IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	:	Def. ID# 9909027880
v.	:	
JULIAN BODNARI	:	

MEMORANDUM OPINION

MOTION FOR JUDGMENT OF ACQUITTAL - DENIED

MOTION FOR NEW TRIAL - DENIED

DATE SUBMITTED: March 18, 2002

DATE DECIDED: June 14, 2002

Adam D. Gelof, Esquire, Department of Justice, 114 E. Market Street, Georgetown, DE 19947

Andrew J. Witherell, Esquire, 100 E. 14th Street, Wilmington, DE 19801

Bradley, J.

Pending before the Court are motions for acquittal and a new trial which defendant Julian Bodnari ("defendant") has filed in this matter. For the reasons set forth below, I deny the motions.

FACTS

In September, 1999, defendant was arrested on drug, forgery, criminal impersonation, and motor vehicle charges. In November, 1999, defendant was indicted on such charges.

The jury trial in this matter began July 10, 2000, and ended with the jury's verdict on July 14, 2000.

Evidence presented at the trial established the following. Defendant requested Herman Garcia ("Garcia") help him transport drugs from Reading, Pennsylvania to the Norfolk, Virginia area. Garcia obtained a kilo of cocaine and wrapped it. Garcia also obtained a vehicle to use in the transportation. Garcia and defendant placed the cocaine in a hidden compartment of the vehicle. Garcia also placed a handgun in a the hidden compartment upon defendant's suggestion.

Defendant was driving the car while Garcia napped. The police stopped defendant for speeding outside Millsboro, Delaware. A search by the police produced marijuana roaches, the cocaine wrapped in, amongst other things, a plastic ziploc bag, the handgun, and a razor blade which contained cocaine residue. Defendant attempted to hide his true identity by using the fake identity of "Mike Allen". He possessed several documents supporting

his fake identity. Defendant signed numerous documents using the name "Mike Allen". Defendant did not have a valid driver's license nor did he have proof of valid insurance on the vehicle.

The jury found defendant guilty of the following charges: trafficking in cocaine, possession of a firearm during the commission of a felony, possession with intent to deliver cocaine, carrying a concealed deadly weapon, forgery in the second degree (six counts), conspiracy in the second degree, criminal impersonation, failure to have minimum insurance, driving without a license, possession of a fictitious license, and speeding. It found him not guilty of two charges: maintaining a vehicle for keeping controlled substances and possession of drug paraphernalia.

On July 26, 2000, defendant filed motions for a new trial and for judgment of acquittal. The motions were filed either in New Castle County or Kent County's Prothonotary's Office on July 21, 2000. They then were filed with the Prothonotary of Sussex County on July 26, 2000. There is nothing in the file indicating whether the other county transferred the filings to this Court or whether defendant discovered the filing error and then filed the documents in Sussex County.

DISCUSSION

1) Motion for Judgment of Acquittal

During trial, defendant made a motion for judgment of acquittal as to all charges except for two charges of forgery in

the second degree,[1] the speeding charge and the criminal impersonation charge. The Court denied the motion. Defendant renewed the motion after trial with regard to the charges of trafficking in cocaine, possession with intent to deliver cocaine, possession of a firearm during the commission of a felony, carrying a concealed deadly weapon, and the remaining four counts of forgery in the second degree.[2] Defendant argues that insufficient evidence was presented at trial to support a finding of guilt beyond a reasonable doubt as to these charges.

As the Supreme Court explained in Bordley v. State, Del. Supr., No. 65, 1995, Veasey, C.J. (August 1, 1995) at 3-4:

> In determining a motion for judgment of acquittal, the trial judge must consider the evidence and all legitimate inferences to be drawn therefrom, in a light most favorable to the State. [Citations omitted.] Acquittal is appropriate only when the State has presented insufficient evidence to sustain a guilty verdict. [Citation omitted.] "The Court is not required to ask

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[1]Defendant argued the State failed to present sufficient evidence to convict him of the following charges of forgery in the second degree: Cr. A. No. S99-10-0280 (possession of altered birth certificate); Cr. A. No. S99-10-0281 (possession of a forged Pennsylvania driver's license); Cr. A. No. S99-10-0282 (possession of a forged Pennsylvania identification card); and Cr. A. No. S99-10-0283 (possession of a forged federal social security card). He conceded the State presented sufficient evidence regarding Cr. A. No. S99-10-0284 (regarding the Delaware State Police Consent to Search Form) and Cr. A. No. S99-10-0286 (regarding the Delaware State Police Notification of Forfeiture Form).

[2]The making of the motion at trial saves this motion from being dismissed as untimely. State v. Coleman, Del. Super., Cr. A. No. S92-12-0265, Lee, J. (May 24, 1994) at 4-5, rearg. den., Del. Super., Cr. A. No. S92-12-0265, Lee, J. (June 15, 1994).

> itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. It must merely inquire as to whether any rational trier of fact could have found that guilt was established." [Citation omitted.]

The Court previously denied the motion for judgment of acquittal. Trial Transcript at C-139 - C-145. Nothing has changed since that ruling. The renewed motion is denied.

2) Motion for New Trial

The motion for a new trial was filed with Sussex County's Superior Court a day late. Super. Ct. Crim. R. 33. However, the Court will not waste time on this issue, such as by examining whether the filing of the motion in another county saved it from being deemed untimely filed, because the motion is meritless.

In the motion filed on July 26, 2000, defendant argues he is entitled to a new trial on two grounds. First, because the verdicts of guilty as to the charges of trafficking in cocaine and possession with intent to deliver cocaine are inconsistent with the verdicts of not guilty as to the charges of maintaining a vehicle for keeping controlled substances and possession of paraphernalia. Second, "the State improperly proffered statements to the jury regarding guilt associated with the Fifth Amendment privilege and solicited the jury into a `law enforcement' role tainting their

ability to deliberate with clear consciousness of the law."[3]

a) Inconsistency of Verdicts

I examine defendant's first ground for a new trial, that the verdicts of guilty as to trafficking in cocaine and possession with intent to deliver cocaine are inconsistent with the verdicts of not guilty as to the charges of maintaining a vehicle for keeping controlled substances and possession of drug paraphernalia.

There was evidence for the jury to conclude that Garcia supplied the vehicle for transportation of the drugs. There was further evidence for the jury to conclude that Garcia wrapped the kilo in the plastic ziploc bag. There was little evidence regarding the razor blade. The jury could have decided that Garcia was the one who supplied the vehicle and packaged the cocaine and defendant's remote involvement with the vehicle, the wrapping of the kilo, and the razor blade did not warrant a conviction. Jury leniency explains such a conclusion by the jury; thus, the convictions are sustained. Brown v. State, 729 A.2d 259, 266 (Del. 1999); Davis v. State, 706 A.2d 523, 525-26 (Del. 1998); State v. Reed, Del. Super., Cr. A. Nos. 90-07-0929 - 0930, Lee, J. (June 26, 1992) at 8-9.

b) Prosecutorial Misconduct

The second ground for a new trial is that the State of

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[3]In his opening brief, defendant adds grounds to the motion. As noted below, these supplemental grounds are time-barred.

Delaware ("the State") improperly proffered statements to the jury regarding guilt associated with the Fifth Amendment privilege and solicited the jury into a "law enforcement" role, tainting the jurors' ability to deliberate with clear consciousness of the law.

Defendant does not develop the contention that the State improperly proffered statements to the jury regarding guilt associated with the Fifth Amendment privilege. Accordingly, the Court deems that argument to be abandoned.

The second contention, that the State solicited the jury into a "law enforcement" role, apparently is based upon the following statement the prosecutor made in closing argument:

> Ladies and gentlemen, it is clear the drugs are off the street. We heard the street value of this, one hundred thousand dollars once it is broken down. That is a lot of misery. The stakes are high here. A lot of drugs were taken off the street. This is pain, affliction, and crime.
>
> Ladies and gentlemen, when you go back and deliberate and draw these inferences, it is time to take the drug dealer off the street, too.

Trial Transcript at D-146.

Defendant maintains the misery and pain statement sought sympathy and the taking "the drug dealer off the street" comment constituted the prosecutor's opinion about defendant's guilt, disclosed defendant would be incarcerated, and requested the jury do something outside its province.

These comments were improper. The prosecutor is not to invoke sympathy. See Thornton v. State, Del. Supr., No. 307, 1993, Moore,

J. (June 9, 1994). In addition, the prosecutor is not allowed to appeal to a juror's sense of personal risk or "direct the jury's attention to the societal goal of maintaining a safe community", Williamson v. State, 707 A.2d 767 (Del. 1998); Black v. State, 616 A.2d 320, 323-24 (Del. 1992). Defendant did not object to the comments; accordingly, the Court determines whether the statements clearly deprived defendant of a substantial right or clearly demonstrate manifest injustice. Black v. State, 616 A.2d at 324. As explained therein:

> In evaluating a claim of prosecutorial misconduct, ... [the] Court applies the three-prong test outlined in Hughes v. State, Del. Supr., 437 A.2d 559, 571 (1981). Under this test, the Court examines (1) the closeness of the case; (2) the centrality of the issue affected by the alleged error; and (3) the steps taken to mitigate the alleged error. Id.

The evidence that defendant was guilty of the crimes on which he was convicted was overwhelming. This was not a close case. The jury was instructed to base its verdict on the evidence, not on the prosecutor's comments. Trial Transcript at D-70 - D-71. Although the comments were improper, they were harmless beyond a reasonable doubt. I deny the motion on this ground.

The Court's consideration of the motion should end here. However, in his briefing on the motion, defendant supplemented the motion for a new trial. These supplemental grounds are time-barred. State v. Reed, supra at 5-7, and accordingly, I deny all the grounds discussed below for that reason. However, even if the

grounds were not time-barred, the Court would dismiss them because they are meritless.

c) Discovery Violations

Defendant maintains that pursuant to discovery requests, the State provided him only with the transcript of an interview conducted on March 10, 2000. Defendant maintains there were other interviews, and transcripts and/or tapes of those interviews were not provided to him.

Ronald Phillips, Esquire, originally entered his appearance as counsel for defendant along with Kenneth Melvin, Esquire, who was allowed admission pro hac vice.

On November 23, 1999, and December 7, 1999, Mr. Phillips filed a request for discovery pursuant to Superior Court Criminal Rule 16. The request sought the production of:

> ... Any conflicting or contradictory statement made by any potential State witness, whether such statement or statements are internally conflicting or contradictory or conflict or contradict statements made by other State witnesses.
>
> ... Prior statements of all witnesses. If such will not be provided at this time, please let me know when you will provide such statements.

On January 4, 2000, Mr. Phillips filed a request for Brady material.

On January 13, 2000, the State provided responses to defendant's discovery request. The responses state in pertinent part:

> 1. See attached police report for the substance of any statements by your client. If indication is made in the police report to a taped statement and one is not attached you may contact me to arrange a mutually convenient time to listen [sic] the statement. *At least two pertinent tapes exist. A tape recording was made at the scene. In addition audio interviews were conducted with your client and the co-defendant. If you provide me with blank standard cassette tapes I will attempt to make copies for your review.*
>
> ***
>
> 6. ... The State is unaware of the existence of any materials which would be discoverable under Brady. If you have reason to believe such materials exist, please contact me in writing and advise me of the specific nature of your belief.
>
> ***
>
> 10. The State is aware of its obligation under Jencks. It will comply with requests made at trial.

The State provided defendant a full copy of the police report, even though defendant had insisted on a preliminary hearing. On page 3 of that police report, it is stated:

> D1 [defendant] WAS DEVELOPED AS DEFENDANTS [SIC] THROUGH INFORMATION GENERATED FROM HIS OWN TAPED INTERVIEW [SIC] AND FROM INFORMATION GIVEN BY D2 [Herman Garcia] DURING A TAPED INTERVIEW....
>
> D2 [Garcia] WAS ALSO DEVELOPED AS DEFENDANT THROUGH INFORMATION GENERATED FROM HIS OWN TAPED INTERVIEW AND FROM INFORMATION GIVEN BY D1 DURING A TAPED INTERVIEW .... REFER TO DET. GOODE'S SUPPLEMENT REPORT AND TAPED INTERVIEW FOR D2....

On page 8 of that report, it is stated:

> **EVIDENCE/SEIZURE**
>
> ***
>
> VIDEOS/TAPED EVIDENCE:

> VIDEO/AUDIO TAPE OF INTERVIEW SEE DET. GOODE'S SUPPLEMENT.
> MICROCASSETTE RECORDING OF PRE-INTERVIEW WHILE AT SCENE.

The supplement to the police report states as follows:

> On 092099 at approximately 0029 hours, I read Def. Herman Garcia his Miranda warning, after which he responded, "Ask anything you want." This interview was audiotaped.

The report then goes on to summarize Garcia's responses to the interview.

Thus, the State produced and/or made available to defendant the tapes of the interview at the scene and the September 20, 1999, interview.

Mr. Melvin and Mr. Phillips were allowed to withdraw on February 4, 2000. Andrew Witherall, Esquire ("defense counsel"), thereafter entered his appearance on behalf of defendant.[4]

On March 31, 2000, defense counsel sent the prosecutor, Adam Gelof, a letter which stated in pertinent part:

> As I previously advised, I did receive a substantial amount of discovery from Ron Phillips when I accepted this case. The documents that I received may be incomplete especially if discoverable evidence has come to your attention within the last 3-4 weeks. That being said, pursuant to Superior Court Criminal Rule 16, on behalf of my client, I request that you provide me with the following items by way of discovery (if your records show that it has been provided, please advise so I may confirm with the file)....

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[4] It was Mr. Witherall and Mr. Phillips' obligations to ensure the discovery was turned over from Mr. Phillips to Mr. Witherall. It was not the State's obligation to go back and reproduce everything.

Mr. Gelof responded as follows:

> To avoid any future delays, as I indicated previously, I am willing to extend an open file review of the material in my file.

In addition, by letter dated May 2, 2000, the State provided defense counsel copies of transcripts of tape recordings of defendant and Garcia at the scene of the arrest. At the suppression hearing held in this matter on May 4, 2000, the tapes and the transcripts of these recordings were referenced. Also, the State, on May 2, 2000, provided defense counsel with a copy of the transcript of Detective Goode's interview of Herman Garcia on March 10, 2000.[5]

At trial in this matter, the following exchange occurred between defense counsel and Herman Garcia ("Garcia").

> Q. You do remember speaking with Detective Good on March 14th on a taped audio statement? ***
>
> A. I spoke with them a couple of times. I don't exactly remember the dates, but I spoke with them.
>
> Q. And you gave a statement. That is the statement you gave regarding this incident?
>
> A. Is that the statement I gave? I don't remember.
>
> ***
>
> A. I remember saying that the first interview.
>
> Q. How many interviews have you had?
>
> A. A lot of them. I had at least three or four. A couple interviews with the detective.

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[5]The date of the transcript was March 14, 2000.

Q. One was at the stop; it that correct?

A. One when we got pulled other. Another one was -- yeah, another one was when we talked, me, the prosecutor, my lawyer.

Q. So that was when you were working out your Plea Agreement?

A. Yeah.

Q. That wasn't an interview with the detectives who were investigating the case?

A. No.

Q. I am speaking of the interview that you had with the detective when he was investigating this case. ***

Transcript B-177 - B-180.

Thus, to recap, the following interviews occurred and the following discovery was produced.

On September 19, 1999, there was an audiotaped statement. The State Police provided police reports that summarized the initial contact. Also, a transcript of the audiotape and tape itself were made available before trial. In addition, the audiotape was played during the pretrial suppression motion. Defendant had this discovery and cannot complain he did not.

On September 20, 1999, there was an audiotaped interview. This interview was not videotaped as the police officer indicated at the preliminary hearing in this matter. The audiotape was made available to trial counsel seven months before trial. The State also provided police reports which summarized this interview.

There also was a March 10, 2000 interview. Defendant concedes

he had discovery from this interview.

The prosecutor also interviewed defendant to prepare for trial; he did not write or record anything.[6] There was no obligation for the prosecutor to provide the substance of Garcia's statements to the defendant. Dickerson v. State, 637 A.2d 826 (Del. 1993).

As the above establishes, the State complied with discovery requests. This argument is frivolous, and this ground fails.

d) Prosecutorial Misconduct

Defendant argues that the prosecutor elicited the following statement by a testifying police officer: "[O]ur investigation has revealed that he [Bodnari] is top dog in the organization." Trial Transcript at C-36. Defense counsel objected immediately. The Court struck that statement and instructed the jury to disregard it. Trial Transcript at C-45 - 46. Defendant argues that no instruction could have cured this prejudicial statement.

The statement was improper. However, as noted earlier, the case was not close. The immediate curative mitigated any prejudicial harm which the question might have created. See Paskins v. State, Del. Supr., No. 294, 1994, Veasey, C.J. (March 15, 1995). There is no basis for a new trial on this ground.

e) Limitation on Cross-examination of Garcia

[6]The prosecutor makes this representation in briefing, and it is accepted as one made by an officer of the Court.

Defendant argues he was unable to fully cross-examine Garcia regarding his plea agreement.

Garcia faced charges of trafficking in cocaine, possession of a firearm during the commission of a felony, possession with intent to deliver cocaine, maintaining a vehicle for keeping controlled substances, carrying a concealed deadly weapon, possession of drug paraphernalia, and possession of marijuana. State v. Garcia, Def. ID# 9909015226. Thus, he was facing substantial mandatory and non-mandatory jail time. On April 6, 2000, he entered into a guilty plea to the charges of possession of a firearm during the commission of a felony, possession with intent to distribute cocaine, and conspiracy in the second degree. Vinnie Vickers, Esquire, one of defendant's attorneys, represented him during this plea.[7]

He was sentenced on April 6, 2000. As to the charge of possession of a firearm during the commission of a felony, he was sentenced to six years at Level 5, and after serving three years of minimum mandatory time, the balance is suspended for three years of probation at Level 3. As to the possession with intent to distribute cocaine, he was sentenced to three years at Level 5, suspended for three years at Level 3 probation. As to the conspiracy in the second degree, he was sentenced to one year at

[7]Defendant also was represented by out of state counsel. It was not necessary that that attorney be present at the plea or sign the plea documents.

Level 5, suspended for one year at Level 2 probation.

When defense counsel began cross-examining Garcia regarding the charges, the State requested that defense counsel not be allowed to elicit testimony that he was facing fifteen years minimum mandatory Level 5 time on the charge of trafficking in cocaine because the State did not want the jury to determine that that was the amount of time defendant would be sentenced if he was convicted of that charge. The State agreed defense counsel could ask the total amount of time Garcia was facing and the total amount of time to which he was sentenced, but contended he could not ask what amounts he was facing on each specific crime. The Court agreed with the State and so ruled. It also agreed that defense counsel could ask Garcia what were the gross numbers of charges he was facing, whether they were serious, the gross number of years he was facing, the charges to which he pled, and the amount of time to which he was sentenced. The Court further allowed defense counsel to ask him whether eighteen of the years Garcia was facing were minimum mandatory. The only thing defense counsel could not do was match the number of years with each specific charge. Trial Transcript at B-209 - B-215.

Defendant argues that he should have been able to ask Garcia what sentence he was facing on each charge. He is correct that he was entitled to attempt to discredit Garcia by determining what evidence of favorable treatment existed. <u>Wintjen v. State</u>, 398 A.2d

780 (Del. 1979). Here, there was no deprivation of that right. Defense counsel was allowed to establish that Garcia received favorable treatment; i.e., by entering into the plea, he obtained a significant deal on his imprisonment time. Defense counsel was allowed to discredit Garcia without providing the jury with information on the sentence defendant might receive since a jury should not consider the sentencing consequences which flow from a guilty verdict. State v. Cohen, 604 A.2d 846, 852 (1992). Defendant's argument is meritless.

f) Duplicity regarding Plea

Defendant also argues duplicity existed regarding Garcia's plea. According to defendant:

> The copy of the plea agreement that was initially provided to Defendant appeared to have been unsigned by the defendant and by counsel. Defendant Bodnari argues that, upon information and belief, counsel Sodomsky was not have [sic] signed the document and that the document remained unsigned until such time as Garcia appeared to testify at trial. In that fashion, Defendant Bodnari argues that there were additional benefits to Garcia, or rather a greater downside if he did not testify. This was not disclosed to the defense. Defendant Bodnari is exceptionally concerned over what he considers newly discovered evidence and/or failure to disclose on the part of the State and as such asserts his right to a new trial.

Frankly, the Court really does not understand this argument. Garcia entered the plea and he and his attorney signed the plea documents before trial in this matter. Garcia was sentenced before the trial took place. Defendant's argument is meritless.

g) Verdict against Weight of the Evidence

Defendant's final argument is that the verdict was against the weight of the evidence. There was evidence for each crime on which defendant was convicted. Much of the evidence was provided through Garcia's testimony. Defendant argues that Garcia was so unbelievable that none of his testimony can be considered and without that testimony, there is not sufficient evidence to convict defendant. The jury, not the Court, determines credibility issues. Nelson v. State, 781 A.2d 695 (Del. 2001). Obviously, the jury believed Garcia's testimony. There was substantial evidence to convict defendant. This ground is meritless, also.

CONCLUSION

For the foregoing reasons, I deny defendant's motion for judgment of acquittal and motion for a new trial.

IT IS SO ORDERED.