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Case Number 586,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NICOLE HANSLEY,	)	
	)	
Defendant-Below,	)	
Appellant	)	
	)	
v.	)	No. 586, 2013
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE'S ANSWERING BRIEF

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DATE: March 17, 2014

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NATURE AND STAGE OF THE PROCEEDINGS

Nicole Hansley ("Hansley") was arrested on November 28, 2012 and subsequently charged by indictment with Tier 4 Drug Dealing, Tier 5 Aggravated Possession, Possession of Cocaine and Possession of Drug Paraphernalia. A1 at DI 1, 4.[1]

Hansley proceeded to jury trial in the Superior Court on July 23, 2013. A2 at DI 18. On July 26, 2013, the jury found Hansley guilty of all counts in the indictment. A2-3 at DI 16.

On September 12, 2013, the State filed a motion to declare Hansley a habitual offender pursuant to 11 DEL. C. § 4214(a). A3 at 19. On October 18, 2013, the Superior Court sentenced Hansley as a habitual offender to 5 years incarceration on the charge of Tier 4 Drug Dealing. On the remaining charges, Hansley was sentenced to 6 years incarceration, suspended after 2 years for Level III probation. (Ex. B to Op. Brf.).

Hansley has appealed her convictions and sentence. On February 12, 2014, Hansley filed an opening brief and appendix in support of her appeal. This is the State's Answering Brief.

[1] "DI" refers to Delaware Superior Court docket entries in *State v. Nicole Hansley*, I.D. No. 1211021447.

SUMMARY OF THE ARGUMENT

I. DENIED. A defendant's right to present relevant evidence is not unlimited, but is subject to reasonable restrictions. Central among these restrictions are state and federal rules of procedure and evidence. Hansley cannot establish that Superior Court's actions in refusing to allow Hansley to present testimony of her cocaine addiction and prostitution through an unrelated third-party precluded her from presenting a viable defense. Hansley provided no relevant basis for such testimony. Hansley cannot show that Superior Court's ruling was "arbitrary or disproportionate to the purposes it was designed to serve" and therefore fails.

II. ADMITTED. While it was entirely appropriate for the State both to indict Hansley for violating sections 4751(1) and 4751(3) and to proceed to trial on both offenses, because in this case the same set of facts and cache of heroin provide the basis for both offenses, Counts I and II merge for sentencing purposes.

STATEMENT OF THE FACTS

In the early morning hours of November 28, 2012, Corporal Eric Huston and other officers from the Governor's Task Force[2] were working in the high-crime area of the Riverview Motel located at 7811 Governor Printz Boulevard in New Castle County, Delaware. A13-14; 37. The officers were wearing blue raid vests with "State Police" clearly printed in gold. A14. At approximately 1:30 a.m., while standing in the hallway of the north wing of the motel, the officers noticed a man enter and immediately exit upon seeing the officers. A14-15. The officers followed the man, Derrick Tann, to his car and made contact with him. A15. Officers also spoke with his companion, Michelle Bloothoofd, who they had observed standing outside the window of Room 404, attempting to make contact with someone inside the room. A15. Tann and Bloothoofd advised the officers that they were not registered guests at the motel. A15.

While the officers were speaking with Tann and Bloothoofd, Nicole Hansley left the north wing of the building and joined the group. A16. Hansley smelled of burnt marijuana. A16. Hansley stated that she was a resident of the hotel, staying in Room 404, and that Tann and Bloothoofd were there to give her a ride. A16. Hansley admitted to smoking marijuana

[2] The Governor's Task Force is a unit comprised of Delaware State Police and Probation and Parole officers. A13.

that day. A16. Officers arrested Hansley. During the search incident to her arrest, police found a pink glassine bag of cocaine on her person, a scale with cocaine residue in her purse, and two crack pipes concealed in her buttocks. A17-19.

Corporal Huston walked to Room 404 and as he stood outside, he detected the scent of burnt marijuana coming from the room. A16. Officers obtained a search warrant for the room. A17.

Room 404 was littered with female clothing. A19. Inside the dresser, between the two beds, officers found a Newport cigarette box that was empty save for six bags of heroin, stamped in blue ink with the brand "Road Killer." A19. Next to the cigarette box, officers found a digital scale, a metal marijuana grinder and Hansley's oxycodone pill bottle, dated 7/7/11, that contained bobby pins. A19.

In the base of the nightstand, officers found Hansley's Social Security Administration supplement dated 11/27/11, as well as a 1/20/12 application for a Social Security card and other documents in the name of Marquis Brown. A20; 36. Under one of the beds, officers found a white, plastic container containing rice and 58 bundles of heroin. A20. The heroin bundles broke down to a total of 755 bags of heroin stamped "Road Killer." A42; 68.

Next to the plastic container of heroin under the bed, the officers found a small, locked fire safe. A22. The officers forced the safe open and found five individually wrapped containers of heroin and three bags of unused hypodermic needles. A24-25. The heroin amounted to 1,298 total bags stamped "Fire" in black ink. A27. Lying on top of the heroin, officers found an envelope from Pabian Properties to Nicole Hansley, containing a $300 check to Hansley dated 11/14/12.[3] A25-26. Also on top of the heroin, officers found a receipt dated 11/12/12 issued to Hansley and Abigail Robbins, $700 in cash and a wallet liner containing various undated cards, one in the name of Ezra M. Brown. A25-26; 40.

The 2058 bags of heroin recovered in the search warrant, worth thousands of dollars, were packaged in a manner intended for sale. A53; 57. The cigarette box was likely used to convey the drugs for sales. A59; 62.

[3] On January 11, 2013, Hansley contacted Corporal Huston and retrieved the check. A26.

I. SUPERIOR COURT PROPERLY PRECLUDED HANSLEY FROM INTRODUCING EVIDENCE OF HER DRUG ADDICTION AND PROSTITUTION THROUGH A POLICE OFFICER UNRELATED TO THE CASE.

QUESTION PRESENTED

Whether Superior Court properly denied Hansley's request to provide testimony of her drug addiction and prostitution through a third party unrelated to the investigation?

STANDARD AND SCOPE OF REVIEW

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion.[4]

MERITS

Hansley's defense at trial was that the drugs in Room 404 did not belong to her, but instead belonged to a drug dealer who would not trust her to be in control of such a large quantity of drugs because she was a cocaine-addicted prostitute. Op Brf. at 9. Hansley complains that Superior Court erred by refusing, in lieu of Hansley's testimony, to allow Cynthia Aman,[5] a retired Wilmington police officer unrelated to the investigation, to testify

[4] *Wright v. State*, 25 A.3d 747, 752 (Del. 2011); *McNally v. State*, 980 A.2d 364, 370 (Del. 2009).

[5] Amman had arrested Hansley in the past for prostitution and cocaine-related charges. A8-9.

that Hansley was a cocaine addicted prostitute. A8-9. Hansley is incorrect.

Prior to jury selection on July 23, 2013, defense counsel advised the court that, with Hansley's permission, he intended to call Aman to testify that she had arrested Hansley in the past for prostitution and drugs. The purpose of calling Aman was to support the defense theory of the case as to "why [Hansley] was near the drugs," and argue that the drugs belonged to someone else. A8-9. The State objected to the proposed testimony. A9. The trial judge denied Hansley's request, stating:

> Just like when a person does something bad one time doesn't mean they've done something bad the next time. The fact that they've committed one crime doesn't mean they didn't commit another crime another time. And so I believe two things. One, that if the intent is to present that testimony without the defendant having to testify to establish what her defense is, I don't believe that can be done.
>
> If the question were posed, if she provides through her own testimony certain foundation, there may be some questions that would be permitted of that other witness. But the defendant herself is going to have provide that foundation. I can't allow that witness to testify.

A9-10. Defense counsel acknowledged being prepared for the court's adverse ruling. A10. Superior Court thereafter determined it would reconsider the defense's proffer at the close of the defense's case. A10. Hansley did not thereafter ask for reconsideration of the Court's ruling.

"[A] defendant's right to present relevant evidence is not unlimited,

but rather is subject to reasonable restrictions."[6] Central among these restrictions are state and federal rules of procedure and evidence "designed to assure both fairness and reliability in the ascertainment of guilt and innocence."[7] The power of courts to exclude evidence through the application of evidentiary rules that serve the interests of fairness and reliability is well-settled.[8] However, a violation of the fundamental right to present a defense is not established merely by showing that the trial court excluded evidence arguably relevant to a defense. "Rulings excluding evidence from trial "do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve."[9]

The United States Supreme Court has provided examples of unconstitutionally arbitrary rules: 1) a rule that bars a co-defendant from testifying in defense of another co-defendant unless the witness has first been acquitted;[10] 2) a rule barring parties from impeaching their own

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[6] *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

[7] *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see also Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

[8] *See Taylor v. Illinois*, 484 U.S. 400, 410 (1987).

[9] *Scheffer*, 523 U.S. at 308.

[10] *See Washington v. Texas*, 388 U.S. 14, 22-23 (1967) (defendant tried for murder

witness;[11] 3) a rule preventing defendant from attacking the reliability of his confession at trial;[12] 4) a *per se* rule excluding all hypnotically refreshed testimony that impermissibly infringed on defendant's right to testify.[13]

By contrast, in *United States v. Scheffer*, the United States Supreme Court held that a *per se* rule against admission of polygraph evidence, even if favorable to the accused, did not violate the Fifth or Sixth Amendment rights of an accused to present a defense.[14] In *Montana v. Egelhoff*, the Court held that a statute barring the defendant from presenting evidence of voluntary intoxication to rebut *mens rea* did not violate due process.[15] In so ruling, the Court stated, "the proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible. As we have said: 'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under

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unconstitutionally deprived right to call as a witness a person who had previously been convicted of committing same murder).

[11] *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (defendant unconstitutionally prohibited from cross-examining own witness who repudiated his previous confession on the stand).

[12] *See Crane*, 476 U.S. at 691.

[13] *See Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections).

[14] *Scheffer*, 523 U.S. at 317.

[15] *See Montana v. Egelhoff*, 518 U.S. 37, 56, 60–61 (1996).

standard rules of evidence.'"[16]

Delaware Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[17] Relevancy is generally determined by examining the purpose for which it is offered.[18] "That purpose must, in turn, accommodate the concepts of materiality, *i.e.* be of consequence to the action, and probative value, *i.e.*, advance the likelihood of the fact asserted."[19] Under DRE 402, "[e]vidence which is not relevant is inadmissible."[20]

DRE 403 provides that, evidence, although relevant, may be excluded if its probative value is substantially outweighed by factors such as "the danger of unfair prejudice, confusion of the issues, or misleading the jury."[21] In *Holmes v. South Carolina,* the United States Supreme Court expressly

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[16] *Egelhoff,* 518 U.S. at 42 (citing *Taylor,* 484 U.S. at 410.)

[17] D.R.E. 401.

[18] *See Farmer v. State*, 698 A.2d 946, 948 (Del. 1996).

[19] *Id.* (citing *Getz v. State,* 538 A.2d 726, 731 (1988)).

[20] D.R.E. 402.

[21] D.R.E. 403.

recognized the application of this evidentiary rule in the regulation of the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged.[22]

To prove Hansley guilty of the felony drug charges, Superior Court instructed the jury:

> In addition to actual possession, possession includes location in or about the defendant's person, premises, belongings, vehicle, or otherwise within reasonable control. In other words, a person who, although not in actual possession, has both the power and the attention at a given time to exercise control over a substance either directly or through another person or persons is then in constructive possession of it.
>
> Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons have actual or constructive possession over a thing, possession is joint, provided, however, two or more persons may possess heroin jointly and knowingly if they have the dominion, control, and possession as I have defined that term.
>
> The element of possession is proven if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

A103. Hansley's proffer of Aman's testimony regarding her actions prior to these offenses was not material to her defense at trial because it did not negate her guilt to the offenses. When defense counsel reiterated that the defense was that "she is a prostitute with a drug dealer and was caught with the drug dealer's stuff, but it not her stuff," Superior Court correctly replied,

[22] *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006) (citing Federal Rule of Evidence ("FRE") 403); *see also Egelhoff*, 518 U.S. at 42 (discussing FRE 403).

"not her stuff is not a defense." A74. And the simple fact, even if true, that Hansley was a cocaine-addicted prostitute, does not by definition make her unable to be a heroin dealer on the date in question or make her any less in possession of the drugs as a seller or other conduit for a drug-dealer.

In any case, Hansley argued in opening and closing that she was a cocaine-addicted prostitute who could not be trusted with large quantities of heroin and money. A95-97. Hansley further argued in closing that a reasonable inference from the evidence was that the drugs belonged to Marquis Brown. A99. On cross-examination of the State's drug expert, Hansley elicited that: the cocaine and crack pipes found in Hansley's possession was for personal use;[23] prostitutes will latch onto drug dealers to get drugs;[24] drug dealers get arrested in the company of prostitutes;[25] and when prostitutes are found with drug dealers, it is generally the drug dealer who is in control of the drugs.[26] In addition, Hansley called Derrick Tann as a witness. He testified that Hansley was a prostitute. A74. Thus, even assuming Superior Court should have permitted Aman's testimony, any

[23] A62, 64.
[24] A65.
[25] A65.
[26] A65.

error was harmless,[27] because the jury learned that Hansley was a prostitute that used cocaine. And defense counsel's statements, although not evidence, made it abundantly clear that Hansley was a "crack head" and a "prostitute." A95.

Superior Court did not prevent Hansley from presenting the relevant details of her case from her perspective or from introducing any relevant factual evidence. Hansley could have testified, if she were willing to do so under oath and subject herself to cross-examination, but she chose not to do so, through no fault of the court. Sufficient evidence was presented to allow Hansley to argue her stated defense. Hansley cannot establish that Superior Court's refusal to allow Hansley to present testimony of her cocaine addiction and prostitution through an unrelated third-party was "arbitrary or disproportionate to the purposes it was designed to serve."[28]

[27] *See* Del. Super. Ct. Crim. R. 52(a); *see also Reynolds v. State*, 424 A.2d 6, 7 (Del. 1980) (finding foundation for expert opinion extremely thin and amounted to little more than surplusage and, as such, if opinion was admitted in error, it was clearly harmless).

[28] *Scheffer*, 523 U.S. at 308.

II. IN HANSLEY'S CASE, THE OFFENSES OF TIER 4 DRUG DEALING AND TIER 5 AGGRAVATED POSSESSION MERGE FOR SENTENCING.

QUESTION PRESENTED

Whether convictions for Drug Dealing in violation of 11 DEL. C. § 4752(1) and Aggravated Possession in violation of 11 DEL. C. § 4752(3) merge for purposes of Hansley's sentencing?

STANDARD AND SCOPE OF REVIEW

This Court reviews a claim not presented to Superior Court for plain error.[29]

MERITS

In 2011, the General Assembly enacted a "comprehensive revision of Delaware's drug offenses."[30] Hansley was indicted under the revised law. Hansley was charged with violating 11 Del. C. § 4752(1) (Drug Dealing), because "on or about the 28th day of November, 2012, … [she] did knowingly possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin, … or any mixture containing any such controlled substance." A6. Hansley was also charged with violating 11 Del. C. § 4752(3), because "on or about the 28th

[29] *See Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986); Del. Supr. Ct. R. 8.

[30] 2011 Del. Laws, Ch. 13 (H.B. 19).

day of November, 2012, … [she] did knowingly possess 5 grams or more of a morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin, … or any mixture containing any such controlled substance." A6. The same quantity of heroin was the factual basis of both charges.

Because each offense requires proof of an element that the other does not, section 4752(3) is not a "lesser included offense" of section 4752(1) that must be merged pursuant to 11 DEL. C. § 206[31] or *Blockburger v. United States*.[32] However, Chapters 48 & 49 of Title 16 allow, for most drug crimes, a defendant to be charged only with the highest grade of offense applicable to the defendant's crime with no additional drug dealing, aggravated possession, or simple possession charges.[33] While it was entirely

[31] 11 *Del. C.* § 206(a) provides that a defendant's conduct may result in a conviction for more than one offense unless "(1) One offense is included in the other, as defined in subsection (b) of this section; or (2) One offense consists only of an attempt to commit the other; or (3) Inconsistent findings of fact are required to establish the commission of the offenses." 11 *Del. C.*§ 206(b) provides: "A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when: (1) It is established by the proof of the same or less than all the facts required to establish the commission of the offense charged; or (2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or (3) It involves the same result but differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission." (emphasis added).

[32] 284 U.S. 299, 304 (1932) ("The applicable rule is 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.").

[33] 2011 Del. Reg. Sess. H.B. 19 (Bill Summary). *And cf.* 16 DEL. C. § 4766(1).

appropriate for the State both to have indicted Hansley for violating sections 4751(1) and 4751(3) and to have proceeded to trial on both offenses,[34] because the same set of facts and cache of heroin provide the basis for the two charges, in Hansley's case Counts I and II merge for sentencing purposes. Thus the case should be remanded for the sole purpose of merging Count II into Count I and resentencing.

[34] *See Zugehoer v. State*, 980 A.2d 1007, 1013-14 (Del. 2009) ("The State may charge different theories of criminal liability for the same offense in a single indictment.").

CONCLUSION

The judgment of the Superior Court should be affirmed and the case should be remanded for merger of Count II (Aggravated Possession) into Count 1 (Drug Dealing) and re-sentencing on that basis.

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