the property seized by the police from the hotel room. Police observed quantities of clothing, including female clothing in the room, but police searched the Defendant and her purse but no room key or key to the safe was found by

[1] According to a police witness at trial, rice is used as a drying agent to dehydrate or prevent a powdered controlled substance from becoming moist.

police in the Defendant's possession or otherwise. A17-27 (D.I. 24. 7/24/13, pp. 42-81).

Cpl. Dewey Stout, DSP, was not involved in the Defendant's arrest that night but testified as an expert for the prosecution on the illegal controlled substances trade and the significance of the evidence seized that night. He testified that the amount and packaging of the heroin seized that night was consistent with heroin distribution. A50-54 (D.I. 24. 7/24/13, pp. 174-189). No spent bags, used needles, or other paraphernalia consistent with active heroin use were found. A57-59 (D.I. 25. 7/25/13, pp. 5-13). He admitted that prostitutes often will associate themselves with drug dealers so that they can obtain access to drugs for their addiction, but that the dealer maintains control of the drugs and that the prostitute essentially prostitutes while the dealer maintains control of the drugs while giving some to the prostitute in order to maintain control of her. A65 (D.I. 25. 7/25/13, pp. 37-39). He also admitted that dealers typically do not consider prostitutes reliable for holding or controlling the dealer's inventory of controlled substances. A71-72 (D.I. 25. 7/25/13, pp. 63-65).

Derrick Tann testified for the Defendant that he went to the Governor Printz that night to pick up the Defendant and to take her to New Castle Avenue. He admitted that he knew her as a prostitute who frequented New

Castle Avenue. A73-84 (D.I. 25. 7/25/13, pp. 100-141).

I. THE SUPERIOR COURT ABUSED ITS DISCRETION BY RESTRICTING THE DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT FAVORABLE EVIDENCE.

Question Presented

The question presented is whether the Superior Court abused its discretion by not permitting the Defendant to introduce evidence from her expert witness that the Defendant was a prostitute addicted to crack cocaine, which was relevant to her defense that the significant amount heroin which the Prosecution charged that she possessed was actually in the control of a drug dealer who would not trust an addict prostitute to have control of a significant amount of heroin and money under his control. The question was preserved for review by the Defendant's proffer of testimony from a retired police officer, who personally knew and had arrested and worked with the Defendant in numerous controlled substance investigations, that the Complainant was a known prostitute addicted to crack cocaine. A8-11.

Standard and Scope of Review

Ordinarily, a trial court's evidentiary rulings are reviewed for an abuse of discretion. *Kelly v. State*, 981 A.2d 547, 549 (Del. 2009). However, alleged constitutional violations pertaining to a trial court's evidentiary rulings are reviewed *de novo*. *Allen v. State*, 878 A.2d 447, 449 (Del. 2005).

Argument

The Defendant did not portray herself as an innocent at trial. She did not contest that she was in possession of a very small amount of cocaine and drug paraphernalia associated with it on the night of her arrest. The Prosecution claimed, however, based on circumstantial evidence of her presence near where the heroin was found, that she had control of that significant amount of heroin, cash, and paraphernalia found by police that would ordinarily only be possessed by a drug dealer. As a crucial part of her defense, she wanted to be able to present evidence to the jury that she was a known addict and prostitute whom a drug dealer who actually was in possession and control of these drugs would never trust to have possession of his drug inventory and the tools of his business.[2] While such a defense may be "unconventional" as the Prosecutor characterized it, (A8), it is not constitutionally prohibited and she should have been permitted to present her full defense. To support that defense, the Defendant sought to introduce the testimony of a recently retired police officer

[2] While her own witness could have testified that drug dealers do not ordinarily allow addict prostitutes to have access to a large drug inventory, that aspect of her defense evidence would have been corroborated by the Prosecution expert's admissions that prostitutes often will associate themselves with drug dealers so that they can obtain some access to drugs for their addiction through the dealer, but that the dealer usually maintains control of the drugs because dealers typically do not consider prostitutes reliable for holding or controlling the dealer's inventory of controlled substances. A65, 71-72 (D.I. 25. 7/25/13, pp. 37-39, 63-65). The Defendant was still deprived of her right to present evidence to that effect, however, and, just as significantly, evidence that she was a drug addict, which the Prosecution would not concede and which the trial court characterized as a "supposition" not supported by the evidence, was not admitted into evidence. A100 (D.I. 26, 7/26/13, p. 63).

who had arrested the Defendant and had conducted drug investigations using the Defendant on numerous occasions and who personally knew the Defendant as a prostitute and crack addict. A8-9. The Prosecution objected to the presentation of this evidence in her defense and the Superior Court ruled that the Defendant could not present this testimony unless she herself first testified that she was an addict and prostitute, otherwise there would not be a sufficient foundation to present evidence from anyone else that she was a drug addict and prostitute. A8-9.

The Defendant had a Constitutional right to present evidence that she was a known addict and prostitute as proof of her defense, even if it was unconventional, and there is no legal requirement that she testify to that herself as a threshold before she is permitted to present her defense through other admissible evidence. A trial court cannot place evidentiary barriers before what would be constitutionally relevant evidence to a complete defense.

"Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Similarly, denying a defendant the opportunity to present defense evidence concerning the circumstances of his confession in order to show the jury that it was not voluntary and therefore unreliable deprived the defendant of

a right to present exculpatory evidence and a complete defense. *Crane v. Kentucky*, 476 U.S. 683 (1986).

In this case, the defense was that someone else, not the Defendant, had actual control of the significant amount of heroin found by police. If the defense is that someone else, not the Defendant, committed the offense, the Defendant could not be constitutionally restricted from presenting evidence to that effect. *Holmes v. South Carolina*, 547 U.S. 319 (2006). A defendant need not prove or meet a threshold of proof that another party had committed the offense. Likewise, a threshold that the Defendant must first testify herself and layout the defense before additional evidence of the defense is permitted is not constitutionally permissible. A reasonable doubt that the defendant had committed the offense based on the proffered defense evidence, regardless of whether it came from the Defendant personally, would be sufficient.

The Superior Court thereby abused its discretion and thereby unconstitutionally deprived the Defendant of her right to present favorable evidence in her behalf and a complete defense.

II. IF THE DEFENDANT POSSESSED HEROIN, THERE WAS ONLY ONE OFFENSE, NOT TWO, AND SHE SHOULD NOT HAVE BEEN CHARGED WITH MULTIPLICITOUS OFFENSES OF DRUG DEALING - AGGRAVATED POSSESSION OF HEROIN.

Question Presented

The question presented is whether it was permissible for the Defendant to be sentenced for two counts of aggravated heroin possession when the evidence showed at best that he had only possessed one quantity of heroin at one time in one place. There was no objection to the Defendant's being charged or sentenced for multiplicitous offenses of aggravated possession of heroin. This issue should, nonetheless, be reviewed on appeal in the interest of justice because the error is clear on the record and it is purely a question of a law unaffected by any interpretation of the evidence at trial. *Williams v. State*, 796 A.2d 1281, 1284 (Del. 2002).

Standard and Scope of Review

The standard and scope of review is plain error. *Id*.

Merits of Argument

The Defendant was convicted and sentenced for two offenses of drug dealing - aggravated possession of heroin under 16 *Del. C.* § 4752, which is a Class B felony. A1. The Prosecution alleged in Count I of the indictment under 16 *Del. C.* § 4752(1) that Defendant possessed with intent to deliver a

Tier 4 quantity of heroin, which is four grams or more of heroin. A6. In the second count of the indictment, the Prosecution alleged under 16 *Del. C.* § 4752(3) that the Defendant possessed 5 grams or more of heroin. A6.

The Prosecution's evidence showed that 6 small glassine bags of heroin were found in a cigarette pack in the nightstand. In addition, 755 small glassine bags of heroin were found with rice in a plastic container under a bed in the motel room. These 761 small glassine bags of heroin were combined by the Prosecution and determined by the Medical Examiner to weigh 7.04 grams. A12(a), 46-49. The 1,298 small glassine bags of heroin found in the personal safe next to the plastic container underneath the bed were determined by the Medical Examiner to weigh 13.17 grams. A12(a), 46-49.

The Prosecution's evidence showed that if the Defendant was in possession and control of the heroin found in the plastic container underneath the bed and the heroin found in the small safe next to the plastic container underneath the bed, she was in possession of the heroin at the same time and in the same place. Nonetheless, the Prosecution charged the Defendant with one offense of aggravated possession of heroin based on the heroin found in the cigarette package and the plastic container and an additional separate offense of aggravated possession based on the heroin

found in the safe adjacent to the plastic container.

The Prosecution's dividing the Defendant's offense of aggravated possession of heroin into separate counts, "charging someone multiple times under the *same statute*," violated the multiplicity doctrine. *Williams v. State*, 796 A.2d., at 1285 (emphasis in original). "Multiplicity is the charging of a single offense in more than one count of an indictment. Dividing one offense into multiple counts of an indictment violates the double jeopardy provisions of the constitutions of the State of Delaware and of the United States." *Id*. As in *Williams*, if a defendant possesses all of the drugs at the same time in the same general location with the same intent even if the drugs were in separate caches, the multiplicity doctrine applies and the defendant can only be charged with one offense. *Id*., at 1286-1288; s*ee also Carletti v. State*, 2007 WL 1098549 (Del. Super.) ("courts have not dissected a statute, applied a single part to the sub-parts, and permitted multiple counts of the same statute based on one act").

Therefore, the Defendant could only have been charged and sentenced for one count of drug dealing – aggravated possession, a Class B felony offense, and her multiplicitous conviction and sentence should be vacated.

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's conviction and sentences for drug dealing – aggravated possession of heroin should be reversed, or in the alternative, at least one of those convictions and sentences vacated.

Respectfully submitted,

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