

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DASHAWN AYERS,
Defendant Below,
Appellant,

v.

STATE OF DELAWARE,
Plaintiff Below,
Appellee.

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No. 646, 2013

ID No. Below: 1208001950,
Criminal Action Nos.
IK12090023W, IK12090024W
and IK12090025W

APPELLANT'S OPENING BRIEF ON APPEAL

BENJAMIN A. SCHWARTZ
Delaware Bar ID No. 4145
SCHWARTZ & SCHWARTZ,
ATTORNEYS AT LAW, P.A.
1140 South State Street
Dover, Delaware 19901
(302) 678-8700
mail@BenSchwartz.com
Attorney for the Appellant

Trial Court: Superior Court of Delaware, in and for Kent County

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NATURE AND STAGE OF PROCEEDINGS

On May 26, 2012, police officers were engaged in surveillance on an alleged drug operation involving suspects Galen Brooks and Michael Demby. Transcript of Trial Volume B (“Transcript B”), Page B-7, Lines 20-23 (A-42). Based on wiretaps and surveillance stemming from the alleged activities of Brooks and Demby, police officers eventually implicated Dashawn Ayers as a suspect, leading to his arrest. State’s Exhibit 1, Wire 12-35, Call #67. As a result, Ayers was charged with Aggravated Possession and Drug Dealing, pursuant to 16 Del.C. § 4752, and Conspiracy. He was tried jointly with codefendant Demby in regard to the alleged incidents occurring on May 26, 2012. Transcript of Trial Volume A (“Transcript A”), Page A-7, Lines 8-9 (in the Appendix at page A-20)(*Please note that the pagination of Transcript of Trial Volume A follows the same convention as that required for Appendix pagination. Appendix citation will follow transcript citation and will be set apart in parentheses*). However, Demby had separate charges stemming from another alleged incident during June 2012 and as a result, Ayers made a written Motion to Sever. Docket No. 15. A written decision was issued by the Superior Court on July 30, 2013. Docket No. 30. In addition, at Transcript A, Page A-5, Line 4 (A-18), a second oral Motion to Sever was made. The Court denied the motion at Transcript A, Page A-12, Lines 5-6 (A-25).

Prior to trial, Ayers moved to exclude the wiretapped conversations between Brooks and Demby, arguing that the statements constituted testimonial hearsay. The State maintained that the hearsay exception of D.U.R.E. 801(d)(2)(e) applied and that the statements in the wiretaps were not hearsay. The Court agreed after hearing testimony of an alleged conspiracy outside the presence of the jury. Transcript A, Page A-103, Lines 1 – A-104, Line 1 (A-37 – A-38).

Once the wiretaps were admitted, the State put on expert witness testimony to translate the wiretaps from street slang to English for the jury, and to provide the jury with “expert” interpretation of the conversations so the jury could infer their true criminal nature. Transcript of Trial Volume C (“Transcript C”), Page C-57, Line 3 (A-79). Moreover, the State’s expert stated that he knew the alleged substance referenced in the wiretaps was cocaine because the declarants in the wiretaps used a cutting material and the price described was consistent with that of cocaine. Transcript C, Page C-58, Lines 19-23 (A-80).

At the conclusion of the trial on October 9, 2013, the jury found Ayers guilty of all counts against him. He was adjudged guilty of Drug Dealing Tier 4, Tier 5 Possession, and Conspiracy Second Degree. Transcript of Motion and Sentencing (“Motion and Sentencing”), page 16, lines 2-4 (A-125). After trial but before sentencing, after Trial Counsel left to join the Attorney General’s office, undersigned counsel filed a Motion for Judgment of Acquittal raising, among other

things, the double jeopardy issue. A-102. That motion was denied as untimely. Motion and Sentencing, Page 11, Lines 17-18 (A-122). However, Ayers's co-defendant, Demby, made a timely Motion for Acquittal also based on double jeopardy. Motion and Sentencing, Page 3, Line 23 – Page 4, Line 8 (A-114 – A-115). After sentencing, Ayers timely filed this appeal.

SUMMARY OF THE ARGUMENT

In this Opening Brief on Appeal, DaShawn Ayers makes three arguments why this Court should reverse his convictions.

First, it was a violation of Mr. Ayers's right to confront the witnesses against him to permit admission into evidence of wiretap recordings of absentee witnesses. The wiretap recordings alone were relied on by the State to circumstantially prove that the alleged substance referenced in the recordings was cocaine, to prove the quantity of the substance, and to prove that Mr. Ayers possessed it.

Second, it was a violation of Mr. Ayers's Double Jeopardy rights to permit him to be tried, convicted and sentenced to prison terms on both Drug Dealing and Aggravated Possession because the latter is a lesser included offense of the former.

Third, it was a violation of Mr. Ayers's right to a fair trial where he was forced to be tried alongside codefendant Demby, because evidence that, in a trial of Ayers only, would have been excluded under Rule 404(b) was admitted for use against Demby, and because Ayers was denied the right to cross-examine Demby.

Mr. Ayers respectfully submits that after briefing is completed and the Court has an opportunity to review the arguments of the parties and the record, it will be clear that Mr. Ayers was denied a fair trial and was convicted solely on the basis of incompetent evidence.

STATEMENT OF FACTS

In the course of police investigation into suspected drug activity involving non-party Galen Brooks, surveillance and wiretaps revealed a number of associates and activity consistent with drug transactions. Transcript B, Page B-32, Lines 17-20 (A-67); Transcript C, Page C-58, Lines 19-23 (A-80). Ayers's codefendant Michael Demby was revealed to be an associate of Brooks via wiretaps and was alleged to have been participating in a criminal enterprise by selling cocaine in conjunction with Brooks. Transcript B, Page B-32, Lines 17-20 (A-67); Page B-38, Lines 14-17 (A-73); State Exhibit 1, Wire 12-35, Call #67.

In addition, through the wiretaps, police believed they were able to ascertain that an alleged drug deal was to take place on May 26, 2012. Transcript B, Page B-33, Lines 16-18 (A-68); B-34, Lines 1-3 (A-69); State Exhibit 1, Wire 12-35, Call #67. Police interpreted the wiretapped conversation between Brooks and Demby to mean that Demby was going to take cocaine and meet someone in a van who was going to purchase it. State Exhibit 1, Wire 12-35, Call #67; Transcript C, C-58, Lines 19-23 (A-80). Surveillance later revealed that there was a meeting between Demby and an individual in a van where no illegal activities were observed and both parties then departed. Transcript B, page B-12, Lines 20-23 (A-47). Police then made a traffic stop on the van in an attempt to identify the individual driving. Transcript B, Page B-36, Lines 4-12 (A-71); Page B-37, Lines 5-6 (A-72). The van

was registered to Dashawn Ayers and the license given to the police officer at the traffic stop belonged to Dashawn Ayers. Transcript B, Page B-37, Lines 6-8 (A-72). The driver then allegedly fled the scene of the traffic stop, but no chase was given by police. Transcript B, Page B-37, Lines 9-10 (A-72). Accordingly, the traffic stop did not lead to a search of the vehicle or person and no drugs or money were ever seen or found. Transcript C, Page C-86, Lines 8-17 (A-84). Dashawn Ayers later turned himself in.

In addition to the investigation of Ayers on May 26, 2012, there was another investigation into alleged drug activity done by the police involving only Demby on June 2, 2012. Transcript of Trial, Volume E (“Transcript E”), Page E-40, Lines 2-4 (A-97). Ayers was not involved in any of the events of June 2, but evidence regarding the charges against Demby were included in the trial due to the joinder of the defendants for trial. Transcript E, Page E-40, Lines 2-4 (A-97).

Ayers’s trial counsel made a Motion to Sever the defendants, which was denied. Transcript A, Page A-12, Lines 5-6 (A-25); Docket No. 15. In addition, a Motion in Limine was made and denied to exclude wiretapped prejudicial statements by Demby that implicated Ayers. The Motion is in our Appendix at A-7. At the conclusion of the trial, the jury ultimately found Ayers guilty on all counts, and so now Mr. Ayers brings this appeal to rectify the Constitutional violations that resulted in a fundamentally unfair trial.

ARGUMENT

I. IT WAS A VIOLATION OF AYERS'S CONFRONTATION RIGHTS UNDER THE UNITED STATES AND DELAWARE CONSTITUTIONS TO ADMIT INTO EVIDENCE WIRETAP RECORDINGS OF ABSENTEE WITNESSES, IN ORDER TO PROVE A SUBSTANCE WAS COCAINE, TO ESTABLISH THE QUANTITY OF THAT SUBSTANCE, AND TO PROVE AYERS POSSESSED THE SUBSTANCE.

Question Presented

Do (a) the Confrontation Clause of the 6th Amendment to the U.S. Constitution, (b) Article I., Section 7 of the Delaware Constitution, and (c) the hearsay rule in the Delaware Uniform Rules of Evidence require exclusion of wiretap recordings of absentee witnesses where those statements are used as testimony at trial to establish the essential elements of the offenses charged?

This issue was presented to the Trial Court in the form of a written Motion in Limine filed prior to trial. (Appendix, page A-7). At Transcript of Trial, Volume A, beginning at line A-17, that Motion in Limine was heard. (Appendix, A-26). Judge Vaughn denied the Motion and ruled that the recorded conversations were not testimonial and thus not excluded under Crawford, and further not hearsay as long as the State lays a foundation to prove a conspiracy. Transcript A, Page A-103, Line 17 – Page A-104, Line 1 (A-37 – A-38). The State made an application to be permitted to lay the foundation for conspiracy in order to introduce the wiretaps by calling Detective Lloyd to testify outside the hearing of the jury, and

At first blush, one would think that the Delaware “face to face” requirement would provide more security to the accused than the Federal Confrontation Clause. Perhaps it ought to. But currently, it appears our Delaware Constitution provides less protection to accused Delaware citizens than does the U.S. Constitution, rendering it effectively meaningless.

Under Gannon v. State, 704 A.2d 272 (1998), the Delaware Constitution sanctions admission of un-confronted out-of-court statements that fit within a hearsay exception. There, a “witness who was being met ‘face to face’ by Gannon at trial was permitted to give testimony that included hearsay statements.” Gannon at 278. The witness testified to an excited utterance made by his daughter, who was not present at trial. The defendant did not have a right to cross-examine the declarant of the excited utterance because the statement fit into a hearsay exception. Gannon followed the rule from White v. Illinois, 502 U.S. 346 (1992), that “statements that qualify as a firmly rooted exception to the hearsay rule are admissible into evidence without a demonstration that the declarant is unavailable”. Gannon at 275.

Since Gannon was decided, the Supreme Court of the United States decided Crawford v. Washington, 541 U.S. 36 (2004), dispatching the previous formulation of confrontational constitutionality from White v. Illinois. The majority opinion in Crawford states at page 51, “[l]eaving the regulation of out-of-court statements to

the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. [Sir Walter] Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court."

The U.S. Supreme Court was, of course, referring to the infamous trial of Sir Walter Raleigh, who was convicted of treason and executed. His prosecution was based on accusatory letters written by Henry Brooke, 11th Baron Cobham. Raleigh's repeated demands for Cobham to appear were denied. The Court in Crawford was essentially saying that the Confrontation Clause should not permit admission of Cobham's confession where (a) Raleigh was able to cross-examine the witness reading Cobham's confession and (b) the written confession itself fit within an exception to the hearsay rule. The U.S. Supreme Court in Crawford gave us a new rule:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law — as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." [Footnote omitted.] Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford at 68. To sum up, if the evidence is testimonial, then the declarant is to be cross-examined. And if the evidence is not testimonial, the evidence must fall within a hearsay exception to be admitted.

Here, the evidence was testimonial in the way it was presented and the purpose for which it was used. Although the Court ruled the wiretap recordings were not testimonial, Transcript of Trial, A-103, the State put Detective Lloyd on the witness stand and played for him the recordings while intermittently pausing to permit him to translate the material from street slang to English for the jury, and provide color commentary to assist the jury in their understanding of the supposed criminal nature of the conversations. This began at Transcript C, Page C-57, Line 3. (A-79).

It should be noted that Ayers's case is based entirely upon circumstantial evidence, no drugs or money having been observed or recovered. The wiretap recordings when mixed with police testimony had a testimonial effect. For example, the State directed Special Agent Dunn's attention to call #67 from the wiretap. Transcript C, C-56, Line 21 (A-78). The State asked him "How do you know that it's cocaine?" and the Detective answered that he determined it was cocaine because they used a cutting material and because the price was consistent with that for cocaine. Transcript C, Page C-58, Lines 19-23 (A-80). In effect, the

declarants in the wiretap recordings were testifying through the police interpreter that the substances were cocaine.

Imagine if you will that we could hold Sir Walter Raleigh's trial today. Instead of calling Detective Lloyd to translate audio recordings referring to "three germs" on the "scizzy" (Transcript C, C-58, Lines 5-9 (A-80)), we could call a linguist expert in Early Modern English to read aloud and translate Cobham's confession from 1603 for the jury, and provide contextual information so the jury understands the treasonous import of the letters as to Raleigh. Plainly, this would be repugnant to the U.S. Constitution¹. But how could anything be more testimonial? A linguist/expert mixing out-of-court statements with his own impressions so as to present a coherent narrative to the jury makes the whole entire presentation, including Cobham's letters – or the wiretap recordings, inherently testimonial.

B. Even if the wiretap statements had not been testimonial, under Crawford v. Washington they should have been excluded because they did not fit under the hearsay exception of DURE 801(d)(2)(e).

Even if the wiretap evidence in Ayers's case was not testimonial, it should not have been admitted under the hearsay exception for codefendant statements found in 801(d)(2)(e). At Transcript of Trial, Volume A, Page A-17 (Appendix A-26), a

¹ Interesting read: "The Trial of Sir Walter Raleigh: A Transcript", at <http://mathewlyons.wordpress.com/2011/11/18/the-trial-of-sir-walter-raleigh-a-transcript/>

Motion in Limine was presented to exclude the recordings. The State maintained D.U.R.E. 801(d)(2)(e) applied, and at Transcript A, Page A-103, Line 22 – Page A-104, Line 1, (Appendix, A-103 – A-104) the Court agreed, ruling that “With respect to the hearsay, they can be admitted under Rule 801(d)(2)(e) provided that the State lays an adequate foundation”.

Rule 801(d)(2)(e) provides in pertinent part as follows:

Article VIII. Hearsay

Rule 801. Definitions.

The following definitions apply under this article:

(d) Statements which are not hearsay. A statement is not hearsay if:

*

(2) Admission by party-opponent. The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy; provided that the conspiracy has first been established by the preponderance of the evidence to the satisfaction of the court.

“A district court faced with a challenge to the admission of a co-conspirator's statement must provisionally admit the statement and then wait until the end of the trial to consider whether, in light of all the evidence, the following four conditions are satisfied by a preponderance of the evidence: (1) a conspiracy existed; (2) the defendant was a member of the conspiracy; (3) the declarant was also a member of the conspiracy; and (4) the declarant's statement was made in furtherance of the conspiracy.” U.S. v. Diaz, 670 F.3d 332, 348 (1Cir. 2012). In addition, “[t]he declarants' statements alone cannot satisfy the preponderance of the evidence

standard; there must be some independent corroboration to allow admission. U.S. v. Diaz at 348 citing United States v. Portela, 167 F.3d 687, 703 (1 Cir.1999).

That was not done here. The Court heard testimony as to an alleged conspiracy outside the presence of the jury over an objection lodged by codefendant Demby's counsel. Transcript B, Page B-4, Line 3 – Page B-5, Line 16 (A-39 – A-40). The Court then ruled that “[u]nder the rule, the conspiracy must be established by a preponderance of the evidence to the satisfaction of the Court. Preponderance meaning more likely than not has to be satisfied to my -- satisfied to my satisfaction and I am satisfied that a conspiracy has been established by a preponderance of the evidence.” Transcript B, Page B-39, Lines 13-18 (A-74).

There was no corroborating evidence independent of the recorded conversations to suggest that Mr. Ayers had any type of agency relationship with any of the people having the conversations. Ayers was the alleged buyer of drugs, not a participant in the drug operation that sold him the drugs. If one accepts the State's proof, Ayers merely engaged in an arm's length transaction where he was the buyer, where he was on the other side of the transaction from those whose voices appear in the wiretap recordings, Galen Brooks and Michael Demby. State Exhibit 1, Wire 12-35, Call #67. In the wiretap recording, Brooks simply instructs Demby to meet an individual, alleged to be Ayers, in a van at a designated location. Id. Through surveillance, officers were able to determine that Demby met

with an individual in a van and the two parted ways. Transcript B, Page B-9, Lines 1-11 (A-44). However, no drugs, containers or paraphernalia were ever seen by the officers during the surveillance and none were ever found at the scene or in Ayers's or Demby's possession to indicate a relationship indicative of a coconspirator/agency relationship. Transcript B, Page B36, Lines 6-7 (A-71). There was no conspiracy that would have made Galen Brooks's statements to Demby and Demby's statements to Brooks binding against Ayers, who was in no agency relationship with them.

Furthermore, the Trial Court failed to make any findings concerning whether Ayers was a member of the conspiracy, whether the declarants in the wiretap recordings were each individually members of the conspiracy and whether the statements were made in the course and in furtherance of the conspiracy.

C. Mr. Ayers respectfully urges the Court to hold that Delaware's Confrontation Clause requires face to face cross examination of witnesses and reverse his conviction.

The Court should now readdress the Delaware Constitution's requirement of face-to-face confrontation in criminal cases. As stated above, "[i]n all criminal prosecutions, the accused hath a right . . . to meet the witnesses in their examination face to face". Delaware Constitution, Article I, Section 7. Justice Holland wrote in *The Delaware State Constitution, A Reference Guide* (Greenwood Publishing Group, 2002) at pages 43-44 that the face-to-face language

has not been completely construed, but that the Gannon case taught that the face to face requirement must be understood in conjunction with the “law of the land” reference at the end of Article I, Section 7.

The “law of the land” at the time of Gannon is, to put it bluntly, no longer the law of the land. At the time Gannon was decided, the Federal Confrontation Clause required either cross-examination of the declarant or a hearsay exception for the statement that would guaranty the trustworthiness of the statement, obviating the need for cross examination. White v. Illinois, 502 U.S. 346 (1992).

Rather than decide Delaware cases under the Crawford rule, this Court should reexamine Delaware’s Confrontation Clause and now fully construe its meaning. The face to face requirement should not be constrained by the law of the land language at the end of Article I, Section 7. This Court has consistently stated that “no constitutional provisions should be so construed as to nullify, or substantially impair, any other constitutional provision or to produce an irrational result.” State ex rel. Gebelein v. Killen, 454 A.2d 737, 746 (1982); Opinion of Justices, 330 A.2d 764, 767 (1974); Opinion of Justices, 225 A.2d 481, 484 (Del.1966), citing 1 Cooley's Constitutional Limitations (8th Ed.) 127-129. Furthermore, “resort to constitutional history or construction is not appropriate where the language of the constitution is clear and unequivocal”. State ex rel. Oberly v. Troise, 526 A.2d 898, 902 (Del.1987), citing Marker v. State, 450 A.2d

397, 399, n.3 (Del.1982); Opinion of the Justices, 290 A.2d 645 (Del.1972). “Constitutional phrases must, if possible, be given their ordinary or plain meaning.” Oberly at 902, citing Marker, 450 A.2d at 399. “Courts are called upon to construe the language of the constitution only when it is in some way obscure or doubtful in its meaning.” Oberly at 902, citing Marker, 450 A.2d at 399, Opinion of the Justices, 290 A.2d 645, and also Giuricich v. Emtrol Corp., 449 A.2d 232, 238 (Del.1982) (dealing with statutory construction). Here, the language of the Bill of Rights, Article I, Section 7 is as clear as a bell and should be given its plain meaning, to wit that witnesses must appear and be cross-examined before the offering party may enter their statements into evidence in a criminal trial.

D. Admission of the wiretap recordings was not harmless error.

“[R]eversal is required whenever the reviewing court ‘cannot say that the error was harmless beyond a reasonable doubt.’” Van Arsdall v. State, 524 A.2d 3, 11 (Del.1987)(Int.Cit.Om). Here, the State’s case was based entirely upon circumstantial evidence, no drugs or money having been recovered. The State relied on statements on the wiretaps to prove the drugs were drugs, to establish the quantities, and to draw the inference that a delivery to Ayers occurred. For example, the State directed Special Agent Dunn’s attention to call #67 from the wiretap. Transcript C, Page C-56, Line 21 (A-78). The State asked him “How do you know that it's cocaine?” and the Detective answered that he determined it was

cocaine because it sounded like they used a cutting material and because the price was consistent with that for cocaine. Transcript C, Page C-58, Lines 19-23 (A-80). In absence of the wiretap recordings, the State would not have been able to establish a prima facie case. No one saw money or drugs change hands, and there was no money or drugs tested. Transcript C, Page C-86, Line 8-17 (A-84). Instead, the evidence of a transaction and possession by Ayers of drugs is all in the wiretap recordings.

Because admission of the wiretap recordings violated Ayers's right to confront the witnesses against him, his convictions must be reversed.

II. AYERS'S DOUBLE JEOPARDY RIGHTS WERE VIOLATED WHERE HE WAS TRIED, CONVICTED AND SENTENCED TO BOTH DRUG DEALING AND AGGRAVATED POSSESSION.

QUESTION PRESENTED

Did the prosecution, conviction and sentencing of DaShawn Ayers on both Drug Dealing and Aggravated Possession violate Mr. Ayers's Double Jeopardy rights where there was only one alleged parcel of drugs?

This issue was fairly presented to the Trial Court in a written Motion for Judgment of Acquittal. Superior Court Docket Entries, No. 46 (A-5). The Motion is reproduced in the Appendix at A-102. A motion raising the same issue was made by Co-Defendant Demby on the day after the jury returned its verdict. Motion and Sentencing, Page 3, Line L23 – Page 4, Line 8 (A-114 – A-115).

STANDARD AND SCOPE OF REVIEW

“Claims alleging the infringement of a constitutionally protected right are subject to de novo review in this Court.” Capano v. State, 781 A.2d 556, 607 (2001).

MERITS OF THE ARGUMENT

Dashawn Ayers was charged, convicted and sentenced for both Drug Dealing and Aggravated Possession under the new Title 16 Del.C. § 4752. The Drug Dealing was in tier four quantity in excess of 20 grams of cocaine and the Aggravated Possession was tier five. But it was the same parcel of purported drugs. That violated the Blockburger rule. Further, it was not the intent of the General

Assembly that defendants would be convicted of both offenses. The text of the statute itself makes that clear, as does the bill's synopsis. Accordingly, the dual prosecution, convictions and sentences violated Mr. Ayers's Double Jeopardy rights.

A. The rule from Blockburger v. U.S., 284 U.S. 299 (1932) prevents trial, conviction and sentencing on both Drug Dealing and Aggravated Possession.

The Bill of Rights, specifically the 5th Amendment to the United States Constitution, provides in pertinent part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb". The Delaware Constitution, Article I, Section 8, states "no person shall be for the same offense twice put in jeopardy of life or limb". These Constitutional prohibitions on multiple prosecutions for the same offense are embodied in the Blockburger rule. Blockburger v. U.S., 284 U.S. 299 (1932). The rule states simply that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Id. at 342.

In this case, the elements of the drug dealing statute as applied were 1) Ayers possessed 2) with the intent to deliver 3) a controlled substance 4) in a Tier 4 quantity where he had fifty six grams of cocaine. 16 Del.C. § 4752(1). Similarly, the elements of aggravated possession were 1) Ayers possessed, 2) a controlled

substance 3) in a Tier 5 quantity where he had that same fifty six grams of cocaine. 16 Del.C. § 4752(3). The purported cocaine was the same parcel of cocaine for both charged offenses. Accordingly, there was no additional element for the aggravated possession and the Blockburger rule was violated.

B. The Delaware General Assembly did not intend the accused “to be twice put in jeopardy” for both Drug Dealing and Aggravated Possession.

The intent of the Legislature is clear from the plain language of the statute and from the text of the bill synopsis.

The plain language of the statute shows that it was intended to create one offense. “In the judicial interpretation of laws, courts are guided by well recognized rules. When the language of a statute is plain and conveys a clear and definite meaning, courts give to the statute the exact meaning conveyed by the language, adding nothing thereto and taking nothing therefrom.” Van Winkle v. State, 91 A. 385, 399 (Del.1914). The use of the disjunctive “or” in paragraph (d) coupled with the singular verbiage “shall be guilty of a Class B felony” shows that either Ayers should have been convicted of Dealing “or” he should have been convicted of Aggravated Possession, but not both. The statute reads:

§ 4752. Drug Dealing. Aggravated Possession. Class B Felony.

Except as authorized by this chapter any person who:

(a) manufactures, delivers, or possesses with the intent to manufacture or deliver, a controlled substance in a Tier 4 quantity;

(b) manufactures, delivers, or possesses with the intent to manufacture or deliver a controlled substance in a Tier 2 quantity, and there is an aggravating factor;

- (c) possesses a controlled substance in a Tier 5 quantity;
- (d) possesses a controlled substance in a Tier 3 quantity, and there is an aggravating factor; **or**
- (e) possesses a controlled substance in a Tier 2 quantity, as defined in any of § 4751C(d)(1) – (9), and there are two aggravating factors, shall be guilty of a Class B felony.”

(Emphasis added). If the General Assembly had intended more than one prosecution under Section 4752, they would simply have worded the statute to say something to the effect of, “the following acts shall be Class B felonies:”, and then they would have listed (a) through (e) and used the conjunctive “and” instead of the disjunctive “or” after paragraph (d). The plain language of the statute shows that a person who commits (a) or (b) or (c) or (d) or (e) shall be guilty of a single Class B felony, not multiple Class B felonies.

Further proof of the General Assembly’s intent is found in the Synopsis to the new statute:

Sections 38, 40, 42, 47 and 54. These sections enact the new laws against Drug Dealing and Aggravated Possession -- 16 Del. C. §§ 4752, 4753, 4754, 4755 & 4756. The structure of these new laws would be pyramidal, where each lower grade of the offense would be a ‘lesser-included offense’ of one or more of the higher grades of the offense.

Synopsis to House Bill 19, 146th General Assembly, available at <http://www.legis.delaware.gov/LIS/LIS146.NSF/vwLegislation/HB+19?Opendocument> (last viewed February 22, 2014). Aggravated Possession was intended to be a lesser included offense of Drug Dealing in the pyramidal structure of this new drug offense statute.

C. This issue was preserved for this Court's consideration.

The State may counter that Defendant did not timely file his motion for judgment of acquittal raising this argument below. "Only 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." Supreme Court Rule 8.

After Mr. Ayers's trial but before sentencing, his trial counsel joined the Attorney General's office as a Deputy Attorney General in the criminal unit of the Kent County office, the same unit in the same county that prosecuted Mr. Ayers. Undersigned counsel took over defense of this case after trial counsel's departure from his firm. Undersigned counsel read the transcripts of the trial and immediately filed a Motion for Judgment of Acquittal raising the double jeopardy issue. Superior Court Docket Entries, No. 46 (A-5). The Motion is reproduced in the Appendix at A-102. Although that Motion was not filed within seven days of the verdict, there exists no time limit on correcting an illegal sentence. "The court may correct an illegal sentence at any time..." Superior Court Criminal Rule 35(a). In substance, the purpose of raising the issue was to prevent the trial court from imposing an illegal sentence that violated Ayers' double jeopardy rights. The Court on that basis alone should have considered Mr. Ayers's application.

Furthermore, the double jeopardy issue was in fact raised in the Trial Court on the day after the jury returned. An application by one codefendant in a joint trial preserves the issue for all codefendants, rendering separate motions a “useless formality”. See, e.g., U.S. v. Love, 472 F.2d 490, 496 (5Cir.1973); U.S. v. Cassity, 631 F.2d 461, 466 (6Cir.1980). Counsel for codefendant Demby filed a Motion for Judgment of Acquittal on October 11, 2013. Motion and Sentencing, Page 3, Line L23 – Page 4, Line 8 (A-114 – A-115). That motion raised the Blockburger claim. The Trial Judge acknowledged on the record, "You're alleging that Aggravated Possession is a lesser included of Drug Dealing." Motion and Sentencing, Page 5, Lines 8-9 (A-116). Furthermore, at Page 9, Line 12 of that motion hearing (A-120), undersigned counsel was permitted leave to address, and laid out the argument that legislative intent was clear. The Court below had the opportunity to consider the issue and thus there was no waiver.

In conclusion, Ayers’s conviction on the lesser included offense of Aggravated Possession should be vacated and that charge should be dismissed.

III. THE TRIAL COURT SHOULD HAVE SEVERED THE CODEFENDANTS AND ORDERED SEPARATE TRIALS WHERE THERE WAS A SUBSTANTIAL LIKELIHOOD THAT MR. AYERS WAS CONVICTED BECAUSE HIS JURY WAS UNFAIRLY PREJUDICED BY EVIDENCE OF A DRUG DEAL INVOLVING HIS CODEFENDANT AND AN UNKNOWN THIRD PARTY, AND WHERE HE WAS DENIED THE ABILITY TO CROSS-EXAMINE HIS CODEFENDANT BECAUSE HE DID NOT TESTIFY.

QUESTION PRESENTED

Did the trial court err in refusing to sever the defendants and order separate trials where: A. The relatively strong evidence relating to Demby's second cocaine delivery to someone else in June impermissibly swayed the jury's evaluation of the extremely weak circumstantial evidence tending to prove a delivery involving Demby and Ayers in May, and where B. Mr. Ayers was prevented from cross-examining the codefendant, even though his wiretap recordings were admitted for use against Mr. Ayers?

This issue was presented to the Trial Judge in the form of a written Motion to Sever. Superior Court Docket Entries, No. 15 (A-2). The Motion itself is in the Appendix at A-11. A written decision was issued by the Superior Court on July 30, 2013. Docket Entries, No. 30 (A-3); The decision is at Appendix pages A-15 – A-17. In addition, at Transcript A-5, Line 4 (Appendix page A-18), a second oral Motion to Sever was made. The Court denied the motion at Transcript A, Page A-12, Lines 5-6 (Appendix page A-25). The basis for the application was that there were two dates on which illegal actions were alleged to have occurred, the May

date and the June date. There was no allegation that Ayers had any involvement in the June date. The concern was that evidence from the unrelated date would be used by the jury against Mr. Ayers. Judge Vaughn ruled that the jury could handle it.

STANDARD AND SCOPE OF REVIEW

“Whether to grant or deny severance is a matter within the sound discretion of the Trial Court. While abuse of discretion usually depends upon the facts and circumstances of each case, as a general rule it may be said that discretion has been abused by denial when there is a reasonable probability that substantial injustice may result from a joint trial.” Bates v. State, 386 A.2d 1139, 1141 (Del.1978), citing Jenkins v. State, 230 A.2d 262 (Del.1967). “The defendant has the burden of demonstrating such prejudice.” Bates at 1141, citing U. S. v. Crockett, 514 F.2d 64 (5 Cir. 1975).

MERITS OF THE ARGUMENT

The Trial Court abused its discretion when it refused to sever the codefendants and order separate trials because evidence relating solely to Demby’s other set of charges prejudiced the jury against Ayers, and because Ayers was denied the ability to confront Demby about his statements on the wiretap recordings.

A. The Trial Judge should have severed the codefendants to avoid unfair prejudice to Mr. Ayers caused by strong evidence relating to Demby's other set of charges.

Ayers and Demby were jointly tried. Both were charged with offenses arising out of the alleged transaction on May 26, 2012 but only Demby had charges stemming from the June 2, 2012 transaction. Under DURE 404(b), the evidence against Demby relating to the June charges would not have been admissible in a trial solely against Ayers. The evidence pertaining to the June offense proved that Demby was working for "ounce dealer" Galen Brooks (Transcript E, Page E-40, Line 9 (A-97)), delivering cocaine to people in their cars in parking lots at shopping centers. Based on that, the jury likely was swayed that Demby in May delivered cocaine to Ayers in Ayers's car while sitting in a parking lot of a shopping center, despite the fact that no drug transaction was observed and no money was seen to have changed hands (Transcript C-26, Lines 11-16 (A-77)) and no drugs or money were seized or tested (Transcript C-86, Lines 8-17 (A-84)). Prior to trial, Ayers's trial counsel filed a Motion to Sever and the Court issued a letter opinion denying that application on July 30, 2013. Docket Entries, No. 15 (A-2); the Motion is found at A-11; the Order is at A-15. That was an abuse of discretion that must be rectified with a new trial.

Delaware Superior Court Criminal Rules 8 and 14 work together to provide a framework for joint trials of codefendants. Rule 8 provides in subsection (b) that:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 further provides, in pertinent part:

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

One of the classic reasons for severing codefendant and ordering separate trials is difficulty in segregating the State's evidence as between the co-defendant and the movant. Jenkins v. State, 230 A.2d 262, 273 (Del. 1967).

Here, the evidence pertaining to Demby's June cocaine delivery would not have been admissible in a trial involving Ayers alone. DURE 404(b) provides that:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Getz v. State, 538 A.2d 726, 734 (Del.1988), requires a six-point appraisal in evaluating admissibility of 404(b) evidence:

(1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue.

(2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.

(3) The other crimes must be proved by evidence which is "plain, clear and conclusive." Renzi v. State, Del. Supr., 320 A.2d 711, 712 (1974).

(4) The other crimes must not be too remote in time from the charged offense.

(5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403.

(6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.

As to the first prong, the evidence proving that Demby delivered cocaine in June to another buyer has nothing to do with Ayers possessing cocaine in May. Thus, it would not have been material in a trial of Ayers alone. As to the second prong, there would have existed in a sole trial of Ayers no proper purpose for admission of such evidence. The evidence of a transaction between Demby and some other buyer does not implicate Ayers's motive, Ayers's opportunity, Ayers's intent, Ayers's preparation, Ayers's plan, Ayers's knowledge, Ayers's identity or Ayers's absence of mistake or accident. As to the third prong, the evidence was plain, clear and conclusive. As to the fourth, the other crime was a month following Ayers's alleged crime. As to the fifth, there would be no probative value in proving an unrelated transaction, but it would be incredibly unfairly prejudicial because the jury would infer that if Ayers was in a vehicle with an individual who sold drugs to someone else, that individual may have sold drugs to Ayers. It has even been

recognized in the Chancery Court that “Birds of a feather do flock together.” Hamilton Partners, L.P. v. England et al., 11 A.3d 1180, 1192 (Del.Ch.2010). As a result, the probative value would substantially have been outweighed by the unfair prejudice. As to prong six, there is no limited purpose for which the evidence could come in in a trial against Ayers only. Accordingly, the evidence would have been barred in a sole trial against Ayers.

The evidence likely influenced the jury to convict Ayers. Although Demby was acquitted on the June charges, the evidence of the June delivery to someone else appears to have been relatively strong, and the same person (Demby) made both deliveries. In the May delivery to Ayers, there was no transaction observed, no drugs or money either observed or seized by the police. Transcript C, Page C-26, Lines 11-16 (A-77); C-86, Lines 8-17 (A-84). But in the June case, Demby was recorded being told by Galen Brooks that he would give him a good deal on an ounce, there is substantial cash observed and video-recorded, then surveillance records Demby leaving Galen Brooks’s house, traveling to Carroll’s Corner Shopping Center where Demby gets into someone’s SUV for a short period of time and then returns. This evidence is smartly summarized by the Duputy in closing arguments beginning at Transcript E, Page E-40, L2 (A-97). The jury at least would actually have seen cash in connection with the June deliver. The jury likely concluded from the June transaction evidence that Demby gets his cocaine from

Galen Brooks, the “ounce dealer”, then goes out and meets cocaine buyers in their vehicles in shopping centers and sells the drugs to them. They then would have viewed the weaker May transaction evidence in the light cast by the June transaction evidence, and concluded that when Ayers and Demby met, it was for a cocaine purchase.

B. Ayers was precluded from cross-examining Demby in the joint trial, which violated his right of confrontation.

There was a second problem with the joint trial: Demby was a party to the wiretap recordings. Ayers should have been able to examine him, but was not able to because Demby exercised his right not to testify. Transcript E, Page E-28, Line 3 (A-85). A codefendant’s statement implicating the defendant results in prejudice to be corrected by a thorough limiting instruction or severance. Bruton v. U.S., 391 U.S. 123, 130-133 (1968). No limiting instruction would have been appropriate in this case. According to the State’s expert witness, the wiretap statements between Brooks and Demby are consistent with language indicative of a drug conspiracy and operation. Transcript C, Page C-58, Lines 20-23 (A-80). However, due to the joinder of the cases, Ayers was unable to examine Demby in court to clarify the ambiguous statements on the wiretaps. There could have been any number of possible lawful activities Demby and Ayers may have been doing at the scene of the alleged crimes. But the lack of confrontation of the codefendant’s statements


resulted in the ambiguities in the wiretap conversations being construed against Ayers without recourse.

As a result of the problems resulting from the refusal of the Trial Court to sever the defendants, Ayers's convictions should be reversed and his case remanded for a new, separate trial.

CONCLUSION

For the reasons stated above, the Appellant, DaShawn Ayers, respectfully maintains that his convictions should be reversed.

SCHWARTZ & SCHWARTZ

By: 
BENJAMIN A. SCHWARTZ
Delaware Bar ID No. 4145
1140 South State Street
Dover, Delaware 19901
(302) 678-8700
mail@BenSchwartz.com
Attorney for the Appellant

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE

VS.

DASHAWN E AYERS

Alias: No Aliases

DOB: 04/09/1979

SBI: 00507020

CASE NUMBER:

1208001950

CRIMINAL ACTION NUMBER:

IK12-09-0024W

DDEAL TIER 4(F)

IK12-09-0023W

TIER 5 POSS(F)

IK12-09-0025W

CONSP 2ND(F)

COMMITMENT

Nolle Prosequi on all remaining charges in this case

SENTENCE ORDER

NOW THIS 25TH DAY OF NOVEMBER, 2013, IT IS THE ORDER OF
THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged.
The defendant is to pay the costs of prosecution and all
statutory surcharges.

AS TO IK12-09-0024-W : TIS
DDEAL TIER 4

Effective September 6, 2012 the defendant is sentenced
as follows:

- The defendant is placed in the custody of the Department
of Correction for 25 year(s) at supervision level 5

- Suspended after 8 year(s) at supervision level 5

- Followed by 6 month(s) at supervision level 4 WORK
RELEASE

- Hold at supervision level 5

- Until space is available at supervision level 4 WORK
RELEASE

- Followed by 18 month(s) at supervision level 3

APPROVED ORDER 1 March 13, 2014 09:03

STATE OF DELAWARE
VS.
DASHAWN E AYERS
DOB: 04/09/1979
SBI: 00507020

The first 2 years of this sentence is a mandatory term of incarceration pursuant to DE1647520001FB .

Probation is concurrent to any probation now serving.

AS TO IK12-09-0023-W : TIS
TIER 5 POSS

- The defendant is placed in the custody of the Department of Correction for 20 year(s) at supervision level 5
- Suspended after 2 year(s) at supervision level 5
- Followed by 18 month(s) at supervision level 3

The first 2 years of this sentence is a mandatory term of incarceration pursuant to DE1647520003FB .

Probation is concurrent to criminal action number IK12-09-0024 .

AS TO IK12-09-0025-W : TIS
CONSP 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5
- Suspended for 1 year(s) at supervision level 2

Probation is concurrent to criminal action number IK12-09-0024 .

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE

VS.

DASHAWN E AYERS

DOB: 04/09/1979

SBI: 00507020

CASE NUMBER:

1208001950

The Defendant is to pay all financial obligations pursuant to a schedule established by probation officer.

Have no contact with Galen Brooks

Have no contact with Gerald Landry

Have no contact with Anzara Brown

Have no contact with James Brooks

Have no contact with Michael Demby

Have no contact with Jermaine Dollard

Have no contact with Robert Ingram

Have no contact with Anthony Jackson

Have no contact with Anthony James

Have no contact with Mark Matthews

Have no contact with John Price

Have no contact with Edwin Scarborough

Have no contact with Eric Young

Be evaluated for substance abuse and follow any recommendations for counseling, testing or treatment deemed
APPROVED ORDER 3 March 13, 2014 09:03

STATE OF DELAWARE
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appropriate.

Pursuant to 29 Del.C. 4713(b)(2), the defendant having been convicted of a Title 11 felony, it is a condition of the defendant's probation that the defendant shall provide a DNA sample at the time of the first meeting with the defendant's probation officer. See statute.

JUDGE JAMES T VAUGHN JR.

APPROVED ORDER

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March 13, 2014 09:03

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.

DASHAWN E AYERS
DOB: 04/09/1979
SBI: 00507020

CASE NUMBER:
1208001950

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	330.00
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	100.00
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	3.00
DELJIS FEE ORDERED	3.00
SECURITY FEE ORDERED	30.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	45.00
SENIOR TRUST FUND FEE	
<hr/>	
TOTAL	611.00

APPROVED ORDER

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March 13, 2014 09:03

AGGRAVATING-MITIGATING

STATE OF DELAWARE

VS.

DASHAWN E AYERS

DOB: 04/09/1979

SBI: 00507020

CASE NUMBER:

1208001950

AGGRAVATING

PRIOR VIOLENT CRIM. ACTIVITY

NEED FOR CORRECTIONAL TREATMENT

APPROVED ORDER

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March 13, 2014 09:03