



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KAHLIL LEWIS)
)
Defendant Below) No. 122/123, 2015
Appellant,)
) Court Below—Superior Court
v.) of the State of Delaware
) in and for New Castle County
STATE OF DELAWARE,) I.D. Nos. 1111020024 & 1304026571
)
Plaintiff Below,)
Appellee.)

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

APPELLANT’S REPLY BRIEF

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DATED: January 22, 2016

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ARGUMENT

CLAIM I: THE TRIAL COURT ERRED IN FAILING TO DISMISS THE CHARGE OF POSSESSION OF A DEADLY WEAPON BY PERSON PROHIBITED-NEGLIGENTLY CAUSING DEATH BECAUSE AT THE TIME OF THE RE-INDICTMENT, 11 DEL. C. §1448(E)(2) HAD BEEN REPEALED WITH NO SAVINGS CLAUSE AND BECAUSE THE TIMING OF THE RE-INDICTMENT TWO WEEKS BEFORE TRIAL PREJUDICED THE SUBSTANTIAL RIGHTS OF MR. LEWIS BY ALLEGING NEW CRIMES.

In its Answering Brief, the State argued that legislative intent was evidenced by the Editor's and Revisor's Notes stating that section 1448(e)(2) was "inadvertently deleted" and therefore the trial judge's finding that there an implied savings clause permitted the State to reindict and prosecute Mr. Lewis was appropriate.¹ The State further argued that because Mr. Lewis was first indicted with Murder in the Second Degree and Possession of a Firearm by a Person Prohibited ("PFBPP"), he was on notice that he would have to defend against the allegations that he caused the death of Toney Morgan and was a person prohibited from possessing a firearm.²

Although the January 30, 2014 amendment Editor's and Revisor's notes states that (e)(2) had been "inadvertently deleted," the fact remains that at the time of the reindictment, the January 30, 2014 amendment was not in effect. Thus,

¹ State's Answering Brief at 10.

² *Id.* at 11-12.

without the Editor's and Revisor's Notes to rely upon, the trial judge had no such evidence of legislative intent that subsection (e)(2) had not in fact been repealed.

It remains undisputed that when a statute is ambiguous and its meaning may not be clearly ascertained, the Court must rely upon its methods of statutory interpretation and construction to arrive at what the legislature meant.³ The plain language of Title 11, Section 1448 was unambiguous. The plain meaning of the statute issues penalties for Persons Prohibited and, at the time of the re-indictment, did not specify that the stricken portion would be saved, or that it had been "inadvertently deleted."

Therefore, at the time of the reindictment, the Court erroneously allowed Mr. Lewis to be indicted with a charge that was no longer a crime. Mr. Lewis went to trial and was convicted only of this charge before the January 30, 2014 amendments reinserted subsection (e)(2).

Originally, Mr. Lewis was indicted for Murder in the Second Degree in violation of Section 635 for *recklessly* causing the death of Toney Morgan under circumstances which manifest a cruel, wicked and depraved indifference to human life, as well as simple Possession of a Firearm by a Person Prohibited.⁴

³ *Coastal Barge Corp.*, 492 A.2d at 1246 (citing *Carper v. New Castle County Bd. of Ed.*, 432 A.2d 1202, 1205 (Del. 1981)).

⁴ A025; 11 Del. C. § 635.

Two weeks before trial, the State reindicted Mr. Lewis. He was again charged with Murder in the Second Degree, but amended the PFBPP charge to read in pertinent part as follows:

Kahlil Lewis . . . did knowingly, and unlawfully own, possess, or control a firearm after having been convicted on June 8, 2012 of the felony charge of Possession with Intent to Deliver Heroin, and, while in possession or control . . . did *negligently* cause serious physical injury to or the death of Toney Morgan through the use of such firearm.⁵

The day the trial began, the State entered a *nolle prosequi* on the Murder in the Second Degree charge.⁶

The Delaware Criminal Code distinguishes negligence and recklessness in Section 231 of Title 11. A person acts with negligence with respect to an element of an offense when the “person fails to exercise the standard of care which a reasonable person would observe in the situation.”⁷ However, a person acts recklessly with respect to an element of an offense when the person is “aware of and consciously disregards a substantial and unjustifiable risk that the element exists or will result from the conduct. The risk must be of such a nature and degree

⁵ A046-047; *11 Del. C.* § 1448 (emphasis added).

⁶ A008.

⁷ *11 Del. C.* § 231(d).

that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.”⁸

The State should not be allowed to benefit from substantively altering the indictment, entering a *nolle prosequi* for the Murder in the Second Degree charge and pursuing the less burdensome PFBPP negligently causing death.

⁸ *11 Del. C. § 231(e)*.

CLAIM II: THE TRIAL COURT ERRED IN PERMITTING THE ADMISSION OF MR. LEWIS’S PRIOR FELONY DRUG CONVICTION AND REFERENCING IT IN ITS INSTRUCTIONS TO THE JURY BECAUSE MR. LEWIS STIPULATED THAT HE WAS A PERSON PROHIBITED AND ADMITTED THAT HE WAS A CONVICTED FELON.

In its Answering Brief, the State argued that Mr. Lewis was not prejudiced when the State cross-examined him on the nature of his stipulated prior felony, or when the Court referenced the nature of the prior felony in its jury instructions.⁹ Further, the State argued that in failing to object and stipulating to being a person prohibited, Mr. Lewis has waived this claim in Superior Court.¹⁰

In *Robinson v. State*, the defendant was charged with Drug Dealing, PFBPP, and Possession of Drug Paraphernalia.¹¹ The State and the defendant stipulated to the fact that Robinson was a “person prohibited.”¹² At trial, the judge gave the following jury instruction for the charge of PFBPP:

In order to find the defendant guilty of possession of a firearm by a person prohibited[,] . . . you must find that all of the following elements have been established beyond a reasonable doubt: One, the defendant knowingly owned, possessed, or controlled a firearm at the time of the charged offense; in this case a handgun; two, the

⁹ State’s Answering Brief at 16-17.

¹⁰ *Id.* at 14.

¹¹ *Robinson v. State*, 2013 Del. LEXIS 543, *2 (Del. 2013).

¹² *Id.*

defendant was prohibited from purchasing, owning, or possessing or controlling a firearm *because he had been previously convicted of a felony*. The parties have stipulated or agreed that the defendant was prohibited from owning, possessing or controlling a firearm, and therefore, this element the parties agree, has been established.¹³

The Delaware Supreme Court noted *United States v. Higdon*, a Third Circuit Court of Appeals case, which explained:

Although a defendant may, by stipulating that he has a prior felony conviction, prevent the jury from hearing the nature or underlying facts of the conviction, he may not prevent the jury from learning the fact that he has a prior felony conviction—a “crucial element” of the offense.¹⁴

The *underlying* facts of a prior conviction are irrelevant to a charge of person prohibited. To reach a guilty verdict, a jury need only know a defendant has been previously convicted of a felony, not the nature of the prior conviction.¹⁵ It is common practice for the State to redact the Indictment in an effort to “sanitize” it and eliminate any prejudice to defendants in exchange for a stipulation of being a person prohibited.¹⁶

¹³ *Id.* at *3-4.

¹⁴ *Id.* at *5-6 citing *United States v. Higdon*, 638 F.3d 233, 242 (3d Cir. Pa. 2011)(internal quotes omitted)(emphasis omitted).

¹⁵ *United States v. Gilliam*, 994 F.2d 97, 103 (2d Cir. N.Y. 1993).

¹⁶ *State v. Hicks*, 2015 Del. Super. LEXIS 223, *14-15 (Del. Super. Ct. May 4, 2015); *See Smith v. State*, 2005 Del. LEXIS 322 (Del. 2005) (“Here, the State redacted the indictment to eliminate any prejudice to Smith, in exchange for Smith’s stipulation that he was a person prohibited by virtue of his September 2003 conviction.”); *Johnson v. State*, 983 A.2d 904, 923 (Del. 2009) (The defendant was a person prohibited as result of his 2003 conviction for Rape in the Fourth Degree. By stipulation, the defendant avoided the jury learning about the nature of his prior

Mr. Lewis stipulated to the fact that he was a person prohibited, and admitted to being a person prohibited under oath. At this point, the jury was aware that Mr. Lewis was a person prohibited, a “crucial element” of the offense of PFBPP. The State’s elicitation of the nature of the crime, then stating it again during closing arguments, and the Court’s statement of the nature of the crime in jury instructions allowed the jury to draw negative inference from the nature of the previous crime.

The State’s argument that Mr. Lewis has waived any claim due to his stipulation is without merit. Mr. Lewis stipulated to being a person prohibited to eliminate the nature of his prior felony from improperly tainting the jury’s perception of him. The State knowingly agreed to the stipulation, and still entered the nature of his prior felony which was unnecessary to prove the element of the offense, and as argued above, irrelevant and prejudicial.

conviction. The stipulation did not provide the reason for Johnson's prohibited status; instead, the stipulation simply stated that the parties agreed Johnson "was prohibited from owning or possession a firearm.")

CLAIM III: THE TRIAL COURT ERRED IN FAILING TO GIVE A SELF-DEFENSE INSTRUCTION TO THE JURY ON THE CHARGE OF POSSESSION OF A DEADLY WEAPON BY PERSON PROHIBITED NEGLIGENTLY CAUSING DEATH.

In its Answering Brief, the State argued that the choice of evils instruction requested by Mr. Lewis was appropriate based on the evidence presented at trial.¹⁷ Pursuant to Title 11, Section 303(c), if some credible evidence supporting a defense is presented, the defendant is entitled to a jury instruction that the jury must acquit the defendant if they find that the evidence raises a reasonable doubt as to the defendant's guilt.¹⁸ Mr. Lewis testified that while standing in a group talking, he heard a click behind him which he thought was a gun.¹⁹ Mr. Lewis then turned to grab the gun in order to protect himself, which caused the gun to fire.²⁰ Mr. Lewis' testimony is credible evidence. Credible is defined as "capable of being believed."²¹

¹⁷ State's Answering Brief at 25.

¹⁸ *11 Del. C.* § 303.

¹⁹ A230.

²⁰ *Id.*

²¹ *Gutierrez v. State*, 842 A.2d 650, 653 (Del. 2003) (Citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 341 (unabridged ed. 1966)).

This Court has previously held that “the evidence presented by a defendant seeking a self-defense instruction is ‘credible’ for purposes of Title 11, Section 303(a) if the defendant's rendition of events, if taken as true, would entitle him to the instruction.”²² It is the judge’s role to determine whether the evidence presented by the defendant would justify the defendant in using force to defend himself. If so found, then the judge should submit the evidence to the jury, *with a self-defense instruction*, to act as the fact finder and decide which evidence should be believed.²³ This Court further cited *People v. Garcia* a Colorado Court of Appeals case which held that if there is credible evidence supporting an affirmative defense, the court must instruct the jury on the defense even if the supporting evidence consists of highly improbable testimony by the defendant.²⁴

Regardless of the State’s evidence, Mr. Lewis provided credible testimony which warranted a self-defense jury instruction. On the charges for which a self-defense instruction was given, the jury acquitted Mr. Lewis. It is clear that the jury likely believed his self-defense claim to justify acquittal. Mr. Lewis suffered prejudice by the Court’s failure to give a self-defense claim on the Person Prohibited—Negligently Causing Death charge because it is just as likely that the

²² *Id.* at 652.

²³ *Id.*

²⁴ *Id.* at 653.

jury would have acquitted him of that charge too. As such, Mr. Lewis has suffered prejudice that warrants relief.

CLAIM IV: THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING MR. LEWIS WITH A CLOSED MIND ON THE VIOLATION OF PROBATION.

It its Answering Brief, the State argued that because the trial judge heard trial counsel's presentation of mitigating factors, the record does not support Mr. Lewis' claim that the trial judge sentenced him with a closed mind. The State also argues that because Mr. Lewis was sentenced within the statutory limits for his violation of probation, there is no abuse of discretion. However, in this case, there were mitigators presented which were supported by evidence. Mr. Lewis' childhood was traumatic, unstable and exposed him to violence at a young age.²⁵ In addition, it was uncontested that Mr. Lewis was indeed shot by Toney Morgan. The trial court failed to consider this mitigating evidence. Therefore, a new sentencing should be ordered.

²⁵ A339-A343.

CONCLUSION

For the reasons stated herein, Mr. Lewis respectfully requests that this Honorable Court reverse his convictions and remand the case for a new trial.

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