



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL RODRIGUEZ,
Defendant Below-
Appellant,

v.

STATE OF DELAWARE,
Appellee.

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: **No. 25, 2013**
:
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:

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY
ID No. 0903019123A

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE STATE’S ARGUMENT THAT THE DEFENDANT GAVE PERMISSION TO HOSPITAL PERSONNEL TO GIVE THE BULLET TO THE POLICE SHOULD BE REJECTED BECAUSE THAT ARGUMENT WAS NOT “FAIRLY PRESENTED” TO THE SUPERIOR COURT BELOW

Scope of Review

Under Supreme Court Rule 8, “[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.” See, *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (“This Court, in the exercise of its appellate authority, will generally decline to review contentions not raised below and not fairly presented to the trial court for decision”).

Argument

In its Answering Brief, the State contends that the defendant is not entitled to post-conviction relief “most notably [because] he consented to the collection of evidence and its release to the police.” (Answering Brief, p. 6). Based on the defendant’s alleged consent, the State argues that any motion to suppress would have failed and, therefore, trial counsel could not have been ineffective. See, e.g., *Thomas v. Varner*, 428 F.3d 498, 502 (3d Cir. 2005) (“Were it likely that the suppression motion would have been denied (or the objection overruled), then [petitioner] could not show prejudice”).¹ In support of its argument that the defendant had consented to

¹ The State also argues in the Answering Brief that trial counsel was not ineffective because
(continued...)

the release of the bullet to the police, the State points to a document, (B61), that was included within State's Exhibit 11,² which indicates that the defendant gave "verbal consent" to the release of the bullet to the police. (B61). See, Answering Brief, p. 7.

The defendant agrees that if he had, in fact, voluntarily given his consent to hospital personnel that the bullet could be turned over to the police, then there would have been no Fourth Amendment violation and no grounds for trial counsel to have sought suppression of the bullet evidence. See, e.g., *Murray v. State*, 45 A.3d 670, 676 n.28 (Del. 2012) ("The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from all the circumstances'") (quoting *Ohio v. Robinette*, 519 U.S. 33, 40 (1996)). However, for the reasons discussed herein, it is submitted that the Court should decline to consider the State's "consent" argument on the merits because that claim was not "fairly presented" to the Superior Court below. Alternatively, it is submitted that if the Court decides to consider the State's "consent" claim on the merits, then the case should be remanded to the Superior Court for an evidentiary hearing on the factual issues raised by the State's "consent" argument.

¹(...continued)
"Counsel had additional strategic reasons not to file [a suppression motion]." Answering Brief, p. 18. This argument should be rejected. The Affidavit submitted by trial counsel states clearly that the **only** reason he did not file a suppression motion was due to his belief that the motion would not have succeeded. (B91). That is not a "strategic" reason because there would have been no "downside" to filing a suppression motion.

² State's Exhibit 11 is a thirteen page document which purports to contain all of the medical records concerning the defendant's treatment for the gunshot wound. Exhibit 11 is reproduced in the State's Appendix at B60 through B75.

Was the “Consent” Issue Fairly Presented to the Superior Court?

The only claim asserted by the defendant in his Motion for Post-Conviction Relief (“Rue 61 Motion”) was the claim that his trial attorney was “ineffective” under *Strickland v. Washington*³ when he failed to file a motion to suppress the “bullet evidence” that was recovered by Hospital personnel and subsequently turned over to the police following surgery for treatment of a gunshot wound sustained by the defendant. (A12). In response to the Rule 61 Motion, the defendant’s trial attorney filed an Affidavit which stated, in pertinent part, as follows:

5. A Motion to Suppress would not have been successful based on the law and the facts. The subject was discussed with Petitioner on several occasions.

* * * *

7. In the present case, Mr. Rodriguez voluntarily sought medical attention for a gunshot wound at Christiana Hospital and consented to the surgical intervention. The surgical intervention was for the benefit of Mr. Rodriguez’s health and welfare, and not a “search” implicating constitutional principles(footnote omitted). **The surgery and surgical removal of a bullet from Mr. Rodriguez was performed by Christiana Hospital doctors/staff, as a private actor, not acting at the request or direction of the government. Upon removal, Mr Rodriguez had no possessory interest or any reasonable expectation of privacy with respect to the bullet.** Affiant believed that the police had come into possession of the bullet lawfully and not in contravention of Mr. Rodriguez’s 4th Amendment and Article 1, §6 of the Delaware Constitution rights.

³ 466 U.S. 668 (1984).

(A19-A20) (emphasis added).⁴

In addition to the submissions by trial counsel, the State filed a “response” to the Rule 61 Motion. In its “response,” the State argued that trial counsel was not “ineffective” because “there is no basis for suppression of evidence because there is no evidence of state action.” (B93). In a second submission to the court below, dated December 12, 2011, the State again argued that any motion to suppress would have been denied because the hospital personnel were not acting as agents of the police:

Petitioner acknowledges that he consented to the surgery. However petitioner argues that the hospital was required to obtain additional consent from him prior to turning over the bullet which was removed during the consensual surgical procedure, to the police. **As stated above, the removal of the bullet and the transfer of the bullet to police was a private action. Yet, even if these were state actions, the State submits that when the petitioner consented to the surgical procedure, he consented to both the removal and disposal of the bullet by hospital personnel.**

(B103) (emphasis added).

In a third submission to the court below, dated September 10, 2012, the State argued:

The defendant has not met his burden of proving that the hospital personnel were acting as instruments or agents of the government. There is no evidence to suggest the purpose of the surgery as to assist law enforcement or the hospital acted at the request of the government. To the contrary, defendant acknowledges that the surgical removal of the bullet was medically necessary, however, argues once removed from his body, the bullet should not have been turned over to the police. **However, the mere**

⁴ Trial counsel’s reasons for not filing a suppression motion were repeated by trial counsel in a subsequent submission to the Court below. (B99-B100).

transfer of a bullet, removed during a medically necessary procedure, by hospital personnel to the police, does not suggest the hospital personnel were acting as an instrument or agent of the government...The defendant's rights were not violated simply because the bullet later ended up in the possession of the police.

(B122) (emphasis added).

The above submissions demonstrate, to a near certainty, that both the State and trial counsel claimed that there was no Fourth Amendment violation because the Hospital personnel were not acting as “agents” for the police. Conversely, the State or trial counsel never raised the claim, now asserted by the State in this appeal, that the defendant had voluntarily consented to the Hospital delivering the bullet to the police. Furthermore, the State and trial counsel never mentioned State’s Exhibit 11 or Appendix page B61 in any of their submissions to the Superior Court.⁵ Finally, a review of the Superior Court’s Rule 61 Decision clearly shows that the court did not believe that the State or trial counsel was asserting a claim that the defendant had “consented” to the delivery of the bullet to the police:

The second issue is whether the hospital personnel, in preserving the bullet and turning it over to the police, violated Rodriguez’s constitutional rights. The first step in this analysis requires me to determine if the Hospital personnel were acting on behalf of the government when they did this (footnote omitted). After the bullet was removed from Rodriguez, it was turned over by the emergency room nurse to a forensic nurse. The forensic nurse then contacted a Wilmington police officer, who came to the hospital and picked up the bullet. **This was done without Rodriguez’s consent and pursuant to**

⁵ The prosecutor who represented the State in the Rule 61 proceedings below also represented the State in the defendant’s trial.

Christiana Care’s policy requiring its personnel to preserve a bullet that is removed from a patient. The purpose of the policy is to preserve forensic evidence.

Rule 61 Decision, p. 7 (emphasis added).

It is true that Supreme Court Rule 8 allows the Court to review a claim on the merits, “in the interests of justice,” even though the claim was not “fairly presented to the court below.” *Id.* The State, however, has not provided any reason or legal authority that would allow the Court to waive the requirement of Rule 8. See, *Greene v. State*, 966 A.2d 824, 827 n.8 (Del. 2009) (“Although [defendant] is entitled to appellate review, he fails to present any reason or legal authority why a waived issue must be reviewed under the same standard that would apply if the issue had been properly preserved). *Cf.*, *McBride v. State*, 477 A.2d 174, 184 (Del. 1984) (court will invoke the “interests of justice” exception in Rule 8 to review constitutional issue of first impression to provide guidance to trial courts and future litigants). In this case, the State’s failure to “fairly present” the “consent” argument in the court below appears to be the result of attorney neglect or oversight. The “interests of justice” exception should not be invoked in such a circumstance. See, *Barnett v. State*, 691 A.2d 614, 617 (Del. 1997) (requirement of Rule 8 will not be waived to consider issue that was not presented to court below due to attorney error; the proper vehicle to present such a claim is a motion for post-conviction relief). Lastly, while not decisive, the Court should consider whether the State’s failure to acknowledge, in its Brief, that the “consent” argument was not “fairly presented” to the court below should be a factor in deciding whether Rule 8 should be invoked.

Consideration of the State’s “Consent” Argument Requires A Remand for an Evidentiary Hearing

The defendant certainly recognizes that invoking Rule 8 against the State on the “consent” issue may appear unduly harsh and that the “interests of justice” exception could be “stretched,” in the Court’s discretion, to excuse the State’s error or neglect. If the Court is inclined to consider the “consent” issue on the merits, the defendant submits, for the reasons discussed below, that the “consent” issue should be remanded to the court below for an evidentiary hearing, with jurisdiction retained.

As acknowledged by the State in its Brief, prior to the trial, the defendant had filed a *pro se* motion to suppress the “bullet evidence” on Fourth Amendment grounds and that this motion had been sent to defense counsel by the Court. Answering Brief, pp. 10-11. The State also has acknowledged in its Brief that defense counsel, prior to the trial, explained on the record why he believed that a suppression motion had no merit. Answering Brief, pp. 11-12 (B19-B23).

At trial, Amy Drejka (“Drejka”), who was employed as a “forensic nurse” at Christiana Hospital, testified concerning the procedures that were followed in removing the bullet from the defendant’s body. Drejka identified State’s Exhibit 12 (B72and B75)⁶ and State’s Exhibit 13 (B74) as the forms that were completed when the bullet was removed from the defendant’s body during surgery and subsequently turned over to Drejka, who then turned over the bullet to the Wilmington Police. On cross-examination by defense counsel, Drejka testified that the patient is not involved

⁶ The Appendix pages B72 and B75 appear to be duplicate pages of the same document.

in this process and his consent is not sought after. (Trial, Vol. B, pp. 49-57) (AR1-AR9).⁷ The State's next witness after Drejka was Amy Compton-Hensel ("Hensel"). Prior to taking Nurse Hensel's testimony, the State moved to preclude the defense from questioning Nurse Hensel about obtaining any consent from the defendant. Defense counsel responded by stating that the defendant wanted him to ask Hensel questions about the consent. The court stated that whether the defendant had consented was relevant only to a possible suppression issue, which had been waived by the defense. (Trial, Vol. B, pp. 59-60) (AR11-AR12). In accordance with the court's ruling, Nurse Hensel was not asked any questions about the "consent" form (B61) that is now relied upon by the State. (B36-B59).

In order to meet the State's "new" claim that a suppression motion would not have succeeded because the defendant had "consented" to the delivery of the bullet to the police, the defendant must be afforded an opportunity to present evidence and argument concerning the alleged consent.⁸ Therefore, if the Court is inclined to consider the merits of the State's belated "consent" argument, it is submitted that the case should be remanded to the court below so that a proper record can be developed concerning the circumstances of the defendant's alleged "consent." See, *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (remanding case to state court for a factual inquiry into all of the circumstances concerning alleged consent to search).

⁷ The procedures that were followed by Drejka in this case were consistent with the procedures outlined by Anita Symonds in her Affidavit. (B111). Nurse Symonds Affidavit was submitted by the State at the request of the court below in the post-conviction proceedings, (B108).

⁸ The State bears the burden to prove that an alleged consent was voluntarily given. See, *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion).

II. THE SUPERIOR COURT’S RULING THAT HOSPITAL PERSONNEL WERE ACTING AS “AGENTS OF THE STATE” WHEN THEY TURNED THE BULLET OVER TO THE POLICE WAS CORRECT AS A MATTER OF LAW

Scope of Review

Questions of law related to suppression issues are subject to *de novo* review. See, *Loper v. State*, 8 A. 3d 1169, 1172 (Del. 2010).

Argument

The Superior Court’s Ruling

While the Superior Court ultimately denied the defendant any relief under Rule 61, the court did agree with the defendant’s argument that Hospital personnel were acting as an “agent of the police” when they delivered the bullet that had been surgically removed from the defendant’s body to the police:

I agree that, at this point, the hospital personnel were acting as an agent of the police. The hospital personnel had no reason to preserve the bullet for their own purposes. Keeping it clearly was not necessary to Rodriguez’s medical treatment. The only reason that the hospital personnel kept the bullet was to preserve forensic evidence, a purpose relevant only to the police...the form that the hospital personnel use is called a “release of evidence” form. This suggests that the police knew that hospital personnel would collect bullets for them and do so in such a manner that would establish an adequate chain of custody, allowing the police to use the evidence for their own needs.

Rule 61 Decision, pp. 7-8 (emphasis added).

In its Answering Brief, the State argues that the Superior Court below was incorrect in its conclusion that Hospital personnel were acting as “instruments of the

government.” See, Answering Brief, pp. 14-18; *id.*, at 16 (“the record shows that the surgery was performed to treat Rodriguez, not to recover the bullet, or otherwise assist police, who were not involved at the time of the surgery”). For the reasons discussed below, it is submitted that the State’s arguments should be rejected.

Factual Background

Under 24 *Del.C.* §1762, the Hospital is required to “report” incidents concerning the treatment of bullet wounds to appropriate police authorities. However, the Hospital’s Affidavit and the testimony of Hospital personnel at trial clearly shows that what actually happens whenever the Hospital treats a gunshot wound goes far beyond the mere “reporting” required by §1762.

The Hospital’s Affidavit describes the procedures followed by Hospital personnel whenever a bullet is surgically removed from a patient. These procedures are clearly designed to establish a “chain of custody” in the event that legal proceedings are subsequently commenced. In fact, the Affidavit itself further states that “the purpose of this process is to preserve forensic evidence.” (B111). The testimony presented at the defendant’s trial was consistent with the practices outlined in the Affidavit.

At trial, Amy Drejka (“Drejka”), who was employed as a “forensic nurse” at Christiana Hospital, testified concerning the procedures that were followed in removing the bullet from the defendant’s body. According to Drejka, a “release of evidence form” was used when the bullet was removed from the defendant’s body during surgery and subsequently turned over to Drejka, who then turned over the

bullet to the Wilmington Police. (Trial, Vol. B., pp. 49-52) (AR1-AR4). On cross-examination by defense counsel, Drejka testified that the patient is not involved in this process and his consent is not sought after. (Trial, Vol. B, p. 56) (AR8).

Did the Fourth Amendment Apply To This Search/Seizure?

In a case such as this, where the defendant alleges that a search/seizure arose from seemingly private conduct, the existence of a Fourth Amendment search is at issue. See, *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (the Fourth Amendment applies only to searches and seizures taken by or at the direction of the State; consequently, evidence obtained illegally by private parties and turned over to the police is not obtained in violation of the Fourth Amendment). Therefore, the threshold question in this case is whether, in preserving the “chain of custody” and delivering the bullet to the police, the Hospital personnel were acting as agents of the police, or merely as a private citizen cooperating with the police by turning evidence of a crime over to them? See, *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (test of government participation is whether, in light of all the circumstances, the private person “acted as an ‘instrument’ or agent of the state”); *Viridin v. State*, 780 A.2d. 1024, 1030 (Del. Super. 2001) (the Fourth Amendment and Article 1, § 6 of the Delaware Constitution do apply when a private party conducts a search as an “instrument or agent” of the government); LaFave, *Search and Seizure*, pp. 43-45, Section 11.2(b) (1996) (collecting cases).⁹

⁹ The defendant agrees that he has the burden of proving that the private party “was acting as an instrument or agent of the government.” *Viridin*, 780 A.2d at 1031.

In determining whether a private party was acting an instrument or agent of the State, the Court must consider the following factors: (1) “whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the private party's purpose in conducting the search was to assist law enforcement agents or to further [its] own ends.” *Viridin*, 780 A.2d at 1030.

Applying the above factors to this case, even though the surgery itself was performed for medical reasons, once the bullet was removed from the defendant, the Hospital had no interest in preserving the bullet. Nevertheless, as stated in the Hospital’s Affidavit, “the purpose of this process is to preserve forensic evidence.” (B111). In fact, the form that was utilized to transfer the bullet from the Hospital to the police is called a “release of evidence” form. (B72-B75). These facts all suggest that the police knew that they could count on Hospital personnel to collect and preserve “evidence” in a manner that would make the evidence admissible in any subsequent court proceedings. Therefore, the Court should conclude that the Superior Court was correct in holding that the Hospital was acting as an agent of the police when it created the “chain of evidence” that resulted in turning over the bullet to the police.

The cases cited by the State in its Answering Brief do not compel a different result. In *Webb v. State*, 467 S.W. 2d 449 (Tex. Crim. App. 1971), the court rejected the defendant’s claim that the surgical removal of a bullet from the defendant and the subsequent delivery of the bullet to the police violated the Fourth Amendment:

Appellant has totally failed to show that the surgeons were conducting an illegal search when they removed the bullet.

They were simply performing a medical operation, for which they had obtained permission from the appellant.¹⁰

The main thrust of appellant's argument is that he should have been warned that the doctors would turn over the bullet to the police authorities. The evidence conclusively shows that this operation was not performed for the purpose of securing evidence for the police. We know of no rule of law which prohibits an individual from submitting to police officials objects which are lawfully in his possession, and the bullet was lawfully obtained from the appellant. We have, in the case at bar, no deception in regard to the reason for removal of the bullet, as was involved in *Graves v. Beto*, 424 F.2d 524 (5th Cir. 1970). We have been unable to find any cases in support of appellant's contention.¹¹

In *Craft v. Commonwealth*, 269 S.E. 2d 797 (Va. 1980), the court also rejected a claim that the surgical removal of a bullet from the defendant violated the Fourth Amendment:

Here defendant was in the emergency room of a hospital, a place frequented not only by doctors, nurses, patients, hospital personnel, and police officers, but also by friends and relatives of persons being treated. **A person admitting himself to an emergency room has little expectation of privacy.**¹²

* * * *

Likewise the bullet was removed from defendant's body during the performance of "appropriate surgical therapy" by the attending surgeon. The defendant had no property right in the bullet. **No search by the officers was required or effected. It was not necessary because the clothing and bullet were not hidden or concealed. The articles**

¹⁰ *Id.*, at 450.

¹¹ *Id.*, at 451.

¹² *Id.*, at 800

lawfully came into the possession of Dr. Stoneburner and, under the circumstances of this case, there was no reason why they should not have been delivered to and received by the officers.¹³

In *Commonwealth v. Storella*, 375 N.E. 2d 348 (Mass. App. 1978), state law required that the treatment of gunshot wounds be reported to the police. *Id.*, at 352. The court rejected the defendant's argument that the reporting statute transformed otherwise private conduct into State action implicating the Fourth Amendment:

The defendant suggests that the doctors' actions were State actions because G. L. c. 112, §12A, required that they notify the police forthwith that they were treating a bullet wound. But the notification required by §12A was not the "search" and "seizure" complained of; the statute imposes no duty on the doctor beyond notification. Even if the statute went further and mandated, for example, that the hospital retain the bullet, when extracted, for use as evidence, it would not follow that the doctor's removal of the bullet and transmission of it to the police would be deemed State action.

Id.

Several factors differentiate *Webb*, *Craft* and *Storella* from the case at bar. In *Webb*, the court assumed, without any analysis, that the hospital personnel were acting as private parties. Also, *Webb* does not appear to involve a "reporting" statute and the facts were not subjected to a *Viridin*-type analysis. Like *Webb*, *Storella* can be distinguished from this case because the court did not subject the facts to a *Viridin*-type analysis. It is submitted that the holding in *Storella* would have been different if the *Viridin* test had been applied by the Massachusetts court.

¹³ *Id.*

In *Craft*, in contrast to *Webb* and *Storella*, the court rejected the defendant's Fourth Amendment claim based on its conclusion that the defendant had no "expectation of privacy" when he presented himself at the emergency room and consented to the surgery to remove the bullet. As discussed in the Opening Brief, the United States Supreme Court has recently clarified, in *Jones v. United States*, 132 S. Ct. 945 (2012) that the existence of a Fourth Amendment violation no longer turns solely upon whether or not the police activity infringed on a "reasonable expectation of privacy." That argument need not be repeated here in its entirety, but several points raised by the State in its Answering Brief warrant a response.

In its Answering Brief, the State argues that the defendant's reliance on *Jones* is "misplaced" because the bullet was not an "effect." (Answering Brief, p. 17). as noted in the Opening Brief, whether or not Rodriguez "owned" the bullet or had a possessory interest in it is irrelevant. Before it was removed, the bullet was located inside Rodriguez's person, an area literally protected from intrusion under the Fourth Amendment and *Art. I, §6* of the Delaware Constitution. Even if Hospital personnel lawfully came into possession of the bullet when it was removed during surgery, and even if Rodriguez did not have an "expectation of privacy" in the bullet once he consented to the surgery, the act of delivering the bullet to the police exceeded the scope of any "consent" and thereby converted a lawful possession into a "trespass" under *Jones*. See, *Scott v. State*, 672 A.2d 550, 553 (Del. 1996) ("the scope of a search is determined by the language used in giving the consent").

CONCLUSION

For the reasons and upon authorities set forth herein and in the Opening Brief, the Court should grant Appellant's Motion for Post Conviction Relief and remand the case to the Superior Court for a new trial.

Respectfully submitted,

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Dated: April 24, 2013