



IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTOPHER CLAY, :
Defendant Below, :
Appellant/Cross Appellee, :

v. :

No. 8, 2016

STATE OF DELAWARE, :
Plaintiff Below, :
Appellee/Cross Appellant. :

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

APPELLANT'S REPLY/ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....ii

TABLE OF CITATIONS..... iv

SUMMARY OF THE ARGUMENT.....1

STATEMENT OF FACTS.....2

ARGUMENT3

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT’S MOTION TO SEVER CO-DEFENDANTS BECAUSE REASONABLE AND SUBSTANTIAL PREJUDICE RESULTED FROM THE JOINT TRIAL.....3

 A. MERITS OF ARGUMENT3

 1. The State did not offer substantial, independent, competent, evidence of Clay’s guilt.....4

 2. The substantial evidence against co-defendant Land caused the jury difficult in segregating the evidence as between co-defendants.....5

II. THE TRIAL COURT ERRED IN DENYING APPELLANT’S MOTION FOR JUDGMENT OF ACQUITTAL7

 A. MERITS OF ARGUMENT 7

 1. Robbery in the first degree7

 2. Possession of a firearm during the commission of a felony.....9

3. Conspiracy in the second degree	9
4. Tampering with physical evidence	9
III. THE TRIAL COURT ERRED IN FINDING THE POLICE OFFICER POSSESSED A REASONABLE ARTICULABLE SUSPICION TO SEIZE AND PROBABLE CAUSE TO ARREST APPELLANT.....	12
A. MERITS OF ARGUMENT	12
1. Lack of Reasonable Articulate Suspicion	12
2. Lack of Probable Cause	13
IV. THE SUPERIOR COURT DID NOT ERR IN REQUIRING THE STATE TO PROVIDE A REDACTED COPY OF THE INTAKE DOCUMENT AND THE PROSECUTOR’S NOTES FROM WITNESS INTERVIEWS TO DEFENSE COUNSEL	15
A. QUESTION PRESENTED	15
B. SCOPE OF REVIEW	15
C. MERITS OF ARGUMENT	15
1. The Intake Documents	17
2. Prosecutor’s Notes of Witness Interviews	18
CONCLUSION.....	20

TABLE OF CITATIONS

Cases	Page (s)
<i>Bates v. State</i> , 386 A.2d 1139, 1141 (Del. 1983).....	3
<i>Commonwealth v. Delgado</i> , 679 A.2d 223 (Pa. 1996).....	10
<i>Dalton v. State</i> , 252 A.2d 104, 105 (Del. 1969).....	7, 8
<i>Fluodiotis v. State</i> , 726 A.2d 1196, 1210 (Del. 1999).....	3
<i>Goldberg v. United States</i> , 425 U.S. 94, 108 (1976).....	17
<i>Harper v. State</i> , 121 A.3d 24, 30 (Del. 2015).....	8, 9
<i>Harris v. State</i> , 806 A.2d 119, 128-129 (Del. 2002).....	13
<i>Harris v. State</i> , 991 A.2d 1135 (Del. 2010).....	10
<i>Hooks v. State</i> , 416 A.2d 189, 200 (Del. 1980).....	17
<i>Jencks v. United States</i> , 353 U.S. 657 (1957).....	17
<i>Jones v. State</i> , 745 A.2d 856, 863 (Del. 1999).....	12
<i>Lampkins v. State</i> , 465 A.2d 785, 794 (Del. 1983).....	3
<i>Lance v. State</i> , 600 A.2d 337, 342 (Del. 1991).....	15
<i>Manley v. State</i> , 709 A.2d 643, 652 (Del. 1998).....	3
<i>Moore v. State</i> , 187 A.2d 807, 811 (Del. Super. Ct. 1963).....	14
<i>Oliver v. State</i> , 60 A.3d 1093, 1095 (Del. 2013).....	15
<i>State v. Trager</i> , 2006 WL 2194764*7 (Del. Super. Ct. July 28, 2006).....	14
<i>Valentine v. State</i> , 74 A.3d 645, 648 (Del. 2013)	17

Statutes

Page (s)

11 *Del. C.* § 512.....9

11 *Del. C.* § 12699, 11

Rules

Super.Ct.Crim.R. 26.2.....16- 18

SUMMARY OF THE ARGUMENT

- I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SEVER CO-DEFENDANTS BECAUSE REASONABLE AND SUBSTANTIAL PREJUDICE RESULTED FROM THE JOINT TRIAL.
- II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.
- III. THE TRIAL COURT ERRED IN FINDING THE POLICE OFFICER POSSESSED A REASONABLE ARTICULABLE SUSPICION TO SEIZE AND PROBABLE CAUSE TO ARREST APPELLANT.
- IV. APPELLEE/CROSS APPELLANT'S CLAIM IS DENIED. THE SUPERIOR COURT DID NOT ERR IN REQUIRING THE STATE TO PROVIDE A REDACTED COPY OF THE INTAKE DOCUMENT AND THE PROSECUTOR'S NOTES FROM WITNESS INTERVIEWS TO DEFENSE COUNSEL.

STATEMENT OF FACTS

In response to the State's claims in its answering brief regarding the factual circumstances of the Tampering with physical evidence charge in Argument II, Appellant Clay submits the following supplemental statement of facts:

At trial, Officer Wilson testified that he responded to Officer Diaz's location and placed Clay into custody. After taking Clay into custody, Officer Wilson testified that his recollection was that he reviewed the MVR footage of Clay's pursuit after returning to the station, long after the gun was recovered at the scene.

(AR23-27)

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SEVER CO-DEFENDANTS BECAUSE REASONABLE AND SUBSTANTIAL PREJUDICE RESULTED FROM THE JOINT TRIAL.

A. Merits of Argument

In its answering brief, the State of Delaware argues that Clay's claim fails, because the factors outlined in *Manley v. State*, 709 A.2d 643, 652 (Del. 1998), do not warrant severance when applied to Clay's case. Ans. Br. at 9-11. This Court has previously declared that, "if the defendants can show a reasonable and not hypothetical probability that substantial prejudice may result from a joint trial, the trial court may grant separate trials." *Fluodiotis v. State*, 726 A.2d 1196, 1210 (Del. 1999) (citation omitted). This decision rests within the sound discretion of the trial court, and will only be overturned if the defendant can show prejudice. *Lampkins v. State*, 465 A.2d 785, 794 (Del. 1983); *Bates v. State*, 386 A.2d 1139, 1141 (Del. 1983).

Clay has demonstrated that actual prejudice resulted from the joint trial with Clay, Martin, and Land. All three co-defendants denied the allegations. However, there was a video of Land committing the robbery and an in court identification of Land by a very emotional victim. Clay's and Martin's denials of the crimes were both considered on the backdrop of Land's denial. Despite the minimal evidence against Martin, the jury rejected his denial of the crimes and convicted him.

The State acknowledged that outside of the minimal facts that Martin was apprehended with Clay and Land with a large amount of cash folded in his pocket, “the State had no evidence establishing [Martin] as a participant in the robbery.” Ans. Br. at 12. Yet, the State charged and tried Martin for Robbery 1st and related charges together with Clay and Land, and the jury convicted all three men. The jury could not have convicted Martin solely on the minimal evidence that the State presented against him.

1. The State did not offer substantial, independent, competent evidence of Clay’s guilt.

Likewise, the State offered limited evidence against Clay. Clay did not rob the store. The State relies on its subjective assertion that on the store’s surveillance video, Clay is “seemingly acting as a lookout for Land.” Ans. Br. at 12. But what the video shows objectively is that while Clay was in the store, he was nowhere near Land, did not communicate with Land, was unable to see Land with a gun and could not see the robbery take place. These simple facts do not comprise substantial, independent, or competent evidence that would establish Clay’s guilt for a robbery or related offenses. Yet, the jury rejected Clay’s defense and convicted him as it did Martin.

Martin’s verdict caused the trial court to recognize that the jury improperly performed its function as the finder of fact by considering only the evidence

against each co-defendant in arriving at a verdict. (A273-274) Ultimately, the trial court acquitted Martin. There is no reason to give confidence to Clay's verdict where the jury was unable to properly perform its function in co-defendant Martin's case.

2. The substantial evidence against co-defendant Land caused the jury difficulty in segregating the evidence as between co-defendants.

The State asserts in its answering brief that the evidence against Land was relevant and admissible to prove Clay's guilt as an accomplice to the robbery, but fails to address the substantial prejudice resulting from the jury's difficulty to segregate evidence amongst the co-defendants. Further, it does not take into account the effect that Land's defense had on Martin's and Clay's defenses to the charges against them that were based on much less evidence.

The State submits that the Superior Court's dismissal of Martin's charges upon a motion for judgment of acquittal are irrelevant. Ans. Br. at 11-12. However, in acquitting Martin of the Robbery, Conspiracy, and Possession of a Firearm During the Commission of a Felony, the trial court found that "no rational jury [...] could have found that Martin committed the offenses of robbery in the first degree, possession of a firearm during the commission of a felony and conspiracy in the second degree because there simply was no evidence supporting those charges against him." A273-274. The jury was irrational with its verdict. It

could not have properly performed its duties. The same jury weighed the limited evidence that the State presented against Clay and found him guilty also.

Ultimately, in the face of the jury's error in Martin's verdict, it would be fundamentally unjust to allow Clay's convictions to stand as an accomplice to a robbery and requires reversal.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

A. Merits of Argument

The State's claim that sufficient evidence was produced for a rational trier of fact to find Clay guilty beyond a reasonable doubt of the four offenses at issue is unavailing.

1. Robbery in the first degree

The State avers that the evidence presented at trial could have led a rational jury to reasonably infer from the evidence that Clay acted as a lookout while Land committed a robbery of the store. Ans. Br. at 16. The State's argument does not prevail. First, there has already been a judicial determination by the trial court that the jury in this trial was not rational in deciding the verdict. A273-274.

Second, the State does not present in its answering brief, sufficient evidence to support its theory that Clay acted as a "lookout" *prior to the offense taking place*. In order to be liable as an accomplice, "it must affirmatively appear that the defendant in some way actively encouraged the principal to commit the crime; mere presence at the scene of the crime is not sufficient." *Dalton v. State*, 252 A.2d 104, 105 (Del. 1969). More specifically, this Court expressly indicated the importance of timing by explaining that: "[a]lthough a simple word or gesture may be enough to constitute such an encouragement, *it must of necessity occur before*

the commission of the crime by the principal.” Dalton v. State, 252 A.2d at 105.
(emphasis added).

Accordingly, the State’s argument fails because the evidence of Clay’s involvement prior to Land committing the robbery is insufficient. The entirety of the State’s evidence of accomplice liability, before the robbery occurred, is that: (1) Clay entered the store directly in front of Land; and (2) Clay was present in the store, placing items on the counter without purchasing the items, while the robbery was being committed in the back office by Land. Ans. Br. at 15. However, the State does not produce any communication or action of Clay to affirmatively establish accomplice liability.

In the absence of evidence of any prior relationship, communication, or a coming together in a meeting of the minds between Clay and Land prior to the offense, the State attempts to improperly introduce evidence of Clay’s conduct after the offense was committed by Land. Ans. Br. at 15-16. When Land walked out of the back office to exit the store, the commission of Land’s crimes of robbery and PFDCF were completed. Under Delaware law, a defendant cannot be convicted as a principal or accomplice to a completed crime based on his or her conduct after the completion of the crime. *Harper v. State*, 121 A.3d 24, 30 (Del. 2015). It follows that the State cannot utilize evidence subsequent to the completion of Land’s robbery to convict Clay of that robbery under accomplice

liability. Therefore, the evidence offered by the State that may be legally considered by a jury does not permit a rational trier of fact to find Clay guilty beyond a reasonable doubt, as an accomplice for the robbery.

2. Possession of a firearm during the commission of a felony

For the same reasons set forth in Clay's analysis above for the charge of Robbery in the first degree, the State has failed to present sufficient evidence to establish accomplice liability for Clay as to Land's possession of a firearm during the felony of Robbery.

3. Conspiracy in the second degree

For the same reasons set forth in Clay's analysis above for the charge of Robbery in the first degree, the State has failed to present sufficient evidence to establish a conspiracy between Clay and Land. Analogous to this Court's rational in *Harper v. State*, 121 A.3d 24, 35-36 (Del. 2015), there is no evidence that Clay was aware of any plans on the part of Land to rob the store before the robbery was completed, let alone any evidence that Clay was in agreement with such plans. Therefore, the State did not present sufficient evidence to establish Clay's guilt of a conspiracy to commit a robbery in the first degree, pursuant to 11 *Del. C.* § 512.

4. Tampering with physical evidence

The State erroneously claims that the elements of Tampering with physical evidence under 11 *Del. C.* § 1269 were met, because the police officer was not sure

that he saw Clay throw an object and view where the object landed. Ans. Br. at 19-20. This Court already decided this issue in *Harris v. State*, 991 A.2d 1135 (Del. 2010), when it noted that a defendant did not commit the crime of tampering where a police officer saw him shaking and making a throwing motion during a pursuit before recovering the evidence. *Id.* at 1141, (citing *Commonwealth v. Delgado*, 679 A.2d 223 (Pa. 1996)). The Court's rationale was that the police officer perceived the defendant's movement during the act of suppression and the police could immediately retrieve the evidence from a garage roof. *Id.*

These facts are analogous to the facts in the matter at bar. Here, Officer Wilson testified that during the pursuit, he witnessed Clay's hand go into the air and, in his experience, that would be indicative of someone throwing something. (A165-166). As a result of witnessing this act, the officer searched the area on the other side of a fence where Clay's movement was seen and discovered a gun while still at the scene.

The State incorrectly asserts in its answering brief that Officer Wilson had to review his MVR footage in order to confirm and locate the gun. Ans. Br. at 19-20. During the trial, Officer Wilson testified that his recollection was that he reviewed the MVR footage of Clay's pursuit after returning to the station, long after the gun was recovered at the scene. (AR23-27) Consequently, the evidence presented by the State to establish Clay's guilt for Tampering with physical evidence was

insufficient based on the plain language of 11 *Del. C.* § 1269, and applicable caselaw, both of which actually requires successful suppression of the evidence.

Therefore, the State failed to present sufficient evidence establishing Clay's guilt under accomplice liability as to robbery in the first degree and possession of a firearm during the commission of a felony. Further, the State failed to produce evidence of the requisite elements for the offenses of conspiracy in the second degree and tampering with physical evidence. Accordingly, the trial court erred in denying Clay's motion for judgment of acquittal, and Clay's convictions should be reversed.

III. THE TRIAL COURT ERRED IN FINDING THE POLICE OFFICER POSSESSED A REASONABLE ARTICULABLE SUSPICION TO SEIZE AND PROBABLE CAUSE TO ARREST APPELLANT.

A. Merits of Argument

1. Lack of Reasonable Articulate Suspicion

Officer Diaz's observations of Clay's conduct and the officer's subjective interpretations of the facts were not sufficient to find reasonable articulable suspicion with respect to Clay. The reasonableness of an officer's suspicion must rest on the facts known to him at the time he ordered a suspect to stop. *Jones v. State*, 745 A.2d 856, 863 (Del. 1999).

At the time Officer Diaz ordered Clay to stop, the facts known to the officer were that a robbery had occurred at a nearby store and a black male wearing black clothing was the suspect. Prior to the stop, Officer Diaz observed Clay and Martin in close proximity to a person matching a general description of the suspect and deemed their conduct to be suspicious. In contrast to the officer's suspicion, Officer Diaz knew that Clay did not match the suspect's description because he was wearing light colored clothing, and did not observe Clay commit any crime. Officer Diaz incorrectly acted upon a hunch by interpreting the facts known to him at that time, with the observations of Clay's apparently innocent conduct, to

determine that Clay was engaged in criminal activity. *Harris v. State*, 806 A.2d 119, 128-129 (Del. 2002).

The trial court abused its discretion by finding these facts and subjective observations constituted reasonable articulable suspicion. Therefore, Officer Diaz did not establish a reasonable articulable suspicion prior to Clay's seizure, and any evidence as a result of the events following must be suppressed.

2. Lack of Probable Cause

In the matter at bar, the trial court erred as a matter of law by finding that the State established probable cause. During the first evidentiary hearing that was held for reasonable articulable suspicion, the State conceded that Officer Diaz lacked probable cause at the moment he ordered Clay to stop. (A74-76) Having already conceded that probable cause did not exist at that time, the State subsequently took the position that Clay's flight from Officer Diaz established probable cause to arrest Clay for a new crime of resisting arrest. The State argued this position at the second evidentiary hearing held for determining probable cause. (A93-96)

In delivering its decision on probable cause, the trial court stated that it understood the State's position, but did not agree because Clay was not under arrest at the time of his flight. Specifically, the trial court stated: "The State argues that there was probable cause for resisting arrest. And it's hard to see how that could occur without an arrest having been effectuated." Ex. C. to Op. Br. at 61.

Now, the State asks this Court to adopt its claim that the trial court held that Officer Wilson had probable cause to arrest Clay for robbery and conspiracy. Ans. Br. at 27. To the contrary, the trial court neither finds that Officer Wilson, or any individual police officer possessed probable cause, nor addresses the facts known by any particular officer at the time of Clay's arrest. Ex. C to Op. Br. at 61-62. In addition, the trial court does not indicate that probable cause was established for Clay as an accomplice for the crimes of Robbery in the first degree or PFDCF. *Id.* at 62. With respect to the charges of conspiracy in the second degree, tampering with physical evidence and resisting arrest, the trial court is silent on whether probable cause existed. *Id.*

“[Probable cause] depends on the facts known, at the time of the arrest, to the person by whom the arrest is made, from which it follows that an arrest cannot be justified by what a subsequent search discloses.” *State v. Trager*, 2006 WL 2194764 *7 (Del. Super. Ct. July 28, 2006) (quoting *Moore v. State*, 187 A.2d 807, 811 (Del. Super. Ct. 1963)). Here, the trial court did not identify the police officer (Officer Diaz or Officer Wilson) upon which it based its probable cause determination. Ex. C to Op. Br. at 61-62. This designation is important because the two officers observed different facts and do not come together until after Clay was placed in custody. Therefore, the trial court erred as a matter of law in determining that the State sufficiently established facts supporting probable cause.

IV. THE SUPERIOR COURT DID NOT ERR IN REQUIRING THE STATE TO PROVIDE A REDACTED COPY OF THE INTAKE DOCUMENT AND THE PROSECUTOR'S NOTES FROM WITNESS INTERVIEWS TO DEFENSE COUNSEL.

A. Question Presented

Whether the Superior Court erred in requiring the State to provide a redacted intake document and the prosecutor's notes from witness interviews to defense counsel.

B. Scope of Review

This Court "review[s] a trial's judge's application of the Superior Court Rules relating to discovery for an abuse of discretion." *Oliver v. State*, 60 A.3d 1093, 1095 (Del. 2013). Alleged "violations of the *Jencks* rule are subject to a harmless error analysis." *Lance v. State*, 600 A.2d 337, 342 (Del. 1991).

C. Merits of Argument

The State's claim that the trial court erred by requiring the State to produce the intake document at the suppression hearing is moot, because even after the production of the document, the trial court denied defense counsel's motion to suppress. Further, the State was not prejudiced by the production of the intake document. After the hearing concluded, the trial court denied defense counsel's motion to suppress evidence and the matter proceeded to trial. Ex. A to Op. Br.

Accordingly, the State did not incur prejudice as a result of the production of the intake document, and in the absence of prejudice suffered by the State, their claim that the trial court erred is moot.

With respect to the prosecutor's notes containing statements of witnesses made during interviews, the issue is also moot. The State was not prejudiced as a result of the trial court's ruling, because at the conclusion of trial, all three co-defendants were found guilty by the jury. However, should the Court disagree and consider this issue on appeal, the trial court's decision to order production of the intake document and the prosecutor's notes are consistent with the Superior Court Rules and applicable law.

During a pretrial suppression hearing, counsel for Martin and Clay requested a copy of Officer Diaz's statements in the State's possession, including any statements made as part of the intake process, pursuant to Superior Court Criminal Rule 26.2. (AR4-6) After reviewing and redacting the intake document *in camera*, the trial court ruled that the document contained relevant statements and produced a redacted copy of the report to defense counsel. (AR16-18) Thereafter, during the trial, defense counsel requested prior statements under Rule 26.2, for witnesses who testified for the State. Upon acknowledgement from the State that the prosecutor interviewed witnesses, without a third party present, the trial court required the State to produce notes taken by the prosecutor during those interviews.

Ans Br. at 31. On cross appeal, the State claims that the Superior Court abused its discretion in compelling production of the documents for both instances. Ans. Br. at 30-31. The State's claims are unavailing.

Superior Court Criminal Rule 26.2 provides that, upon motion of a party and after a witness has testified on direct examination, the other party must produce "any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified." Rule 26.2 substantially mirrors and codifies the ruling set forth in *Jencks v. United States*, 353 U.S. 657 (1957). *Valentine v. State*, 74 A.3d 645, 648 n.10 (Del. 2013) (citations omitted). "Under the rule [in *Jencks*], the defense, upon demand at the time of cross-examination, is entitled to statements of government witnesses made to governmental agents if the contents thereof relate to the subject matter of the direct examination." *Hooks v. State*, 416 A.2d 189, 200 (Del. 1980). In *Goldberg v. United States*, the United States Supreme Court held that the work-product doctrine does not bar the production of writings otherwise producible under the Jencks Act. 425 U.S. 94, 108 (1976).

1. The Intake Documents

During the suppression hearing, the trial court reviewed the intake document *in camera* and ruled that portions of the document were subject to disclosure under Rule 26.2. (AR16-18) All other information in the intake document was redacted

by the trial court. (AR16-17) Specifically, the trial court ruled that the statements in the intake document were produced because, “you can see where this particular’s witness’s [Officer Diaz] input is reflected.” (AR18) Therefore, the trial court did not err in requiring production of the intake document, after a review and redaction of its contents *in camera*, because the portion of the document produced to defense counsel was applicable under Rule 26.2.

2. Prosecutor’s Notes of Witness Interviews

The trial court did not commit error, because the prosecutor’s notes contained relevant statements of witnesses that testified at trial on the State’s behalf. The State candidly admits that the prosecutor interviewed witnesses in preparation for trial and suppression hearings without a third party present during the interviews. (B 65); Ans. Br. at 31. In addition, the prosecutor redacted and produced redacted copies of those notes to defense counsel and the trial court. (B79-80) Now, on cross-appeal, the State asks this Court to find that the Superior Court abused its discretion in ruling that the State produce notes of those witness interviews to defense counsel.

Had the prosecutor undertaken the interview of such witnesses properly, an investigator or other third party would have been present and would have taken a recordation of the interview and been available for cross examination purposes at trial. Absent a third party’s presence in the witness interviews, there were no other

recordings of the witnesses' statements. Moreover, there were no other independent witnesses to these statements available for trial, other than the prosecutor herself. Therefore, the Superior Court did not commit error by properly requiring the State to provide documents containing statements of witnesses that testified on the State's behalf to defense counsel.

CONCLUSION

For the reasons set forth herein, Appellant contends that the decision of the trial court in denying Appellant's motion for judgment of acquittal on the aforementioned charges and denying Appellant's motions to suppress for lack of reasonable articulable suspicion and probable cause, should be reversed and remanded accordingly.

Alternatively, if the Court finds that the trial court erred in the denial of Appellant's motion to sever the co-defendants from a joint trial, then Appellant respectfully requests that Appellant's convictions be reversed and remanded for purposes of a new trial.

For the foregoing reasons, Appellant/Cross Appellee submits that the judgment of the Superior Court requiring the State to produce documents containing witness statements should be affirmed.

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