




IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMAR K. THOMPSON, :
Defendant Below, : No. 489, 2017
Appellant, :
v. :
STATE OF DELAWARE, :
Plaintiff Below, :
Appellee. :

APPELLANT'S REPLY BRIEF

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Date: March 5, 2018

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SUMMARY OF ARGUMENT

- I. THE CONTESTED HEARING THAT WAS BASED SOLELY ON NEW CRIMINAL CHARGES, WHERE AN INCOMPLETE DISCLOSURE OF THE EVIDENCE WAS LATE AND WHERE THOMPSON WAS UNAVAILABLE TO TESTIFY AND HIS WITNESS WAS NOT ALLOWED TO TESTIFY VIOLATED THOMPSON'S CONSTITUTIONAL DUE PROCESS RIGHTS.

- II. THE TRIAL COURT ERRED ACCEPTING EVIDENCE OBTAINED IN VIOLATION OF THOMPSON'S FOURTH AMENDMENT RIGHTS ON THE BASIS THAT SUPPRESSION ISSUES WERE NOT RELEVANT OR APPLICABLE DURING VIOLATION OF PROBATION HEARINGS.

- III. THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THOMPSON IN VIOLATION OF PROBATION WITHOUT COMPETENT EVIDENCE THAT HE WAS AWARE OF THE PRESENCE OF THE GUN AND MARIJUANA IN THE VEHICLE.

ARGUMENT

- I. THE CONTESTED HEARING THAT WAS BASED SOLELY ON NEW CRIMINAL CHARGES, WHERE AN INCOMPLETE DISCLOSURE OF THE EVIDENCE WAS LATE AND WHERE THOMPSON WAS UNAVAILABLE TO TESTIFY AND HIS WITNESS WAS NOT ALLOWED TO TESTIFY VIOLATED THOMPSON'S CONSTITUTIONAL DUE PROCESS RIGHTS.

Merits of Argument.

A. Thompson was not provided disclosure of the evidence against him.

The State is correct that a Violation of Probation hearing is not a criminal trial that requires a full panoply of rights provided to a defendant in criminal prosecution. However, a probationer is to be afforded Due Process Rights, which are found in our rules. The State argues about the manner in which and extent to which Thompson requested evidence when under Del. Super. Ct. Crim. R. 32.1, Thompson had no duty at all to make any request for disclosure of the evidence against him at all. Rule 32.1 says "The person shall be given: (B) disclosure of the evidence against the person." The mandatory, unconditional language of the rule places the onus was on the State to provide the evidence.

Yet, more than a month prior to the contested Violation of Probation hearing, Thompson did file and docket a Certificate of Service of the request, which caused a docket entry to be generated on August 4, 2017 (p. Avi, Entry No. 53), and such entry

was available for the State's review on every day thereafter. That Request did identify the Case Identification Number and the VOP Numbers in the Caption. As well, the introductory language specifically identified the case that was the basis for the Violation, its case number, and the applicable rules:

NOW COMES the Defendant, by and through the undersigned counsel, and pursuant to **Criminal Rule 16 and 32.1(a)(B)** requests that the Attorney General permit the inspection, copying, photographing, reproduction and/or disclosure of the following items, which are known, or by the exercise of due diligence may become known, by the Attorney General to be in the possession, custody or control of the State of Delaware with regard to the **allegations in the VOP Report, which included but are not limited to Case No. 1707002670, which was bond discharged at Preliminary Hearing on July 13, 2017:** (emphasis added)(A4)

The State did not object or respond to the requests prior to the hearing; it only provided a couple of police reports the day before, and the court ruled that sufficient and held the hearing. The testimony revealed that the "evidence against [Thompson]" consisted of more. Rule 32.1(b) and the law upon which it is based does not require "select evidence," or "some evidence." It requires "the evidence." Thompson's argument is not that he did not receive "full trial discovery;" his challenge is that he did not receive all of the evidence against him for evaluation and preparation of defense of the matter, an express violation of limited and expressly identified Due Process Rights due Thompson, as a probationer.

B. The late and incomplete disclosure hampered Thompson's ability to cross-examine the witnesses against him.

Thompson did not receive Paskie's report, the Suscom recordings, DeMalto's notes, the search warrant, or recorded interview prior to or at the hearing in the sparse information that he was provided, and the information that he was provided was not timely. So, Thompson was not afforded a fair "opportunity to question adverse witnesses," or the right to cross-examine.

C. The timing of the hearing, where the State expected to re-file the charges and possibly prosecute the vehicle owner, did not allow Thompson the opportunity to testify or present witnesses on his own behalf.

The State argued that it is not unusual for a probationer to have to address a violation based on new charges prior to resolution of those charges. But, this fact does not excuse the constitutional harms this causes. As recognized by this court in Perry v. State, 741 A.2d 359, 364 (Del. 1999), the State exercises a marked advantage by first proceeding with a violation on the unproven charges. Then, here it unfairly furthered its advantage against Thompson by providing untimely and incomplete disclosure of evidence, and threatening the defense's witness, owner of the gun and car, with prosecution prior to the hearing when it was aware of her ownership of both at the time of Thompson's arrest for months. These circumstances deprived Thompson of the meaningful opportunity to present a defense at the hearing as required by the law.

II. THE TRIAL COURT ERRED ACCEPTING EVIDENCE OBTAINED IN VIOLATION OF THOMPSON'S FOURTH AMENDMENT RIGHTS ON THE BASIS THAT SUPPRESSION ISSUES WERE NOT RELEVANT OR APPLICABLE DURING VIOLATION OF PROBATION HEARINGS.

Merits. The State relies on Jenkins v. State, 8. A3d 1147 (Del. 2010), where this Court deemed the Defendant's suppression argument waived because he filed it in the co-pending charges, but not the violation. It asserts that Thompson filed no motion, so waived his suppression argument. Thompson's violation hearing was on September 8th, 2017; Thompson received police reports the day before, so there was no time for the filing of a formal Suppression Motion. The State should not be allowed to withhold information necessary to formulate the basis of a Suppression Motion, and then argue that the motion was not filed so is waived. (Ans. Br. 21)

At the earliest possible opportunity, Thompson clearly argued facts of an extended stop and unlawful detention in closing arguments and that the search was conducted during that time in violation of his Constitutional rights.¹ (A63) The Court was not receptive to this argument, and advised that these facts were not relevant

¹ Before the argument was cut off by the Court, Thompson argued that the detention beyond the reason for the stop without probable cause was a violation of Thompson's Constitutional rights. (A88-9) A violation of the federal Fourth Amendment is necessarily a violation of Del. Const. art I, § 6. State v. Prouse, 382 A.2d 1359 (Del. 1978). So, the argument has State and Federal implications.

because it was not a suppression hearing. Under the circumstances, Thompson sufficiently presented and preserved his suppression issue at the hearing and further fleshed out the argument that DeMalto violated his State and Federal Constitutional Rights by detaining him beyond the reason for the initial inquiry without probable cause. (Op. Br. p. 19)

The Federal exclusionary rule is a judicially created means of deterring illegal searches and seizures and is applied where this objective is best served and where the benefit of its deterrence outweighs the great social costs. Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357, 362-3 (1988). The United States Supreme Court has declined to extend this rule to Violation of Probation hearings. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973). But, Delaware may afford its citizens more protections than does Federal law; it just cannot provide less. Sanders v. State, 585 A.2d 117, 145 (Del. 1987) quoting California v. Ramos, 463 U.S. 992, 1013-14 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."). And, Delaware left the door open and acknowledged that suppression motions may be filed and considered in Violations of Probation. Jenkins v. State ("Jenkins III"), 8 A.3d 1147 (Del. 2010).

This Court should apply the exclusionary rule to this probation hearing because

the police officer's reason for detaining Thompson beyond what was necessary for the issuance of the traffic citation without probable cause was rooted in Thompson's status as a probationer. DeMalto was candid in stating that he had no intention of completing the stop until he received a return call from the probation officer that he called. During the extended period of detention, the police officer also called a canine officer and requested an open air sniff on the vehicle and began asking Thompson, who was in his custody at this time, questions about his probation and the vehicle that he was driving. The information learned during this time from the questioning and the open air sniff lead to the vehicle's search and Thompson's arrest.

The fact that Thompson was on probation was not incidental to the way the officer handled this stop. It was the cause for the officer treating this detention this way. If a police officer's goal was to arrest and successfully prosecute Thompson for crimes based on the evidence that he obtains from that stop, he has the incentive to do his job dutifully observing Thompson's State and Federal Constitutional rights against unreasonable searches and seizures to achieve that end. Otherwise, the prosecution can be extinguished because the evidence is suppressed. On the other hand, if a police officer's goal was to successfully arrest and prosecute Thompson for crimes based on evidence obtained from a stop and he knows that Thompson is a probationer, the deterrent of suppression and inability to proceed with evidence unlawfully obtained is

nil because there is another avenue to prosecute Thompson that does not take into account the officer's compliance with constitutional protections. So, the application of the exclusionary rule to probation revocation proceedings provide for probationers the same right of respect for constitutional rights that is due the ordinary citizen.

Federal Exclusionary Rule. Thirty years ago, the Scott court examined parole revocation hearings before a board; the prevailing argument against the application of the Federal exclusionary rule to parole revocation hearings was that the rule would frustrate financially upset the largely administrative procedures and impede the rehabilitative process. Scott, supra at 367. Delaware's probation revocation hearings are already held in a court before a judge where the probationer has the assistance of counsel. The hearing itself is trial-like feature a witness with personal knowledge who undergoes direct and cross examination. Objections are made and heard, and any evidentiary question is settled by a judge, who makes a formal determination and imposes any sentence. So, the court is already integral to the probation revocation process, and there is no imposition on the already utilized trial like system. Further, the concern that exclusion of unlawfully obtained evidence against a probationer impedes the truth-finding process and rehabilitative goal of probation and somehow weakens our system falsely supposes that probation officers and law enforcement cannot work within the confines of the law to obtain evidence.

Delaware Exclusionary Rule. The search and seizure provision in the Delaware Constitution preceded the adoption of the Fourth Amendment to the United States Constitution and was originally like a similar provision in the Pennsylvania Constitution. Jones v. State, 745 A.2d 856 (Del. 1999). It states on the issue of searches and seizures:

The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.

Del. Const. art. I, § 6. While Delaware has not decided the applicability of the exclusionary rule to probation revocation hearings, the Commonwealth of Pennsylvania recently addressed the issue. In Commonwealth v. Arter, 151 A.3d 149 (Pa. 2016), the Court held that the exclusionary rule applied to parole and probation hearings based on the language of Pa. Const. art. I, § 8:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. art. I, § 8. In its decision to apply the exclusionary rule to revocation of probation proceedings, the deciding factor was not the deterrent purpose of the rule. It

was Pennsylvania’s historical interpretation of its Constitution to “incorporate a strong right of privacy and an equally strong right of privacy, and an equally strong adherence to the requirement of probable cause under Pa. Const. art. I, § 8.” Arter supra at 551 quoting Commonwealth v. Edmunds, 586 A.2d 887, 894 (Pa. 1991).

The language of Pennsylvania constitution is similar to Delaware’s, and Delaware has likewise stressed the right of privacy and need for greater protection of its citizens rights to privacy with regard to searches and seizures. In the 2016 case, Wheeler v. State, 135 A.3d 282, 298 n. 71(Del. 2016), this court discussed the adoption of its constitution in 1792 that tracked the Pennsylvania Constitution and likewise it afforded its citizens greater protection than the Fourth Amendment to the U.S. Constitution in its expansive definition of seizure,² its rejection of the good faith exception to the exclusionary rule,³ and its requirement of more for nighttime search warrants.⁴

Further, and most importantly, Delaware has insisted for years that rights must have remedies and has expressly rejected the U.S. Supreme Court’s rationale for the exclusionary rule. Dorsey v. State, 761 A.2d 807, 820-1 (Del. 2000). Delaware’s exclusionary rule preceded by a decade the application of the Federal exclusionary rule

² Flonory v. State, 805 A.2d 854, 857 (Del. 2001).

³ Dorsey v. State, 761 A.2d 807 (Del. 2000).

to state cases and is not a deterrent, but a remedy for violations of Del. Const. art. I,

Section 6:

We believe that as long as the [Delaware] Constitution contains the [search and seizure] guarantees to the citizen referred to, we have no choice but to use every means at our disposal to preserve those guarantees. Since it is obvious that the exclusion of such matters from evidence is the most practical protection, we adopt that means. It is no answer to say that the rule hampers the task of the prosecuting officer. If forced to choose between convenience to the prosecutor and a deprivation of constitutional guarantees to the citizen, we in fact have no choice.

Rickards v. State, 77 A.2d 199, 205 (Del. 1950). For the last sixty-eight years, Delaware has adhered to its ruling that the remedy for violations of Del Const. art. I, Section 6 is to exclude the evidence obtained as a result of the violation. Delaware's history is consistent with Pennsylvania's interpretation of Pa. Const. art. I Section 8, which takes into consideration the individuals' rights in today's society. Our exclusionary rule remedies the wrong of violation of the Delaware citizens' constitutional rights against searches and seizures, and like Pennsylvania should exclude the wrongfully taken evidence from use in this revocation of probation in accord with its history of protection to remedy violations of those rights.

⁴ Id. at 819.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THOMPSON IN VIOLATION OF PROBATION WITHOUT COMPETENT EVIDENCE THAT HE WAS AWARE OF THE PRESENCE OF THE GUN AND MARIJUANA IN THE VEHICLE.

Merits of Argument. The court held a hearing where Thompson was not afforded due process in his violation of probation hearing—disclosure of evidence against him and the opportunity to testify and present his own witnesses and refused to consider facts relevant to suppression of statements and the search and to the officer’s credibility. Still, in that hearing, there was no evidence that Thompson was aware of the presence of the marijuana or a gun in Shoniece Showell’s car on July 4, 2017. None of the items were in plain sight; and there was no admission on his part as to knowing that they were in his girlfriend’s vehicle when he was driving it. Yet, the court still found that Thompson was aware that marijuana was in the console and trunk and that a gun was under the passenger seat.

And despite the testimony that Thompson’s vehicle was in distress, and there was no rear end collision as the officer believed, the State now argues “no harm, no foul” because the court could have found him in violation of probation just based on driving violations. The problem is the actual finding produced in light of the constitutional violations at the hearing produced an unjust result. See Lilly v. State, 649 A.2d 1055, 1056 (Del. Supr. 1994). On October 26, 2017, the court considered all

of its findings, and Thompson was sentenced him to three-and-a-half years at Level 5, one year at work release, then one year of home confinement. Had the court sentenced Thompson just for the traffic offense of following too closely, it would have sentenced him in consideration of that behavior. There is no question that the lengthy sentence of incarceration was heavily weighted on its findings that Thompson knew of the marijuana in the console and trunk of the car and the gun under the passenger's seat.

In the absence of being afforded due process in the hearing, the finding based on the record in that hearing that is void of evidence of Thompson's knowledge of a gun or marijuana that was not in plain sight in the vehicle and the sentence of incarceration in excess of three years based thereon is an abuse of discretion that must be corrected.

CONCLUSION

Based on the foregoing argument, Defendant request this Honorable Court find that the finding of a violation of probation against Defendant, Jamar Thompson, must be reversed because 1) Contested Violation of Probation hearing did not comport with the requirements of Constitutional Due Process, 2) it was an abuse of discretion for the trial court to disregard the Defendant's suppression argument and to consider evidence taken in violation of Thompson's Constitutional Rights, and 3) the finding of a violation for gun and drug offenses and sentencing thereon was an abuse of discretion.