



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARC T. TAYLOR
Defendant-Below,
APPELLANT,
v.
STATE OF DELAWARE
APPELLEE.

No. 293, 2012

DEFENDANT BELOW APPELLANT'S AMENDED OPENING
BRIEF ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

SUBMITTED BY

/s/ Michael C. Heyden, Esquire
Michael C. Heyden, Esquire
1201 N. King St.
Wilmington, Delaware 19801
(302) 654-0789
Delaware bar ID: 2040

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NATURE AND STAGE OF PROCEEDINGS

On or about November 8, 2010, the defendant was indicted and charged with gang participation, conspiracy second degree, possession of a firearm by a person prohibited (two counts), assault second degree, possession of a firearm during the commission of a felony, possession with intent to deliver narcotics, resisting arrest, noncompliance with bond.

A jury trial began on February 13, 2012 and ended on March 15, 2012. The defendant was found guilty of gang participation, possession of a firearm by a person prohibited (two counts), assault second degree, possession of a firearm during the commission of a felony, and noncompliance with bond. He was found not guilty of conspiracy, resisting arrest and possession with intent to deliver narcotics. He was; however, found guilty of the lesser included offense of simple possession of narcotics. Sentencing took place on May 23, 2012 and he received 15 years in jail followed by probation. He took an appeal to this court. This is his opening brief.

SUMMARY OF ARGUMENT

Argument I

The court erred when it permitted a hearsay statement that purportedly identified the defendant as the shooter.

Argument II

The gang participation statute is unconstitutionally vague.

STATEMENT OF FACTS

This case involved a number of crimes including murders, attempted murders, assaults and weapon charges stemming from a dispute between two groups of young men in Wilmington, Delaware. One group consisted of young men who had grown up together and were members of a rap group named the “Trap Stars”. They consisted of Kevin Raisin, Kevin Fayson, Jeroy Ellis, Terance Mills, Quincy Thomas, Darnell Flowers and Terry Smith. They generally hung out in the area of Third and Harrison Streets in Wilmington, Delaware. (T41, A1)

Terrance Mills was dating Vanessa Rosa who is the sister of Carlos Rosa. One day he came home and Mills ran out the back door. Subsequently, Carlos Rosa caught him and beat him. A few days later, there was a fistfight involving Mills, Ellis, David Hill and Carlos Rosa. Thereafter, more friends of the disputing parties became involved. On December 25, 2009, Tyaire “Gunner” Brooks burglarized an apartment frequented by the Trap Stars to collect a drug debt from Mills. On April 3, 2010, someone went to the Mills house and shot up the front door. (T54, A2) . Subsequently, one of the Trap Stars’ car was firebombed. On February 28, 2010, Anthony Doyle was shot and killed. It was believed that members of the Trap Stars were involved in the shooting. Next, Fayson was the subject of a drive-by shooting; however, he was unharmed. On April 5, 2010,

Mills and Thomas were involved in a shootout wherein Alvin Butcher was killed. (T41, A1) On April 30, 2010, Kenneth Swanson and Jazmon Smith were shot at as they drove in the Browntown area of Wilmington. The State claimed that Kevin Fayson and Kevin Raisin were involved in the shooting. At this point, the dispute had grown to such intensity that Jose Chariez put a \$10,000.00 bounty on the head of any Trap Star with instructions to “shoot on sight”. On May 3, 2010, Jose Chariez, was shot and killed (T42, A1). It was alleged he was shot by Kevin fbRaisin as he rode on 9th & Adams Streets in Wilmington.

During that spring, Kevin Raisin and Kevin Fayson became friends with Marc Taylor and began hanging out in his neighborhood in the area of 8th & Adams Streets. The State claimed that Chariez was shot driving by Raisin who emerged from a group standing on the corner, ran after and shot at the Chariez vehicle as it passed. He shot numerous times at the Chariez vehicle. Chariez who was inside the vehicle was struck and killed. The State did not allege that Taylor was involved in a shooting.

Marc Taylor was not a member of the Trap Stars. He lived in a different part of the city near 8th & Adams Streets. He was a friend of Kevin Raisin and Kevin Fayson. He did not know the other members of the rap group. Likewise they did not know him. Witness after witness for the State testified similarly.

Nekivis Walker identified members of the Trap Star group; however, testified that Taylor was not a member of the group and he had never seen him before. (T123, A3)

Tyaire Brooks testified that Taylor was not part of the group and he had never seen him before. (T179, A4).

Erica Jenkins testified that Marc Taylor was not a Trap Star. (T98, A5)

Carlos Rosa testified that he had never seen Mark Taylor before. (T111, A6)

Denise Tolbert testified that she did not know Taylor to be Trap Star and had never seen him before. (T64, A7)

Britney Mangrum testified that she did not know Taylor to be a Trap Star and had not seen him before. (T150, A8)

Melvin Dillard testified that he did not know Mark Taylor to be a Trap Star. (T56,A9)

Christina Washington testified that she had never seen Mark Taylor before, and she had no idea who he was. (T29, A10)

Felicia McKinnon testified she never met anyone named Gunner or Guntown and did not know Marc Taylor. (T85, A11)

Darnell flowers testified that Taylor was not a Trap Star. (T43, A12)

Jeroy Ellis testified that he did not know Mark Taylor personally that he just

knew of him and that he saw him a few times, and only talked to him once. (T97, A13)

Robert Valentine testified that Marc Taylor was not part of the Trap Star group. (T111, A14)

Terry Smith testified he did not know Marc Taylor. (T63, A15)

Quincy Thomas named the members of the Trap Stars and did not include Marc Taylor and he said did not know Marc Taylor. (T99, A16)

Jason Ortiz never met Marc Taylor. (T110, A17)

Marc Taylor testified he knew only Kevin Raisin and Kevin Fayson, but did not know anyone else involved in the case. (T147, A15)

Shameka Fayson said that she saw her brother Kevin and Marc Taylor together a few times in April or May 2010. (T68, A19)

On May 6, 2010, Marc Taylor was walking on Adams Street when someone came up behind him and shot him striking the lower part of his body. Taylor survived the shooting and was able to run to a nearby apartment collapsing in the doorway. The police who arrived on the scene traced his steps and found a handgun in the apartment into which he had run after being shot. That gun was later connected to previous homicides. On May 15, 2010 at 1:10am, Darnell Whye stopped his vehicle in the vicinity of 9th & Adams Street. The State alleged

he met two men to wit: Robert Valentine and Mark Taylor. Whye had words with Valentine who allegedly told Taylor to shoot Whye. Whye was struck in the hand.

On August 10, 2010, Taylor was arrested in the 800 block of Adams Street and charged with possession with intent to deliver cocaine. When he was arrested, the police found a small amount of cocaine near him and a small amount of money on him.

During the investigation, various members of the Trap Stars made deals and turned State's Evidence. The primary witness was Kevin Fayson, who gave lengthy accounts about what had occurred. He testified at trial along with Quincy Thomas, Darnell Flowers, Jeroy Ellis, Robert Valentine and Terry Smith.

Kevin Faison and Marc Taylor went to trial.

ARGUMENT I

QUESTION PRESENTED

Whether the court erred when it permitted hearsay evidence that purportedly identified the defendant as the shooter?

SCOPE OF REVIEW

Rulings of the trial court on evidentiary issues are reviewed for abuse of discretion. Tics v. State, 624 A2d 399 (DE 1993)

OBJECTION NOTED

(T9, A20)

MERITS OF ARGUMENT

On May 15, 2010 Larry Whye, who lived in north Wilmington, drove his wife to work at about midnight leaving his children at home. Approximately one hour later, he drove to 8th & Adams Streets, purportedly to visit a friend. He parked his car approximately one and a half blocks from his friend's house so that he would have easy access to Interstate 95 when he departed. After he parked and exited his vehicle, he came upon Robert Valentine who was standing alone on the sidewalk. Whye greeted Valentine who apparently became annoyed and had

words with Whye. A few seconds later, a car pulled up alongside them.

According to Whye and Valentine, Taylor emerged from the car and shot Whye, striking him in the hand. When questioned by the police, Whye told them that he could identify Valentine but would not be able to identify the other man. He identified Valentine in a lineup but was unable to identify Taylor. Valentine was arrested months later. Facing 31 years in jail, and the potential of being sentenced as a habitual offender and thus life, he struck a deal with the State and testified that Taylor was the shooter.

Over the objection of defense counsel, Ericka Jenkins testified that night she heard a young boy, Maleek, state that “Gunner shot the guy.” Maleek did not testify at the trial. The defense objected that it was hearsay. The State countered that it was an excited utterance and exempted from the hearsay rule. (T9, A20)

Unknown to the police at the time of the investigation, there were two men with the moniker “Gunner”. Marc Taylor was sometimes referred to as “Guntown,” “Gunner” or “G”. Tyaire Brooks was known as “Gunner”. (T145, A21) Brooks was associated with the group that was fighting with The Trap Stars. He played an integral part in the dispute between the two groups. (T146, A21) He committed the burglary of the house frequented by the Trap Stars that accelerated the dispute. (T146, A21) He was a friend of Alvin Butcher who was murdered and

also “Pope” Chairez who was also murdered. He was at the hospital with each of them on the night that they died. He was present when the order went out “to shoot the Trap Stars on sight”. Most importantly, he admitted on the witness stand to hunting for the Trap Stars to seek retaliation and, in fact, one night in May 2010 went to the area of 8th & Adams Streets looking for Traps Stars to kill (T216, A22). That night, he telephoned his friend Omar to get Kevin Raisin while he was at 8th & Adams Streets. Brooks had a motive, plan and an expressed desire to kill Trap Stars. He was actively hunting them in May 2010. (T216, A22)

This statement made by Maleek that “Gunner shot the guy” was used by the State to identify Taylor as the shooter. They argued that since Brooks did not live in that area that Maleek and must have referred to Taylor not Brooks as the shooter. They argued that it was admissible as either an excited utterance or present sense impression exception to the hearsay rule.

For a hearsay statement to be admissible as an excited utterance, the statement must satisfy three requirements:

1. The excitement of the declarant must have been caused by the event;
2. The statement being offered must have been made during the time while the excitement of the event was continuing; and
3. The statement must be related to the startling event. Foster v. State 961 A2d 526 (DE 2008) Delaware Rule of Evidence 803(2)

Rule 803 sets forth to pertinent exceptions to the hearsay rule. Present sense

impression is a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Delaware Rule of Evidence 803(1)

If Maleek had testified, counsel could have asked him if he meant Brooks or Taylor. He could have been shown photos and asked to identify the shooter. The hearsay identification was permitted even though the statement could not be tested through cross examination. This statement eviscerated the defense that Brooks not Taylor was the shooter.

An excited utterance has an indicia of reliability because the statement is made quickly, without reflection or influence. Here, it is not known if Maleek's statement was spontaneous. It is unknown if it was based upon personal knowledge and observation or a hearsay statement made to Maleek. It is unclear if it was a rumor or conjecture. In fact, no one knows which man to whom he was referring.

The residual exception set forth in Delaware Rule 807 permits evidence when there is a circumstantial guarantee of trustworthiness and the court determines that:

- a. The statement is offered as a material fact;
- b. The statement is more relevant on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

c. The general purposes of the rules and the interest of justice will be best served by admission of the statement into evidence.

Here, there was no showing by the State that it was unable to produce Maleek as a witness. There was no circumstantial guarantee of trustworthiness. In fact, because there were two men with similar nicknames, the chance of an erroneous identification was greatly increased. The fact that the defense was unable to cross examine the witness made it impossible to test the evidence. If the solution was to force the defendant to call Maleek as a witness, it would be an improper shifting of the burden of proof.

The hearsay statement should not have been admitted into evidence. The fact that it was deprived Taylor of a fair trial.

ARGUMENT II

QUESTION PRESENTED

Whether the gang participation statute is unconstitutionally vague?

SCOPE OF REVIEW

The Standard and scope of review is whether the court below erred in formulating or applying legal precepts. Arnold v. Society of Savings Bancorp, Inc., 650 A2d 1270 (De Supr 1994)

OBJECTION NOTED

pretrial motion attached (A, 25) joined by Taylor

MERITS OF ARGUMENT

Count one of the Indictment alleged that defendant and his co-defendants participated in a criminal street gang in violation of 11 Del. C. § 616.

Section 616 states, in pertinent part:

§ 616. Gang participation

(a) Definitions. —The following terms shall have the following meaning as used in this section.

(1) "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraph (a)(2) of this section, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or

- have engaged in a pattern of criminal gang activity.
- (2) "Pattern of criminal gang activity" means the commission of attempted commission of, conspiracy to commit, solicitation of, or conviction of two or more of the following criminal offenses, provided that a least one of these offenses occurred after July 1, 2003, and that the last of those offenses occurred within three years after a prior offense, and provided that the offenses were committed on separate occasions, or by two or more persons:
- a. Assault, as defined in § 612 or § 613 of this title.
 - b. Any criminal acts causing death as defined in §§ 632—636 of this title.
 - c. Any criminal acts relating to sexual offenses defined in §§ 768—780 of this title.
 - d. Any criminal offenses relating to unlawful imprisonment or kidnaping which are defined in §§ 782—783A of this title.
 - e. Any criminal acts of arson as defined in §§ 801—803 of this title.
 - f. Any criminal acts relating to burglary, which are defined in §§ 824—826 of this title.
 - g. Any criminal acts relating to robbery, which are defined in §§ 831—832 of this title.
 - h. Any criminal acts relating to theft or extortion, which are defined in § 841, § 849 or § 851 of this title, provided that such acts meet the requirements of felony offenses under said sections.
 - I. Any criminal acts relating to riot, unlawful disruption, hate crimes, stalking or bombs which are defined in § 1302, former § 1303 [repealed], § 1304, § 1312A or § 1338 of this title, provided that such acts meet the requirements of felony offenses under said sections.
 - j. Any criminal acts involving deadly weapons or dangerous instruments which are defined in § 1442, § 1444, §§ 1447—1448, § 1449, § 1450, § 1451, § 1454, or § 1455 of this title.
 - k. Any criminal acts involving controlled substances which are defined by §§ 4751, 4752, 4753A, 4755, 4756, 4761, 4761A of Title 16.

(b) Forbidden conduct. —A person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity and who knowingly promotes, furthers or assists in any criminal conduct by members of that gang which would constitute a felony under Delaware law, shall be guilty of illegal gang participation. Illegal gang participation is a class F felony.

The standard for examining statutes against challenges for vagueness is whether the statute was drawn with sufficient specificity and clarity so as to inform a person of reasonable intelligence of the conduct that is proscribed. State v. J.K., 383 A2d 283 (De Supr 1997) Vagueness challenges not involving First Amendment freedoms must be examined in light of the facts of the particular case. Wright v. State, 405 A2d 685 (DE 1979)

The statute requires that the group have as one of its **primary activities** the commission of enumerated crimes. The Trap Stars were a musical rap group. Their primary purpose and activity was to make music. It was a group of young men who knew each other from high school who were involved in making rap songs. They were not a criminal street gang like the Hells Angels or the Sur 13. They did not function as a criminal organization. Some of them may have sold illegal drugs; however, it was on individual basis. There was no common sharing of drugs or monies in connection with those activities. There was no hierarchy within the organization. There was no distribution network. Their only connection was music.

The statute also requires that the person **actively** participates in a criminal street gang with knowledge that its members engage in a pattern of criminal activity and who knowingly promotes, furthers or assists in **any** criminal conduct by members of that gang. Marc Taylor was not a member of the group. Marc Taylor did not make rap songs. He did not grow up with them. He was not even from the same neighborhood, but was from a different part of the city, 8th & Adams Street. He had no idea whether or not the individuals in the group were involved in criminal activity. He only knew two of the Trap Stars. He did not know any of the others. Witness after witness testified that he was not a Trap Star. In fact most of the witnesses did not know who he was.

The evidence showed that he was a victim of a shooting one night while walking home. When that occurred, he was alone. He was not wearing any Trap Star clothing, nor was he with any of the Trap Stars. He was not in their neighborhood.

The State alleged that on a different night, a man Larry Whye, who was not associated with either group, came to the area of 8th & Adams Street to visit a friend and that he was shot in the hand by Mark Taylor. Larry Whye was not a member of either group, nor did he know any of the people involved in the previous skirmishes. The State did not contend the shooting was committed to

benefit activities of the Trap Stars. This was an isolated and totally unrelated event.

Sub Section 616(b) fails to define the element of what constitutes "active participation" in a criminal street gang. The California courts have struggled with this definition. In People v. Green, 227 Ca App 3d 692 (Ca App 1991). The court determined that it meant that the person's relationship with the criminal street gang was: 1.) More than nominal, passive, inactive or purely technical; and 2.) The person devoted all or a substantial part of his time and efforts to the criminal street gang. Later it was interpreted to mean that the defendant aided and abetted a separate offense committed by a gang member and that the defendant's gang involvement had to be more than nominal or passive. People V. Castaneda, 3 P3d 278 (CA Supr 2000) Specifically, what type of behavior must a person engage in to move from "passive participation" to "active participation?" Does being a friend or associate a member constitute active participation? Would wearing a Trap Star T-shirt by a fan of the group constitute "active participation" if nothing more were done? If a bar or a club rents a room for a party for the group; does that constitute active participation if criminal activities such as underage drinking or drug use take place during the party? Does a overly rowdy drunken fan at an Eagles game get prosecuted as a gang participant and receive an

enhanced sentence because he is wearing clothing with the Eagles logo and others wearing the same logo are committing like crimes on that same Sunday?

Here, it was clear that Taylor did not devote all or a substantial part of his activities to the Trap Star group. In fact, he never met most of them and they did not know him. The crimes that he was alleged to have committed were separate and apart and had nothing to do with the Trap Star group.

Since § 616 fails to communicate exactly what constitutes "active participation," it is unconstitutionally vague by failing to give fair notice to citizens of how to conform their conduct to the limits of the law. The determination of what constitutes "active participation" cannot be delegated to the wisdom of the Attorney General, because that would be unconstitutionally delegating a legislative power to the executive branch. State v. Baker, 720 A.2d 1139 (Del.E 1998)

Due process requires that a criminal statute provide fair notice and fair warning of the act which prohibits. Vague laws offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. State laws may trap the innocent by not providing fair warning. Second, if arbitrary and

discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policeman, judges and juries for a resolution on an ad hoc and subjective basis with the attendant dangers of improper or discriminatory application. Grayned v City of Rockford, 408 US at 108, see also Kolender v. Lawson, 461 US 352 (1983). In Lanzatta v. New Jersey, 306 US 451 (1939) the court overturned as vague a statute making it a crime to be a “gangster”. The court found that the term “gang,” “gangster” and “known to be a member” were unconstitutionally vague, indefinite and uncertain.

In this case, the statute defines “pattern of criminal activity” as the commission of two or more of specifically enumerated offenses. Then the statute defines “forbidden conduct” as actively participating in a criminal street gang with knowledge that its members engaged in a pattern of criminal activity and who knowingly promotes, furthers or assists **any** criminal conduct by members of that gang. Inherent in the statute is the confusion between the enumerated offenses and the term **any** criminal conduct. How is a person to know what is the proscribed conduct that falls within the gang participation statute. Is it the enumerated felonies or is it **any** criminal act including misdemeanors and traffic offenses?

The statute also is constitutionally overly broad. It invades the protected

freedom of association which only may be permitted upon a showing of a compelling need. NAACP v. Alabama ex rel Flowers, 377 US 288 (1963); Prior v. Municipal Court, 25 Cal 3rd 238,(1979) The right of free association protects the rights of individuals to pursue political, social, economic and recreational interests without governmental intrusion. NAACP v. Alabama ex rel Patterson, 357 US 449 (1958). In re Primus, 436 US 412 (1978); Roberts v. United States Jaycees, 468 US 609 (1984). In this case, the police focused on a musical group that was active in and promoting a music genre that was popular in a minority community. Are they being treated differently then the Los Angeles Police Department whose members from time to time have been convicted of felonies. Likewise, are they being treated differently than organizations whose views are very popular and respected such as a VFW club that nonetheless may have a illegal slot machines.

In this case, Marc Taylor was not a member of the Trap Stars. He was not a rapper. He was merely acquainted with two of the members. The Trap Stars did not function as a criminal organization. Some sold illicit drugs; however, it was not a combined organized undertaking. There was no common sharing of funds or drugs. There was no distribution chain or hierarchy in the group. They were simply a rap group.

Taylor was found not guilty of conspiracy. The State claimed that one night

he assaulted Larry Whye. No members of the Trap Star rap group were present or were involved. On another night, they claimed he either sold or purchased drugs. No Trap Stars were present or involved.

The gang participation statute enhances sentencing in a very substantial manner. A person found guilty of gang participation will be sentenced at one felony level higher than the crime that he committed. The gang participation statute is unconstitutionally vague, broad and inherently conflicting. Therefore, the verdict should be reversed and/or Taylor granted a new trial.

CONCLUSION

For the above stated reasons, the verdict should be reversed or the defendant granted a new trial.