



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK SEWELL, :
 :
 :
 Defendant-Below, : No. 317, 2014
 Appellant, :
 :
 : COURT BELOW: In the Superior
 v. : Court of the State of Delaware, In and
 : for Sussex County, I.D. #
 :
 STATE OF DELAWARE :
 :
 :
 Plaintiff-Below, :
 Appellee. :

APPELLANT'S OPENING BRIEF

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DATED: March 18, 2015

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NATURE OF THE PROCEEDINGS

After the Defendant was arrested on May 15, 2013, the State indicted him in Superior Court on June 10, 2013 prior to his preliminary hearing in the Court of Common Pleas. He was arraigned in the Superior Court of Sussex County, on August 8, 2013 for a total of ten counts: Assault in the 1st degree; Possession of a Deadly Weapon during the Commission of a Felony; 3 counts of Possession of a Firearm by a Person Prohibited, Aggravated Menacing; Conspiracy in the 2nd degree; Offensive Touching; Receiving Stolen Firearm and Possession of a Firearm during the Commission of a Felony.

The trial was held in the Superior Court, over eight days, in April of 2014. The Defendant was found guilty by a jury as follows: Assault in the 1st degree; Possession of a Deadly Weapon during the Commission of a Felony; 1 counts of Possession of a Firearm by a Person Prohibited, Aggravated Menacing; Conspiracy in the 2nd degree; Offensive Touching; Receiving Stolen Firearm and Possession of a Firearm during the Commission of A Felony. At sentencing, the Defendant received eighty-one (81) years at Level V, followed by probation. This appeal followed.

This is Appellant's Opening Brief.

SUMMARY OF THE ARGUMENT

- I. THE DELAWARE HABITUAL OFFENDER STATUTE WAS NOT DESIGNED TO IMPOSE HABITUAL OFFENDER STATUS FOR PREVIOUS FELONY TRAFFIC OFFENSES.**

- II. THE FAILURE OF THE STATE TO TURN OVER ALL THE DISCOVERY PRIOR TO TRIAL INTERFERED WITH THE PREPERATION OF THE DEFENSE STRATEGY.**

- III. DID THE STATES FAILURE TO FILE THE HABITUAL OFFENDER MOTION PRIOR TO THE FINAL CASE REVIEW CAUSE PREJUDICE TO THE DEFENDANT.**

STATEMENT OF THE FACTS

This criminal prosecution resulted from a shooting in West Rehoboth, Sussex County, Delaware on May 10, 2013.

On March 10, 2013 Jacqueline Boyer (Jacqueline) was sworn and testified that she threw a birthday party for her sister Vanessa at a house on Duffy Street in West Rehoboth (A-11). According to Jacqueline, while taking plates outside to her car when Derrick Sewell (Sewell) pulled up to the house in a car and got out and started to exchange angry words with another party guest Alesha Boyer (Alesha) (B-89). Jacqueline testified that also in the car was Precious Tiggs (Precious) and Rakeem “Keemer” Conquest (Keemer) (A-12). Keemer got out of the car and joined Sewell in arguing with Alesha as well (A-13). Jacqueline testified that Alesha then called for Howard Whaley (Howard) who came out of the back yard to the front with Marvin Burton . Marvin and Derrick squared up as if, according to Jacqueline they were going to fight .Howard and Keemer adopted a similar stance. Jacqueline testified that Keemer drew a firearm and that’s when Howard knocked the gun out of Keemer’s hand. Marvin then picked the gun up and places it back on the ground and then Keshia (A-14) picked up the gun and held it (A-15). Jacqueline testified that Derrick asked Precious for a different gun in the glove compartment of the Impala and he proceeded to use it to shoot Howard in the leg. (A-16). Precious, Derrick and Keemer then got into the car (A-17) and left (A-18.).

Detective Stephen Kelly responded to the scene. Detective Kelly (Kelly) testified at trial that Jacqueline made a statement to him. According to Det. Kelly, in her statement Jacqueline did not tell him that night that Howard picked up the gun from the street nor that she went out to her car to store a plate of food.(A-19).

On cross examination, Jacqueline testified that she has a previous conviction from 2000 for using her sister's name during the traffic stop (A-20).

Jeremy Ricketts (Ricketts) was sworn and testified that he ran up front when Howard was called (A-21) Shortly thereafter, Ricketts testified a fight started to break out and Ricketts was shoved into Jacqueline's car. Ricketts testified further that Marvin was chasing Keemer after Marvin knocked the gun out of Keemer's hand (A-22) and Derrick told Precious to give him the gun out of the box and then Sewell shot Howard as Ricketts was literally just beside Howard. (A-23)

Detective Jonathan King (Det. King)was called and testified that Ricketts told him Sewell had the gun that Marvin had knocked out of Sewell's hand and (A-24) and Derrick then got another gun and shot Howard(A-25)

Devlyne King (King) testified that he was in jail due to a guilty plea to theft of gun offenses from Seaford, Delaware in May 2013(A-26) and that he was testifying in hope of his sentence would be in the lower range of 63 to 78 months (A-27). King further testified that he sold the gun without a clip to Sewell (A-28) in May of 2013 for about \$80.00. (A-29)

Robert Daigle testified that he owned a gun shop in Seaford Delaware (A-30) and the black gun was stolen from his gun shop in Seaford Delaware on May 9, 2013. (A-31)

Mark Doughty testified that he is a Detective with the Delaware State Police and he responded to Mr. Daigle's theft and (A-32) the specific nine millimeter Ruger pistol, Black in color SR-9, serial number 331-95332 (A-33) that was recovered in West Rehoboth on Duffy street on May 10, 2013(A-34)

William Keith Marvel (Marvel) testified that he has been a Delaware State trooper for over 26 years and is the supervisor of the Evidence Unit at Troop 4 in Georgetown, Delaware (A-35). Marvel further testified that documented the scene with digital photography (A-36) and that he recovered a 9-millimeter Ruger SR-9 pistol at the scene on Duffy Street(A-37), as well as a spent cartridge from a Ruger that was also collected that night (A-38). On cross examination Marvel testified that the evidence envelope he packed and sealed with the 9 Millimeter Ruger pistol in it (A-39) did not have initials when the tape was broken and the gun examined further in accordance with the procedures of the Delaware State Police.

Marvin Burton (Burton) was sworn and testified that he has multiple convictions for felonies and crimes of dishonesty(A-40) and that on May 10, 2013 I was at the birthday party for Howard Whaley's mother Vanessa Whaley(A-41)

and that he heard Sewell tell Precious “Hand me the gun out of the glove box” and that Sewell then shot Howard. (A-42)

On cross examination Burton testified that he had not seen Precious, Keemer or Sewell arrive that night and that he heard one shot (A-43) Burton testified that Lacy was not involved in the incident.

Det. Kelly (Kelly) was recalled and testified that Burton told him he saw Precious, Keemer and Sewell arrive in a gold Impala to the scene (A-44) and that Lacy was present at the scene and was confronted by Sewell and Sewell struck Lacy in the face(A-45). Kelly testified further that Burton told him that Sewell dropped the gun and Keemer shot Howard in the leg.(A-46) Det. Kelly testified that Burton stated he heard three shots fired(A-47).

Gerald Windish (Windish) was sworn and testified that he was a Sergeant with the Delaware State Police and was the Supervisor of the major Crimes unit in May of 2013 and was contacted on May 10, 2013 in regards to a shooting in West Rehoboth (A-48) Windish testified that information was developed that the gold impala may be at the Classic Motel in Georgetown (A-49), that location was checked and two individuals drove out of that parking lot in a VW Jetta (A-50) and that the vehicle was followed by police and that Windish tried to stop the vehicle(A-51) but the vehicle didn't stop for a mile until the marked Georgetown

police cars caught up to his location and Keemer and Jessica Partain were found in the vehicle (A-52) with two firearms.(A-53)

On cross examination Windish testified further that he did not encounter Sewell that night (A-54)

On redirect Windish testified that the vehicle stop was made at 11:24 in the evening.(A-55)

Det. Kelly (Kelly) was recalled and testified that he found two firearms which he secured (A-56) and a flip phone that he removed from Keemer(A-57)

Ashley Stetser testified that she is a Delaware State Trooper and she was on duty on May 14, 2013 (A-58) when she observed a 2006 maroon Dodge Stratus whose registered owner had a suspended license. A traffic stop was made to see if the registered owner was the operator of the vehicle on Concord Road (A-59) in Seaford and (CC-149) found in the vehicle was Sewell (A-61).

Lakeshia Boyer (Lakeshia) testified that she saw the argument between Derrick and Aleshia and then Derrick and Howard (A-62) and that she saw Derrick shoot Howard (A-63) .

Carl Rone (Rone) testified that he is a civilian employee of the Delaware State Police assigned to the Forensic Science Services Unit (A-64) Rone testified further that the casing found on Duffy street came from the firearm recovered

under the passenger seat (A-65). Rone testified further that the Pistol without the clip was capable of being fired.(A-66)

Detective Kelly was recalled and identified the cell phone he recovered from Keemer (A-67-68)

Andrew Gatti (Gatti) testified that he was a Delaware State Trooper since 2004 and was assigned to the High Technology Crimes Unit and is a certified computer forensic examiner. (A-69) Gatti testified further that he examined Keemer's cell phone (A-70) and produced reports (A-71). Gatti further testified that the phone was working on May 9, 2013 (A-72) and Keemers phone had several missed calls after 7:00 PM that day (A-73)

On cross-examination Gatti testified that the phone continued to receive text messages after it came into the possession of the Delaware State Police (A-74) and that the phone was left on in the evidence envelope (A-75)

Dr. David Sopa (Sopa) that he is an orthopedic surgeon since 1980 (A-76) , and he was at Beebe Hospital on May 10, 2013 and was asked to treat Howard Whaley(A-77) . Sopa further testified that Whaley was scheduled for an internal fixation which in this case was plates and screws (A-78) and the surgery was completed and Dr. Sopa dictated a two page medical note (A-79)

Alquisha Conquest testified that she has a brother Keemer (A-80) , she picked up Derrick on the night in question at K-Mart(A-81) but she never hear him called Blok or D-Blok that she didn't know (A-82).

Bonita Conquest (Bonita) testified that she has a son Keemer, in May of 2013 his girlfriend was Jessica Partain and her nephew is Sewell.(A-83). Bonita further testified that Sewell's nickname is "Blok" (A-84) and that she knew Precious as well (A-85). On the night in question she was in the car that picked Sewell up at Kmart (A-86) and went back to the Classic Motel in Georgetown. (A-87)

Jessica Partain (Partain) testified that she was convicted of a Felony in 2010 and was in a relationship with Keemer in May of 2013. (A-88), picked up Sewell at K-Mart (A-89) and dropped him off near Lowe's (F-67) Partain testified that she left the Classic Motel with Keemer and they realized they were being followed so she turned into the Dash in lot (A-90) and then made a u-turn on the highway towards Millsboro, made a right at the Exxon and kept going until Keemer said to stop. (A-91) Partain testified further that she pled guilty to Possession of ammunition by a person prohibited and was testifying truthfully today to get some consideration upon sentencing (A-92).

On cross-examination Partain testified that in the statement that she gave to Detective King was not truthful about her knowledge of guns in the vehicle (A-93)

and in the Statement that she gave to Sgt. Windish that it was not truthful about how she got to the Classic Motel in Georgetown from Rehoboth picking up Sewell (A-94)

Rakeem Conquest (Keemer) testified he has pled to charges resulting from his involvement to the incident in question (A-95) but has not been sentenced yet and understood his obligation to testify truthfully (A-96) . Keemer testified that he paid \$80 for a gun from King the day before the shooting (A-97). Keemer further testified that he heard a gunshot but did not see where the shot came from(A-98) or who took the shot that hit Howard (A-99)

Mary Beth Burton testified that she is a presentence officer for the Superior Court and prepared a report (A-100) after interviewing Keemer. (A-101) Ms. Burton continued that Keemer told her that “Howard’s a big boy, so I shot him in his leg”. Keemer continued, according to Ms. Burton that “I did the shooting, Derrick didn’t. (A-102) Keemer said on a later occasion to Ms. Burton that “I’m not covering for Derrick and continued by telling Ms. Burton I didn’t do the shooting and I don’t know who did the shooting. Ms. Burton concluded her testimony by stating that Keemer concluded the second interview by stating “I also lied before about that I shot Howard, when I didn’t. “(A-103)

Precious Tiggs (Precious) testified that she pled guilty to three charges related to this incident and is currently serving a jail term for her involvement and

as part of her plea agreement she has to testify truthfully (A-104). Precious testified that she did not see Derrick shoot Howard, but that she heard the shot and that after the shot was taken Keemer, Sewell and herself got back into the car (A-105) and they drove to the outlets where we parted ways(A-106)

Aleshia Boyer testified that she saw Derrick shoot Howard (A-107) and then get into the car and then Precious, rakeem and Derrick got into the car and left.(A-108)

Vanessa Boyer testified that she saw Derrick shoot her son Howard(A-109).

Howard Whaley (Howard) testified that he had been convicted of a crime of dishonesty a robbery 2nd in 2012 and misdemeanor theft in 2010(A-110). Howard further testified that he saw Derrick and Keemer arrive on Duffy street and that Derrick hit him and that he chased Derrick around a car parked on Duffy Street in West Rehoboth. Howard further testified that he stopped at Keemer and tried to fight him and (A-111)then he knocked the gun out of Keemer's hand. (A-112) Howard further testified that he saw Precious give Derrick a gun from the back seat of the car (A-113), and that Derrick shot him (A-114), with the bullet hitting him in the right knee(A-115).

On cross-examination Howard testified that he had been convicted of a charge involving Keemer on the boardwalk in 2011 and that he tossed the gun he knocked out of Keemer's hand into the grass(A-116).

Mark Doughty was recalled and testified that the burglary at Delmarva Shooting Supply took place at May 8, 2013 at 2304 Hours. (A-117)

Det. Kelly was recalled and testified he was the chief investigating officer in the case (A-118) that Sewell's cell phone was not recovered and there were no fingerprints or DNA or physical evidence recovered with. Sewell's DNA or fingerprints on any of the firearms in this case. (A-119) Kelly testified further that the gold Impala was never seized nor was a search warrant ever executed on it. (A-120)

ARGUMENT

I. THE DELAWARE HABITUAL OFFENDER STATUTE WAS NOT DESIGNED TO IMPOSE HABITUAL OFFENDER STATUS FOR PREVIOUS FELONY TRAFFIC OFFENSES.

a. Question Presented.

Is the Delaware Habitual offender statute, Title 11 Delaware Code, Section designed to impose Habitual Offender status on a defendant when, as in the case *sub judici*, the defendant previous felony convictions included 2 counts of Failure to Stop at the Command of a Police Officer and a Conspiracy 2nd degree as an adult. This issue was properly preserved in the Court below. (A- 121)

b. Scope and Standard of Review

When the question involved concerns questions on matters of law, “[t]he standard and scope of review is whether the court below erred in formulating or applying legal precepts.”¹

c. Merits of the Argument

¹ See *Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993). See also *Rohner v. Niemann*, 380 A.2d 549, 552 (Del. 1977).

Whether or not the Delaware Habitual Offender Statute was designed to impose Habitual Offender status on a defendant when, as in the case *sub judici*, the defendant previous felony convictions included 2 counts of Failure to Stop at the Command of a Police Officer and a Conspiracy 2nd degree as an adult. Title 21 was amended in 2006 by House Bill No.363.² (A-122). According to the legislative history, the Bill changed the penalty from a misdemeanor to a felony.

It should be of the utmost importance to this decision that the Legislature never stated in hearings that habitual offender status would be applicable for felony traffic offenses. The legislature in the past has specifically designated offenses that may be considered for habitual offender status for criminal in Title 11 and for traffic in Title 21. A habitual offender for traffic has a sanction of a loss of license for five years and the traffic offense of Driving after Judgment Prohibited. Criminal Habitual offender status changes the penalty to a starting point at the end of the range of the penalty to life. No where in the Habitual Offender Section of Title 11 does it state that it includes traffic offenses for this determination.³

² House Bill No. 363, 143th General Assembly: An Act to Amend Title 21 of the Delaware Code Relating to the Rules of the Road.

³ 11 Delaware Code Section 4214

II. THE FAILURE OF THE STATE TO TURN OVER ALL THE DISCOVERY PRIOR TO TRIAL INTERFERED WITH THE PREPERATION OF THE DEFENSE STRATEGY.

a. Question Presented.

Did the State’s failure to timely respond to the request for discovery under Rule 16 of the Court’s rules prior to trial interfere with the preparation of the defense strategy. ."⁴ This issue was properly preserved in the Court below. (A-123)

b. Scope and Standard of Review.

When the question involved concerns questions on matters of law, “[t]he standard and scope of review is whether the court below erred in formulating or applying legal precepts

c. Merits of the Argument.

⁴ See *Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993). See also *Rohner v. Niemann*, 380 A.2d 549, 552 (Del. 1977).

The State's practice in the case *sub judici* by providing discovery late with major portions not being given until deep in trial absolutely interfered with the pre-trial defense preparations. On the first trial day before jury selection through the last trial day, several discovery issues came up. Initially, there were federal reports that became the subject of a protective order just before trial. (A-124-A-132). Counsel informed the Court that initially a different person was going to testify (a Mr. Cannon) and then on the Friday before trial another person was identified (a Mr. King) (A-133-) Officer notes were either not disclosed timely (A-137-A-141) or provided just before a witness testified(A-142). This pattern continued during the trial. At least two times during the trial defense counsel made applications for a mistrial, which were ultimately denied by the Court. (A-143-146). The defense concedes that some of the discovery issues were minor, but in toto the defense had to constantly rework the trial strategy. The State apologized at one point(A-147), but the practice of late turning over of discovery continued through the trial (A-148-A-150). The Court said it would further address the complaint (A-151-A-155). For example if all of the firearms expert discovery had been timely provided, specifically pictures provided just before trial, counsel could have retained an expert to assist in a review of the report and pictures.(A-154-A-159) Several police reports were not

provided due to different case numbers, which in trial precluded a motion in limine about the traffic stop which ultimately located the defendant several days after the incident in West Rehoboth.(A-160-A-170) According to the docket, defense counsel's discovery motion was filed on June 21, 2013(A-1) two days after counsel was appointed by the Resident Judge to represent the defendant, and over ten months before trial commenced on March 31, 2014. Discovery issues continued until the next to last day of testimony (A -171-A-178). A defense counsel cannot file motions to compel discovery if they do not know what other documents and evidence is in the hands of the State.

**III DID THE STATES FAILURE TO FILE THE HABITUAL
OFFENDER MOTION PRIOR TO THE FINAL CASE REVIEW CAUSE
PREJUDICE TO THE DEFENDANT**

a. Question Presented.

Did the State's failure to file the Habitual Offender motion prior to the defendant's Final Case Review unfairly prejudice the defendant. This issue was properly preserved in the Court below. (A- 121)

b. Scope and Standard of Review.

When the question involved concerns questions on matters of law, "[t]he standard and scope of review is whether the court below erred in formulating or applying legal precepts."⁵

c. Merits of the Argument.

The final case review on this case was held on February 7, 2014. At that time the defendant was told the range of his potential liability for all the offenses. He chose to go to trial on the charges against him. It came up on the first day of trial before jury selection (A-179-A-181) It was not until May 8, 2014 after the

⁵ See *Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993). See also *Rohner v. Niemann*, 380 A.2d 549, 552 (Del. 1977).

completion of the trial that the motion for Habitual Offender was properly filed by the State and docketed in the Court.(A- 7) The range of penalties increased because of this filing. This issue was argued at length at sentencing. (A-179-A-189)The State and Defense disagreed on when the draft motion was discussed. But the State did not dispute that a draft motion was not filed with the Court and the first filing was on May 8, 2014. (A-7) As a result of the filing, the presiding judge at sentencing declared the defendant a habitual offender on five of the eight counts he was to be sentenced upon: Assault in the 1st degree, Possession of a Deadly Weapon during the commission of a Felony, Aggravated Menacing, Possession of a Firearm during the Commission of a Felony, and Possession of a Firearm by a Person Prohibited. As a result of that finding, the defendant was sentenced to over 80 years at Level 5 followed by probation. Although a draft may have been circulated prior to trial, at the time of final case review was when the potential penalty should have been available in writing for review by the defendant. The State at sentencing did not dispute that the filing for habitual offender was not made until after the final case review (A-7) and in fact had come up before jury selection as well(A- 179-181). The State must provide that information before final case review for a defendant to make an informed choice about the range of penalties that they may be facing.

CONCLUSION

WHEREFORE Defendant prays this Honorable Court enter judgment in favor of the Defendant and reverse the conviction below.

Respectfully submitted,

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DATED: March 18, 2015