



IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	No. 423, 2013
Appellee,	)	
	)	On Appeal from the
v.	)	Superior Court of the
	)	State of Delaware in and
JERMAINE WRIGHT,	)	for New Castle County
	)	
Defendant Below,	)	
Appellant.	)	

APPELLANT'S REPLY BRIEF

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December 20, 2013

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JURISDICTION

The State maintains that both the Superior Court and this Court lack jurisdiction to consider Mr. Wright's claims because he should have raised them by cross-appealing when the State appealed the Superior Court's 2012 grant of a new trial. SAB 8.¹ Each argument is unfounded.

A. This Court Has Jurisdiction.

As to this Court's jurisdiction, the State ignores important principles of appellate procedure. First, Mr. Wright was the prevailing party in the Superior Court, which vacated his conviction and sentence, suppressed his custodial statement, and granted him a new trial on both guilt-innocence and penalty. A-171, 185, 189 (Superior Court Opinion at 83, 97, 101). He received all the relief he had sought in post-conviction review. "As a general rule, the prevailing party may not appeal a decision in its favor" if it has received all the relief sought in the trial court. *Hercules Inc. v. AIU Ins. Co.*, 783 A.2d 1275, 1277 (Del. 2000); accord *In re CNX Gas Corp. Shareholders Litigation*, No. 5377-VCL, 2010 WL 2705147, at *1-2 (Del. Ch. July 5, 2010). "Standing to cross-appeal . . . like standing to appeal, requires the party seeking relief to have been aggrieved by the judgment." *Id.* (citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334 (1980)). Only to seek additional or

¹ "SAB" refers to the State's Answering Brief, and "B-" to the State's appendix. "AOB" refers to Appellant's Opening Brief, and "A-" to Appellant's appendix.

“affirmative” relief must a prevailing litigant cross-appeal. *See Banaszak v. Progressive Direct Ins. Co.*, 3 A.3d 1089, 1093 (Del. 2010) (rejecting appellee’s challenge to form of relief granted in lower court because appellee failed to cross-appeal); *Lawrence v. Simmons*, 889 A.2d 283 (Table), 2005 WL 3454825, at *1 (Del. Dec. 14, 2005) (because appellee did not cross-appeal to seek additional affirmative relief, limited on appeal to arguments defending lower court judgment). Mr. Wright had no standing to cross-appeal.

Second, the statute that authorized the State’s 2012 appeal, 10 Del. Code Ann. § 9902(d), does not allow for cross-appeals. *See* AOB 10 (citing *State v. Brower*, 971 A.2d 102, 110 (Del. 2009) (Supreme Court had no jurisdiction over defendant’s cross-appeal during State’s appeal pursuant to § 9902(d) of order granting new trial); *State v. Maxwell*, 620 A.2d 859 (table), 1992 WL 401575, at *1 (Del. Dec. 7, 1992) (Supreme Court had no jurisdiction over cross-appeal by defendant during State’s § 9902(d) appeal of order suppressing evidence); *State v. Cooley*, 457 A.2d 352, 356-57 (Del. 1983) (Delaware law does not provide for cross-appeals in cases governed by §§ 9901-04)). The State attempts to distinguish *Brower*, *Maxwell*, and *Cooley* on the ground that in each of those cases the Superior Court had not yet imposed sentence at the time of the State’s appeal (SAB 9-11), but that is a distinction without a difference. In each case this Court had no jurisdiction over the defendant’s cross-

appeal because there was no final judgment. The State does not explain why it should matter for jurisdictional purposes whether the lower court has *not yet* sentenced the defendant or has *vacated* the previously imposed conviction and sentence. In either event, a defendant has no final adverse order to appeal and this Court has no jurisdiction to hear the appeal.² Therefore, Mr. Wright could not have cross-appealed these claims in 2012.

Now, however, that the Superior Court has entered a final order denying relief and reimposing Mr. Wright's convictions and sentences, this Court has jurisdiction to address the claims raised in his opening brief. That review will not give him a second bite at the apple (SAB 12), but a first opportunity to appeal these claims.

B. The Superior Court Had Jurisdiction.

This Court conferred jurisdiction on the Superior Court by remanding the case. A-201. On remand, until the lower court reimposed the convictions and sentences, it had jurisdiction to “hear, try, and finally determine” the matter. 10 Del. Code. Ann. § 2701. Thus the Court had jurisdiction to address Mr. Wright's *Motion to Clarify* unresolved claims. The Commonwealth maintains that the *Motion to Clarify* was

² The State quotes this Court's statement in its 2013 opinion that “Until the appeal is decided, Wright's conviction is not finally vacated.” SAB 10 (quoting 67 A.3d at 322). That statement addresses the proper construction of the bail statute, 11 Del. Code Ann. § 2103, and related provisions, and has no bearing on the construction of § 9902(d).

analogous to a motion to reopen, re-argue, or reconsider its prior judgment. SAB 13. That specific argument applies only to the claim that trial counsel was ineffective at the penalty retrial, and Mr. Wright explains in Point II why the argument is unsound. More generally, the State argues that the only way Mr. Wright could have presented his claims appropriately in 2013 was by a successive post-conviction petition under Rule 61. SAB14. Even if that is true, a successive post-conviction petition may require relief for a petitioner who establishes the exceptions to the procedural bars. Mr. Wright alternatively asked the Superior Court to consider each claim in the *Motion to Clarify* as a new Rule 61 motion (*see* B-66, 69), and, as described below, alleged that exceptions applied to any potential procedural bars.

LEGAL ARGUMENT

I. THE STATE FAILED TO DISCLOSE EXCULPATORY INFORMATION RELATING TO WITNESSES GERALD SAMUELS AND KEVIN JAMISON, AND THOSE NON-DISCLOSURES, CUMULATIVELY WITH THE NON-DISCLOSURE OF EVIDENCE PERTAINING TO THE BRANDYWINE VILLAGE LIQUOR STORE ROBBERY, WERE MATERIAL.

A. The Non-Disclosure of Evidence That Impeached State’s Witness Gerald Samuels Prejudiced the Defense.

1. The Status of the Samuels Claims

In the 2012 appeal, Mr. Wright defended the Superior Court’s grant of relief for a *Brady*³ violation relating to the Brandywine Village Liquor Store attempted robbery, and argued, as an alternate basis for relief, that the State had also committed several *Brady* violations relating to its cooperating witness Gerald Samuels. This Court’s 2013 opinion does not mention the Samuels claims. It is therefore unclear whether those claims received a merits ruling on appeal. In both the Superior Court and this Court, Mr. Wright has sought a definitive ruling on the Samuels claims. Under Rule 61(i)(4), he should receive a merits ruling in the interest of justice because of the uncertainty surrounding their status and because of his innocence.

The State argues that this Court has already “implicitly rejected” the Samuels claims (SAB 19). Mr. Wright urges to Court to rule explicitly. As discussed below

³ *Brady v. Maryland*, 373 U.S. 83 (1963).

and in the opening brief, the Samuels claims require relief both individually and cumulatively with the other *Brady* claims.

2. Samuels's Prior Cooperation Agreement and the Expectation of Leniency in This Case

The State argues that the claims are procedurally barred because they are untimely and could have been presented in earlier proceedings. SAB 17. It omits any mention of the exception to those bars in Rule 61(i)(5), which (as the Superior Court found) applies because Mr. Wright is innocent and has advanced colorable constitutional claims. A-140-41, 160-61. The State misconstrues each of the *Brady* claims in the course of arguing for their rejection. First, it misunderstands what the prosecution withheld concerning Samuels's record: not just specific details concerning his prior convictions, but the fact that he had previously cooperated with the state against a co-defendant in return for leniency in his own case.⁴ AOB 11-12. Next, the State argues that the Superior Court's fact finding – that the prosecution made no agreement with Samuels in return for his testimony – is not clearly erroneous. SAB 20. But Mr. Wright's argument is that Samuels had an expectation

⁴ That Samuels did not actually testify against his co-defendant (SAB 20) is irrelevant. The information had exculpatory value because Samuels had previously agreed to cooperate in exchange for a benefit in his own case.

of leniency, even if unilateral, which the prosecution should have disclosed. AOB 14.

B. The Evidence Concerning Kevin Jamison and Norman Custis

The State argues that, because Keith Jamison was a defense witness, the State had no duty to disclose his prior arrest for robbery. SAB 21. That does not excuse the prosecutor's failure to correct Jamison's false testimony. As Jamison testified during trial that he and his cousin Custis rarely met, only the State knew of the existence of an arrest warrant – for a robbery committed with that same cousin – that was not executed until immediately after he left the witness stand. The prosecutor violated Mr. Wright's due process rights by letting Jamison's false testimony stand uncorrected.

II. TRIAL COUNSEL’S FAILURE TO CONDUCT A CONSTITUTIONALLY ADEQUATE MITIGATION INVESTIGATION DEPRIVED PETITIONER OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

In 2009, the Superior Court advised counsel that it would grant a hearing on some of Mr. Wright’s claims, but did not include the issue of counsel’s deficient mitigation investigation. The State now acknowledges that the hearing was limited to only a few claims. SAB 25.⁵ The Superior Court originally rejected this claim because it thought Mr. Wright had “abandoned” it during the evidentiary hearing. A-159. On remand, however, Mr. Wright explained why the abandonment ruling was mistaken (given the limited issues allowed at the hearing) and why the court had jurisdiction to correct the mistake under Rule 57(d) of the Superior Court Rules of Criminal Procedure and Rule 60(b) of the Superior Court Rules of Civil Procedure. *See* B-68-69. As the State now acknowledges, the Superior Court then ruled on the merits. SAB 23 (“[T]he Superior Court found Wright’ proffer insufficient to require an evidentiary hearing and denied relief.”).

The State, setting up straw men to knock them down, argues that the post-conviction rule, Rule 61, does not provide for “re-opening,” and that a re-argument

⁵ It is therefore immaterial that, as the State indicates (SAB 25-26), post-conviction counsel did not explore this claim at the evidentiary hearing, and even objected to some cross-examination of trial counsel that strayed beyond the scope of direct. The direct examination was appropriately limited to the issues on which the Superior Court had allowed the hearing.

motion under Civil Rule 59(e) is untimely unless filed within five days. SAB 13-14 (citing *Roten v. State*, 69 A.3d 372 (Table), 2013 WL 3206746 (Del. May 23, 2013)). In contrast to *Roten*, the Superior Court in Mr. Wright’s case *granted* him relief and then, after reversal, corrected a mistake before reimposing judgment. The Superior Court had jurisdiction to do so under Criminal Rule 57(d).

The State also argues that the claim was untimely and “abandoned,” and thus barred by Rules 61(i)(1) and (2), because Mr. Wright’s prior counsel did not pursue it during the 1997 post-conviction proceedings. SAB 23-24, 28. As the Superior Court found, Mr. Wright’s innocence is a compelling ground that requires an exception to otherwise applicable procedural bars. A140-41. In addition, it is well established that the ineffectiveness of trial counsel is a constitutional violation that, if “colorable,” can “undermine the fundamental legality, reliability, integrity, or fairness of the proceedings.” *See Zebroski v. State*, 12 A.3d 1115, 1121 (Del. 2010) (by definition, a valid ineffective assistance claim would satisfy miscarriage of justice exception of Rule 61(i)(5)). As described in Mr. Wright’s opening brief, his claim is more than colorable, and requires an evidentiary hearing and relief.

III. POST-CONVICTION COUNSEL, WHO PERFORMED NO EXTRA-RECORD INVESTIGATION, FAILED TO PURSUE MERITORIOUS CLAIMS, AND LABORED UNDER CONFLICTS OF INTEREST, PROVIDED INEFFECTIVE ASSISTANCE UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Mr. Wright argues that his previous post-conviction counsel failed to perform necessary extra-record investigation or present meritorious claims, and labored under conflicts of interest, depriving him of his right to the effective assistance of post-conviction counsel. AOB25. The State, citing *Guy v. State*, ___ A.3d ___, No. 400,2013, 2013 WL 6224483 (Del. Nov. 27, 2013), implicitly recognizes that a post-conviction petitioner has a constitutional right to counsel's effective assistance. SAB 30. It contends, however, that because Mr. Wright "received the only remedy available" from the Superior Court, he suffered no prejudice. As the State sees it, it was enough that the Superior Court "refused to apply any procedural bar to any of the *Brady* or 'actual innocence' claims, and permitted him to expand the record." SAB 31.

Mr. Wright suffered broader harm than the State acknowledges. The Court should grant him relief from *any* procedural default attributable to post-conviction counsel's deficiencies, on *any* of his claims, including those on which the Superior Court denied relief.

CONCLUSION

WHEREFORE, the Superior Court's order denying Rule 61 relief should be reversed, and a new trial of guilt-innocence and/or penalty, or further post-conviction proceedings, should be ordered.

Respectfully submitted,

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I HEREBY CERTIFY that on this 20th day of December, 2013, I caused one copy of appellant's initial brief to be served electronically upon the following

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Respectfully submitted,

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