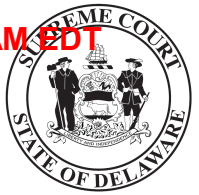


In The Supreme Court of the State of Delaware

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Case Number 350,2012



Cory J. Holmes
Appellant, Def

NO. 350, 2012

v.

State of Delaware
Appellee, Res

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DELAWARE SUPREME COURT
FILED

RePLY Brief to the states response

Cory J. Holmes

SSIF# 399-190

1181 Paddock RD Smyrna DE 19977

October 20, 2012

A. Mr. Heyden's strategic decision to not present phone records

The state argues that Mr. Heyden properly utilized the phone records during the cross-examination of Freeman.¹

This claim is based on the mere fact that Mr. Heyden asked Freeman about calls and was able to elicit evidence of some calls. In other words, Mr. Heyden and the state are arguing that because Freeman was asked about calls and testified about two in-operable calls with the defendant, Mr. Heyden ultimately utilized the phone records.

The defendant simply argues Mr. Heyden's questioning and elicitation of Freeman's version of calls does not take the place of effectively cross-examining Freeman with the extensive records particularly the ten phone calls on the day of the incident which Freeman clearly left out.

Mr. Heyden's secondary argument on this point is that a showing of the extensive phone calls would have given the state opportunity to argue the witnesses were targeted drug dealers.² This argument falls because, as ...

stressed in the defendant's earlier responses, the state never alleged Elder, Freeman, and Smith were drug dealers whom were robbed. Instead, the state argued the opposite; that the witnesses were innocent victims. Changing their theory to argue a planned drug dealer robbery would have contradicted their own witnesses testimony. For example the state would have had to concede Elder, and Smith allowed the defendant in the home to conduct drug business and was only robbed after letting the defendant in the home. This new theory would have altered the entire case changing the outcome significantly. At the very least the defendant would not have been convicted of burglarizing the home by claiming to be W.P.D.

Thus for Mr. Heyden reasoning that the state would have argued the witnesses were targeted drug dealers is highly unreasonable.

Mr. Heyden failed to present factual evidence oppose to merely asking Freeman questions; excepting any answer.³ The defendant suffered prejudice from the calls the jury did not hear of,⁴

Question 1. Was Mr. Heyden ineffective in not using the extensive calls in the records to cross-examine Freeman?

Question 2. Were the phone records significantly different from the calls Freeman testified to in his own interpretation?

Question 3. Does the extensive calls in the phone records contradict the version of events Freeman testified to and does those same calls corroborates the defendant's theory?

The state continues its response by arguing Mr. Heyden "wisely acknowledge that Holmes characterization of the crimes as 'drug deals gone bad' did not mitigate Holmes culpability."⁵

First in formost Mr. Heyden presented a defense which required proving a drug deal went bad. Although, Mr. Heyden acted off information supplied by the defendant, the record reflects his strategy was to get Freeman, Elder, and Smith to admit that this case was a "Drug Deal gone Bad" not a robbery⁶ Mr. Heyden argued this point through trial and on direct appeal⁷

Defendants argument was never that a drug deal situation mitigated any culpability, but simply that Mr. Heyden had a...

Constitutional obligation by the laws established in Strickland v. Washington to investigate and present factual evidence in support of the line of defense he chose to pursue.⁸

The state says "If Holmes claims he was entering into drug transactions with allegedly known drug dealers" then it was more probable Holmes possessed a weapon because drug dealers are known to carry guns.⁹ The state and Mr. Heyden forgets that Mr. Heyden argued the defendant entered into drug transactions with the witnesses and even cross-examined the witnesses on their prior drug convictions to further aid his argument.¹⁰ In other words Mr. Heyden's own argument that Freeman gave the defendant drugs on consignment and Elder/Smith allowed the defendant in the home to buy PCP heightened the probability the defendant possessed a gun since drug dealers are known to carry weapons. If this is the case, counsel admits arguing inferences that made it more probable the defendant possessed a fire arm.

B. Mr. Heyden failure to utilize phone call to Elder.

The state limits its response to the phone record issues to Freeman, but completely ignores the clear prejudice the defendant suffered from Mr. Heyden's failure to cross examine Elder and Smith with the phone records showing calls to and from the defendant. These calls proved prior knowledge and supported the defendant's and Mr. Heyden's claim the defendant knew Elder and was invited into the home after calling. The state responds that counsel utilize the phone records with Freeman with the defendant refutes above but the state has yet to explain counsel's failure to present, and cross-examine Elder and Smith with the phone calls to them from the defendant after their direct denials of any prior knowledge.

These should have been before the jury in support of the defense theory the defendant was let in the residence and did not have to obtain entry by claiming to be W.P.D.¹²

Although, the state does not speak on the Elder phone call in its response, the prosecution in its closing clearly . . .

emphasize the importance of Mr. Heyden presenting evidence of a call to Elder if in fact there was a call ^B

The defendant's argument is in accord with the prosecution's suggestion: If there was a call to Elder common sense dictates any competent attorney facing the intricacies of this unique case whom had the records would have presented the evidence instead of feeding the jury what appeared to be pure conjecture, and unfactuated speculation. Unlike the Freeman issue, counsel cannot claim that because their were ^{extensive} calls the state could say this was a planned drug related robbery because the phone call to Elder was not extensive but, was central to the defense the defendant was invited into the home without a gun.

Defendant asserts his defense never had a chance of viability absent such compelling evidence available but not utilized.

Defendant ask the courts to up hold the law and grant him a new trial, and/or at bare minimum conduct evidentiary hearing or order Mr. Heyden to supplement his affidavit to . . .

get a detailed reason for why he failed to present and utilize such compelling evidence consistent with his own defense strategy.

C. Defense Counsel improper suggestion of a BB Gun

The state responds Mr. Hayden inference that the defendant could have possessed a BB Gun was appropriate because counsel, being the state failed to produce a gun, tried to persuade the jury to acquit if they had reasonable doubt.¹⁴

First and foremost, the entire defense at every stage of this case has always been Elder, Smith, and Freeman were lying about being robbed with a gun; to prove dishonesty and discredit the witnesses the strived to prove drug gone bad or prior drug relations which led to the defendant's arrest. The defense strived to prove the witnesses bias and motive even after their constant denials. In no way, shape or form have the defendant ever admitted to possessing any type of object during his encounters with the witnesses; significantly a BB Gun.

Mr. Hayden, verbatim, told the jury the defendant possessed a object, but that, only it could have been a BB Gun.¹⁵

Defendant asserts regardless of what Mr. Heyden intended to convey to the jury (i.e., they should acquit) Mr. Heyden inadvertently told the jury the defendant possessed some sort of object which could have been a BB Gun despite the defendant's adamant assertions to the contrary.

This inference was not isolated as the state rebutted by reminding the jury that Mr. Heyden wanted them to believe the defendant possessed a object which could have been a BB Gun. The state also reminded the jury that there was nothing in the record from either side that supported such a new theory.¹⁶ The state was absolutely correct on this point and the defendant suffered as a result.

Defendant asserts that this grand error is sufficiently prejudicial and requires a new trial in the interest of justice.

1. ST. Resp. Page: 13

2. ST. Resp. Page: 14

4. United States v. Kaplan 554 F.2D 577, 580
(No prejudice when the defense utilized the evidence)

3. Davis v. Alaska 415 U.S. 308, 318 (1974) (To make any inquiry effective the jury should be exposed to the "facts")

5. ST. Resp. Page 14

6. Tr. Tr. A-18 57A

7. See entire closing of counsel

8. Defendant asserted Strickland v. Washington, 466 U.S. at 681 s. ct 2061 "If there's only one line of defense counsel must conduct 'reasonable substantial investigation' in to that line of defense, since there can be no strategic choice that renders such an investigation unnecessary even if counsel relied on only one line of defense when there's others available" See Def. Post. Page 3-4

9. ST. Resp. Page: 14

10. See cross-exam. of Freeman, Elder, and Smith. Counsel elicited prior drug convictions and other prima facie crimes.

11. See phone record of Def. Jan. 26.09 3.50 PM
Def. call to Elder

12. Mr. Hayden, in his closing, argues the defendant was let in the home and would not have had to claim to be w.p.D. A-159-T-80

13. A-162 T-93 — A-163-T-95 line 12-14

14. St. RSP. Page-15

15. ID. see also Tr. Tr. at A-156 T-70 line 8-10

16. A-162 T-91 lines 3-5

Certificate of service

I Cory J. Holmes, hereby certify that I have served a true and correct copy of the attached reply brief to the Delaware supreme court with the following party:

To: clerk of the supreme court Po. Box 476 Dover, DE 19903

By placing same in a sealed envelope and depositing same in united states mail at James .T. Vaughn. Correctional Center, Smyrna DE, 19977
on this 20 day of October 2012

Signed ~~Cory J. Holmes~~

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