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Case Number 253,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANDON WYCHE,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 253, 2014**
	)	
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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NATURE AND STAGE OF THE PROCEEDINGS

On September 11, 2011, a New Castle County Grand Jury returned a four-count indictment against Brandon Wyche ("Wyche") alleging Murder First Degree, Possession of a Firearm During the Commission of a Felony ("PFDCF"), Possession of a Deadly Weapon by a Person Prohibited ("PDWBPP") and Possession of a Firearm By a Person Prohibited ("PFBPP"). A1. The case proceeded to a jury trial which resulted in a hung jury on June 24, 2013. A11. On February 17, 2014, Wyche filed a motion *in limine* to exclude the prior recorded statement of Carlyle Brathwaite. A14. The Superior Court denied the motion and the matter proceeded to a jury trial. On February 27, 2014, a jury found Wyche Guilty of Murder First Degree and PFDCF.[1] A14. On April 25, 2014, the Superior Court sentenced Wyche to a life term plus 25 years incarceration. *Exhibit B to Op. Brf.* Wyche appealed his convictions. This is the State's answering brief.

[1] On March 27, 2014, the State entered a *nolle prosequi* on the PDWBPP charge. A1. The PFBPP charge was severed by the Superior Court on June 24, 2013. A1.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court correctly denied Wyche's Motion *In Limine* to exclude Carlyle Brathwaite's prior recorded statement. While 11 *Del. C.* § 3507 requires that the proponent of the statement demonstrate, *inter alia*, that the statement was made voluntarily, there is no requirement that the witness receive the *Miranda* warnings prior to making the statement.

STATEMENT OF FACTS

On March 12, 2011, BJ Merrell ("Merrell") shot Brandon Wyche ("Wyche") in the head during a street robbery.[2] Wyche recovered from his injuries and Merrell was never charged in the shooting.

On August 30, 2012, Merrell's girlfriend, Michelle Newkirk ("Michelle"), met him at Wilton Park in New Castle County, Delaware.[3] Merrell was at the park to sell Percocet pills to an unknown individual.[4] When Michelle arrived at the park, Merrell was playing basketball.[5] As Michelle watched Merrell play basketball, her twin brother, Michael Newkirk ("Michael") and Carlyle Brathwaite ("Brathwaite") arrived at the park.[6] Merrell eventually stopped playing basketball and participated in a dice game on the basketball court.[7] As Merrell was playing dice, Wyche and Kevann McCasline ("McCasline") arrived at the park in McCasline's car.[8] McCasline and Wyche exited the car and Wyche walked over to

[2] B136-37.

[3] B140.

[4] B140.

[5] B140.

[6] B141.

[7] B141.

[8] B142.

the dice game.[9] Wyche was wearing camouflage shorts and a black t-shirt.[10] As Wyche approached the dice game, he pulled his shirt over his face.[11] Michael saw Wyche and Merrell get into an altercation and observed Wyche pull out a gun.[12] Michelle, who was looking at her phone, looked up and saw Wyche shoot Merrell.[13]

Earlier that day, Wyche had driven up to Michael, who was outside a friend's house, and asked him to come over to the car.[14] Wyche told Michael that Michelle and Merrell had shot him and that "they had to go."[15] Michael later told Michelle about the incident and said that Wyche had a gun in his lap when he made the threat.[16]

The first officer to respond to the shooting was Gina Collini ("Collini") of the New Castle County Police Department. When Collini she arrived at the scene

[9] B142.

[10] B144.

[11] B144, B189.

[12] B189.

[13] B145.

[14] B185.

[15] B186.

[16] B139.

she saw Michelle "huddled" over Merrell.[17] Michelle told Collini that a dark-skinned black male named "Brandon" wearing a black t-shirt shot Merrell two times prior to fleeing the scene.[18] Sergeant Brian Burke, who was familiar with Wyche from the 2011 robbery in which Wyche was shot in the head, learned that another officer spotted and apprehended Wyche near the shooting scene.[19]

That same evening, Janice Dick ("Dick"), who lives near Wilton Park, was sitting on her patio when she observed a black male wearing camouflage shorts enter her backyard.[20] The man appeared anxious and indecisive about where he was going to proceed from Dick's backyard.[21] After pacing back and forth in Dick's backyard, the man jumped over a fence and headed in the direction of a development located behind Dick's house.[22] Donald Dry ("Dry") was driving out of The Villas apartment complex when a shirtless black male wearing camouflage shorts, who he did not know, approached his car and asked for a ride to the bus station because he was "in trouble."[23] Captain Robert McLucas ("McLucas") was

[17] B76.

[18] B76-77.

[19] B80-81.

[20] B105-106.

[21] B105.

[22] B106.

[23] B108.

in his patrol car when he heard a radio broadcast which provided a suspect description for the shooting.[24] He initially observed Wyche, crossing the road toward The Villas.[25] Wyche, who was wearing camouflage shorts and no shirt, matched the description of the shooter.[26] McLucas saw Wyche as he approached the passenger side of Dry's car, which was exiting The Villas.[27] McLucas immediately pulled his patrol car behind Dry's car, got out of his vehicle, and apprehended Wyche.[28]

At trial, McCasline testified that he drove Wyche to the basketball courts in Wilton Park.[29] McCasline went to the basketball courts while Wyche remained in McCasline's car.[30] While McCasline was playing basketball he heard gunshots, immediately got into his car with a person named "Fletch," and drove away from the park.[31] According to McCasline, Wyche was not present in the car

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[24] B112.

[25] B112.

[26] B113.

[27] B113.

[28] B113.

[29] B88-89.

[30] B91-92.

[31] B92.

immediately after the shooting.[32] As he was driving, McCasline observed a person lying on the ground. McCasline received a phone call from Wyche minutes after the shooting during which Wyche asked McCasline to pick him up. McCasline declined to pick up Wyche and he did not return to the park because, as an active probationer, he wanted to avoid police contact.[33]

Brathwaite was interviewed by the police in December of 2012 after his arrest on unrelated theft charges.[34] In a recorded statement, Brathwaite said that he was aware of the threat communicated to Michael by Wyche prior to the shooting.[35] Brathwaite acknowledged being at the park when he saw Wyche get out of a car and approach Merrell who was at the dice game.[36] He was concerned that there would be a confrontation between the two and decided to leave the area.[37] However, prior to leaving, he heard gunshots.[38] Brathwaite said that he saw Wyche pull out a gun after which Merrell tried to hit him.[39] Wyche then shot

[32] B92.

[33] B93.

[34] B257-58.

[35]B370, 376.

[36] B371, 376.

[37] B371.

[38] B371.

[39] B371-372.

Merrell.[40] During the interview, Brathwaite identified Wyche in a photographic line-up as the shooter.[41]

At trial, the State had to secure Brathwaite's appearance with a material witness warrant.[42] Brathwaite testified that he remembered giving a statement to the police in December of 2012.[43] However, according to Brathwaite, he was either unsure or had no memory of many of the statements he made to police and the statements he was able to remember making were mostly lies.[44] Because it was clear that Brathwaite was an uncooperative witness, the State introduced his December 2012 statement into evidence pursuant to 11 *Del. C.* § 3507.[45]

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[40] B372.

[41] B392.

[42] B257.

[43] B257-58.

[44] B257- 261.

[45] B262-66.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY FOUND THAT BRATHWAITE'S STATEMENT TO POLICE WAS VOLUNTARILY MADE, THUS PERMITTING ITS ADMISSION UNDER 11 *DEL. C.* § 3507.

Question Presented

Whether the trial judge abused his discretion by permitting the State to introduce the statement of Carlyle Brathwaite pursuant to 11 *Del. C.* § 3507, after finding that the statement was made voluntarily.

Standard and Scope of Review

This Court reviews for abuse of discretion a trial court's ruling on the admissibility of a witness' out of court statement to an investigating police officer pursuant to 11 *Del. C.* § 3507.[46] "Whether a witness made his out of court statement voluntarily is a question of fact, and [this Court] review[s] the trial judge's determination of that question to ensure that competent evidence supports it. Thus, the trial judge's decision to admit the section 3507 statement is reversible only if the decision was clearly erroneous."[47]

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[46] *Talley v. State*, 2007 WL 914201, *3 (Del. Mar. 28, 2007) (citing *Barnes v. State*, 858 A.2d 942, 945 (Del. 2004)).

[47] *Taylor v. State*, 23 A.3d 851, 860 (Del. 2011) (Steele, C.J. and Ridgley, J., dissenting) (citing *Ortiz v. State*, 2004 WL 77860, at *2 (Del. Jan. 15, 2004) (citing *Martin v. State*, 433 A.2d 1025, 1032 (Del. 1981); *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006)).

Merits of the Argument

When the State intends to introduce a statement under 11 *Del. C.* § 3507,[48] "[t]he prosecutor must offer the statement before the conclusion of the declarant's direct examination and must demonstrate the voluntariness of the statement during direct examination. Moreover, the trial judge must make a finding that the out of court statement was voluntary before allowing the jury to hear it."[49]

Here, Wyche argues that Brathwaite's statement to police was involuntary because the police failed to administer the *Miranda* warnings prior to questioning him. Wyche principally relies on *Taylor v. State*[50] in support of his contention that an unwarned statement made by a witness in custody is *ipso facto* involuntary. His argument is unavailing.

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[48] 11 *Del. C.* § 3507 provides:

> (a) In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.
>
> (b) The rule in subsection (a) of this section shall apply regardless of whether the witness'in-court testimony is consistent with the prior statement or not. The rule shall likewise apply with or without a showing of surprise by the introducing party.
>
> (c) This section shall not be construed to affect the rules concerning the admission of statements of defendants or of those who are codefendants in the same trial. This section shall also not apply to the statements of those whom to cross-examine would be to subject to possible self-incrimination.

[49] *Talley,* 2007 WL 914201, at *3 (citing *Smith v. State,* 669 A.2d 1, 7 (Del.1995)).

[50] 23 A.3d 612 (Del. 2010).

To determine whether a statement is voluntarily made, this Court employs a totality of the circumstances analysis.[51] The Court considers a variety of factors including whether the police administered the *Miranda* warnings.[52] The *Miranda* warnings are, however, only one of the many factors considered by the Court.

In *Taylor v. State*, this Court held that a witness' unwarned statement was not voluntary and could not be introduced into evidence under 11 *Del. C.* § 3507.[53] The witness in that case, Steven Sanders, had witnessed a shooting in which Jaiquon Moore was killed.[54] Sanders was taken into custody by the police and told he was being arrested on a domestic violence charge.[55] Sanders was interviewed about the homicide and initially denied knowing who the shooter was.[56] The police demanded that Sanders identify the shooter. And, although he was not a suspect in the shooting, he was handcuffed to a chair and advised that he was going

[51] *See Taylor*, 23 A.3d at 854 (when determining whether a statement is made voluntarily, "[a]s always, the totality of the circumstances must be considered.").

[52] *See id* (stating "[t]his Court has recognized several factors that indicate a statement is involuntary: 1) failure to advise the witness of his constitutional rights; lies about an important aspect of the case; 3) threats that the authorities will take the witness's child away; 4) extended periods of detention without food; and 5) extravagant promises") (citations omitted).

[53] 23 A.3d at 855-56.

[54] *Id.* at 852-53.

[55] *Id.* at 853.

[56] *Id.* at 854.

to be charged with murder.[57] Sanders immediately began crying and eventually gave a statement identifying Taylor as the shooter.[58] The police employed deception in soliciting a statement from Sanders and did not administer the *Miranda* warnings prior to interviewing him. On appeal, this Court held that "*Miranda's* procedural safeguards apply to the interrogation of a witness who is in custody and is told by the police that he is under arrest."[59] However, in conducting its voluntariness analysis, the *Taylor* Court considered the following factors in addition to the absence of the *Miranda* warnings: (1) Sanders was handcuffed and told he was being arrested; (2) the successful deception of Sanders resulted in his highly emotional reaction; and (3) Sanders thereafter made a statement which he previously refused to make during the preceding two hours of interrogation.[60]

Wyche's reading of *Taylor* does not square with this Court's assessment of voluntariness in the context of a § 3507 statement. The totality of the circumstances analysis is eviscerated by a bright-line rule which renders an otherwise voluntary witness statement inadmissible under § 3507 because the police did not give the *Miranda* warnings. "As the Miranda Court itself

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[57] *Id.*

[58] *Id.*

[59] *Id.* at 855.

[60] *Id.*

recognized, the failure to provide Miranda warnings in and of itself does not render a [statement] involuntary."[61]

Indeed, under Wyche's reading of *Taylor*, any inmate who voluntarily came forward to give information about a crime in which he was not involved would need to be Mirandized in order to meet the voluntariness prong of § 3507. Similarly, a witness with an outstanding warrant for an unrelated misdemeanor who voluntarily appears at a police station to provide information about a crime he witnessed, would need to be Mirandized prior to giving a statement for it to be voluntary under § 3507. Whether a witness is Mirandized is *one* factor to be considered when assessing voluntariness under the totality of the circumstances – it should not be the *only* factor.

Here, Brathwaite was in custody on theft charges which were unrelated to the shooting of Merrell. The police did not provide Brathwaite with the *Miranda* warnings prior to interviewing him; however, he was not questioned about the drug charges. A review of the unredacted statement reveals that Brathwaite's statement, while unwarned, was voluntarily made. The interview lasted less than two hours and did not become antagonistic in any way. The police did not deceive Brathwaite, provoke a strong emotional reaction or overbear his will. He

[61] *New York v. Quarles*, 467 U.S. 649, 655 (1984) (citing *Miranda v. Arizona*, 384 U.S. 436, 457 (1966)).

understood that he was not a suspect. He was not threatened by the police, nor were any extravagant promises made. While the caselaw presumes a custodial interrogation to be "inherently coercive,"[62] there is no indication that Brathwaite's interview went beyond that presumptive baseline or that his statement was otherwise involuntary. Indeed, the Superior Court rejected Wyche's argument under *Taylor*, similarly distinguishing the facts of this case, and stating:

> So, you have two different situations here. And, by [Brathwaite's] very demeanor, attitude and approach, he was anything but coerced, because he didn't remember anything. And the statement is evidence itself of how conversant he was and how – he didn't cry, he didn't do anything, except tell the story when he doesn't have a choice.
>
> Whether it was true or not, I don't know and I don't pass on it. But there were no rubber hoses and no threats he'd never see his children, if he has any. There wasn't much of anything because he evaded police for so long.[63]

The trial judge did not abuse his discretion in making that assessment. Reviewing the recorded statement under the totality of the circumstances, it is apparent that the statement was made voluntarily despite the absence of the *Miranda* warnings. The voluntariness requirement of § 3507 was met and the Superior Court correctly admitted Brathwaite's statement as such.

Even if this Court were to determine that the Superior Court abused its discretion by admitting Brathwaite's statement under § 3507, such error was

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[62] *Taylor* at 854 (quoting *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401 (2011)).

[63] B266.

harmless. "An error in admitting evidence may be deemed "harmless" when "the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction . . . ."'[64]

The evidence presented at trial, exclusive of Brathwaite's statement to police, consisted of two eyewitnesses to the shooting, Michelle and Michael Newkirk. Both Michelle and Michael identified Wyche. DNA evidence linked Wyche to a shirt found in Kevann McCasline's car, and McCasline himself acknowledged that he drove Wyche to Wilton Park prior to the shooting. The witnesses who saw Wyche the day of the shooting all consistently testified about his clothing – camouflage shorts and a black shirt (or no shirt, depending on when he was seen). Additionally, Wyche was seen and apprehended shortly after the shooting in close proximity to Wilton Park. In his statement to police, Wyche denied being at Wilton Park, he denied having the nickname of "Smooth," and said that when he was apprehended he was attempting to get a ride from Donald Dry, who he claimed to know. Each of Wyche's contentions was squarely contradicted by the witnesses' testimony presented at trial. Moreover, there was significant evidence of motive which came from the testimony of several witnesses regarding the 2011 robbery in which Merrell shot Wyche. In sum, there was a significant quantum of evidence presented which is sufficient to sustain Wyche's convictions.

[64] *Nelson v. State*, 628 A.2d. 69, 77 (Del. 1993) (quoting *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991)).

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be affirmed.

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CERTIFICATION OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on this 14th day of November, 2014, he caused the attached *State's Answering Brief* to be delivered via Lexis/Nexis File and Serve to the following person:

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