



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDRE MCDUGAL,)
)
 Defendant Below-)
 Appellant,) No. 350, 2018
) ON APPEAL FROM
) THE SUPERIOR COURT OF THE
 v.) STATE OF DELAWARE
) ID No. 1011012275
 STATE OF DELAWARE,)
)
 Plaintiff Below-)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

COLLINS & ASSOCIATES

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NATURE OF THE PROCEEDINGS

Arrest, Indictment, and Violation of Probation

Police arrested Andre McDougal on November 18, 2010.¹ On January 18, 2011, a grand jury indicted him on the following charges:

- Trafficking in Heroin
- Possession with Intent to Deliver Heroin (PWID)
- Possession of a Firearm During the Commission of a Felony (PFDCF)
- Possession of a Firearm by a Person Prohibited (PFBPP), and
- Receiving a Stolen Firearm.²

The arrest triggered a violation of probation (VOP) for Mr. McDougal.³ The Superior Court held a VOP hearing on March 2, 2011.⁴ The judge found Mr. McDougal in violation and sentenced him to 15 years of unsuspended prison time.⁵ Mr. McDougal appealed, and this Court affirmed the violation and sentence.⁶

Trial, Sentencing, and Appeal

Mr. McDougal rejected a plea offer at final case review on June 13, 2011.⁷

¹ A49-56.

² A57-59.

³ A15; ID No. 0607023450; VN0608064202.

⁴ A31-41.

⁵ A42-43.

⁶ *McDougal v. State*, 2011 WL 4921345 (Del., October 17, 2011); A44-48.

⁷ A61.

Then his public defender, Timothy Weiler, Esquire, declared a conflict four days later.⁸ Christopher Tease, Esquire was appointed on June 30, 2011.⁹

Mr. McDougal had a two-day jury trial beginning September 13, 2011.¹⁰ The jury found him guilty of Trafficking, PWID, and PFBPP, and not guilty of PFDCF and Receiving a Stolen Firearm.¹¹

The State filed a motion to declare Mr. McDougal an habitual offender.¹² The Superior Court granted the motion and sentenced Mr. McDougal to two life sentences on the drug offenses, and five years for PFBPP.¹³

Mr. McDougal filed a timely notice of appeal and was permitted to proceed *pro se* on appeal. This Court affirmed his conviction and sentence.¹⁴

Postconviction case

Mr. McDougal filed a *pro se* motion for postconviction relief on July 10, 2013.¹⁵ Theopalis Gregory was appointed to represent Mr. McDougal.¹⁶ Then, on January 28, 2014, the undersigned attorney (postconviction counsel) was appointed

⁸ A3; D.I. 12; A247.

⁹ A3; D.I. 16.

¹⁰ A3; D.I. 18.

¹¹ A3; D.I. 20.

¹² A127-134.

¹³ A143-147.

¹⁴ *McDougal v. State*, 2012 WL 3862030 (Del., September 5, 2012); A148-157.

¹⁵ A158-163.

¹⁶ A7; D.I. 48.

in his place.¹⁷ On July 1, 2014, postconviction counsel filed the Amended Motion for Postconviction Relief.¹⁸ The assigned Commissioner stayed the case because two of the claims involved the malfeasance and other issues at the Office of the Chief Medical Examiner (OCME) drug testing lab.¹⁹ The other issue delaying the case is that Mr. Tease did not file an affidavit as ordered. The Commissioner ordered that the matter proceed without Mr. Tease's affidavit.²⁰

On January 10, 2016, postconviction counsel filed a Motion to Amend Petitioner's Amended Motion to add one claim.²¹ This was granted, and the Court ordered that a consolidated Second Amended Motion be filed. That motion was filed on March 28, 2017.²² The retesting of the drugs ordered by the Commissioner²³ was completed; the State advised the Court of this fact on January 24, 2018.²⁴

After all the briefing was done, the Commissioner ordered Mr. Weiler to file an affidavit.²⁵ Mr. Weiler filed his affidavit and exhibits on September 13, 2017.²⁶

¹⁷ A7; D.I. 49.

¹⁸ A9; D.I. 58.

¹⁹ A9; D.I. 59.

²⁰ A11; D.I. 67.

²¹ A12; D.I. 74.

²² A166-199.

²³ A13-14; D.I. 82.

²⁴ A14; D.I. 86.

²⁵ A14; D.I. 84.

²⁶ A248-257.

On March 16, 2018, the Commissioner issued a Report and Recommendation that the Second Amended Motion for Postconviction Relief be denied.²⁷ The Superior Court issued an Order adopting that report.²⁸

This is Mr. McDougal's Opening Brief.²⁹

²⁷ *State v. McDougal*, 2018 WL 1393831 (Del. Super. Ct., March 16, 2018); A258-268.

²⁸ *State v. McDougal*, 2018 WL 2970770 (Del. Super. Ct., June 11, 2018); Exhibit A.

²⁹ Of the five original claims, only one is being appealed. Claims I and II below pertained to the OCME and were deemed withdrawn by the Court after review of the retesting result. ²⁹ *State v. McDougal*, 2018 WL 2970770 at *1 (Del. Super. Ct., June 11, 2018); Exhibit A.

Claim IV alleged ineffective assistance of counsel as to Mr. Tease for failing to advise Mr. McDougal of his potential life sentence. This claim is not being appealed, because the post-briefing affidavit and exhibits from Mr. Weiler establish that he informed Mr. McDougal in writing of his habitual status and urged him to take the plea. (A252-256).

Claim V regarding the failure of the two life sentence to merge is not being appealed because the State's explanation of the law was correct, for the time of Mr. McDougal's case, even though modern day drug dealing and aggravated possession sentences now routinely merge at sentencing. Moreover, Mr. McDougal will have the opportunity to seek modification under our new habitual law when he becomes eligible. As such, only Claim III survives, and will be designated as Claim I in this Opening Brief.

SUMMARY OF ARGUMENT

CLAIM I: THE SUPERIOR COURT ERRED IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE FOR STIPULATING THAT MR. MCDUGAL WAS A PERSON PROHIBITED BY VIRTUE OF A PRIOR CONVICTION.

Trial counsel inexplicably departed from the longstanding practice in the Superior Court of severance of the PFBPP charge to avoid unfair prejudice to the defendant. Instead, he stipulated that Mr. McDougal was a person prohibited by virtue of a prior conviction. As such, the jury was able to infer a general criminal disposition to Mr. McDougal, adversely affecting his right to an impartial jury.

The Superior Court erred in finding that Mr. McDougal was not prejudiced. In addition to other analytical errors, the Commissioner decided the jury's not guilty verdict on the PFDCF charge must have meant the jury did not infer a general criminal disposition and therefore Mr. McDougal was not prejudiced.³⁰ The Superior Court's attempt to extrapolate a lack of prejudice from the verdict was error. It is just as likely the jury simply decided that Mr. McDougal did not have the gun on him when he sold the drugs and decided not to convict him of PFDCF.

Mr. McDougal suffered prejudice due to trial counsel's failure to move to sever the PFBPP charge; the Superior Court erred in finding otherwise.

³⁰ *Id.* at *7.

STATEMENT OF FACTS

On direct appeal, this Court found the following facts:

On November 18, 2010, at approximately 10:20 a.m., a detective from the City of Wilmington Police Department's Operation Safe Streets was conducting surveillance in the 2300 block of Carter Street in Wilmington, Delaware. The area was known by police to be a high crime area with drug trafficking activity. The detective conducted his surveillance with binoculars from a nearby rooftop. The day was clear and the detective had an unobstructed view of the target area.

At approximately 10:35 a.m., the detective's attention was drawn to an African American man, wearing a black leather jacket, who entered the 2300 block of Carter Street from the north. The man, later identified as McDougal, then entered the alleyway on the east side of Carter Street next to a vacant row house at number 2314. After a few seconds, McDougal walked onto the porch at number 2312. It is undisputed that McDougal neither owned nor resided at that property. After a few more seconds, McDougal sat down on the front steps. Another man then entered the porch and stayed a couple of minutes.

Thereafter, two other African American men approached Carter Street from the north. The detective observed McDougal walk back to the alleyway and then quickly leave the alleyway. Thereafter, the detective observed McDougal engage in some kind of interchange with one of the men, who later was identified as James Hamilton. The detective testified that it appeared to him that Hamilton and McDougal engaged in what the police term a "hand-to-hand" transaction involving the exchange of drugs and money. At that point, additional law enforcement was called in to assist. A police sergeant stopped Hamilton and patted him down. While the officer was speaking with Hamilton, four baggies of heroin, each containing a blue wax paper baggie stamped "Jaguar," fell from Hamilton's pant leg onto the ground.

After receiving permission from the property owner, the police searched the porch area at 2312 Carter Street. Under a hat that was sitting on a chair they found a loaded handgun and one hundred thirty baggies, each containing a blue wax paper baggie of heroin with the

name “Jaguar” stamped on it. The heroin was packaged as ten bundles of thirteen baggies each. The police detective testified that the heroin, which was later determined to weigh 2.71 grams, had a street value of approximately \$600. At the time the handgun was seized, it was inoperable. No fingerprint or DNA testing was conducted on the weapon, although the serial number indicated that it had been stolen outside the State of Delaware.³¹

Defense counsel argued, and the evidence supported, that even though the heroin found on the buyer had the “Jaguar” stamp, it did not come from the “log” of heroin on the porch, because the wrapping on that log was unbroken.³²

Mr. McDougal did not testify. As to his status as a person prohibited from possessing a firearm, the State and Defense entered a joint exhibit stipulating:

That on November 18, 2010, the defendant was arrested and charged with Possession of a Deadly Weapon by a Person Prohibited, and the defendant agrees that on that date he was prohibited from possessing a deadly weapon by virtue of a prior conviction.³³

The jury found Mr. McDougal guilty of Trafficking, PWID, and PFBPP.

³¹ *McDougal v. State*, 2012 WL 3862030 at *1 (Del., September 5, 2012).

³² A123.

³³ A79.

ARGUMENT

CLAIM I: THE SUPERIOR COURT ERRED IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE FOR STIPULATING THAT MR. MCDUGAL WAS A PERSON PROHIBITED BY VIRTUE OF A PRIOR CONVICTION.

A. Question Presented.

Did the Superior Court err in finding that trial counsel was not ineffective for failing to move to sever the person prohibited charges and stipulating to his prohibited status by way of a prior conviction? This issue was preserved by the filing of a Second Amended Motion for Postconviction relief on March 28, 2017.³⁴

B. Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion.³⁵ A *de novo* standard is applied to legal and constitutional questions.³⁶

C. Merits

1. Applicable Legal Precepts

a. Ineffective assistance of counsel

To prevail on an ineffective assistance of counsel claim, a petitioner must show that counsel's performance was deficient and that the deficiency prejudiced

³⁴ A188-191.

³⁵ *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013).

³⁶ *Id.*

the defendant.³⁷ To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness,"³⁸ under prevailing professional norms and that the defendant was prejudiced.³⁹ The defendant must overcome the presumption that "under the circumstances, the challenged action 'might be considered sound trial strategy'."⁴⁰

To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This is a standard lower than 'more likely than not.'"⁴¹ To put it another way, it is "a probability sufficient to undermine confidence in the outcome."⁴²

b. Person Prohibited charges are routinely severed to avoid prejudice

Delaware Superior Court Rule of Criminal Procedure 14 provides for the severance of charges when a defendant or the state is prejudiced by a joinder of offenses.⁴³ When an indictment includes a PFBPP charge, it is the longstanding practice to permit severance of that charge. The obvious reasoning for such severance is that the jury "may be unable to compartmentalize their judgment of

³⁷ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

³⁸ *Id.* at 688.

³⁹ *Id.* at 687-88.

⁴⁰ *Id.* at 689.

⁴¹ *Ploof*, 75 A.3d at 852.

⁴² *Strickland*, 466 U.S. at 694.

⁴³ Super. Ct. Crim. R. 14.

guilt or innocence with regard to each of the separate counts of the indictment, and may infer a general criminal disposition.”⁴⁴

A jury’s consideration of bad character evidence to infer a general disposition violates due process; the exclusion of such evidence is codified at Delaware Rule of Evidence 404(a) and (b). To the extent such an inference of bad character is established by a prior criminal conviction, the Honorable Richard S. Gebelein’s holding in *State v. Walls* is apt: “bluntly, the [proof of other criminal convictions] evidence tends to predispose the minds of jurors to believe the accused is guilty. It is difficult to conceive of evidence that would have more impact upon the jury.”⁴⁵

This Court had occasion last year to assess a postconviction claim founded on trial counsel’s failure to move to sever the PFBPP charge.⁴⁶ In *Dale*, the Commissioner found that trial counsel’s failure was objectively unreasonable but

⁴⁴ *Massey v. State*, 953 A.2d 210, 218 (Del. 2008), citing *State v. Williams*, 2007 WL 2473428, at *1 (Del. Super. Aug. 29, 2007) (citing *State v. Loper*, 1990 WL 91087, at *1 (Del. Super. June 19, 1990)). See also, *State v. Wilson*, 1978 WL 185316, at *2-3 (Del. Super. Feb. 8, 1978) and *State v. Morrow*, 1994 WL 636994, at *1 (Del. Super. Jan. 7, 1994).

⁴⁵ *State v. Walls*, 541 A.2d 591, 593 (Del. Super. 1987)(excluding evidence of other robberies sought to be admitted pursuant to D.R.E. 404(b)).

⁴⁶ *Dale v. State*, 2017 WL 443705 at *2 (Del., January 31, 2017).

did not find prejudice.⁴⁷ As in the present appeal, trial counsel did not file an affidavit, so counsel's decision cannot be discerned.⁴⁸

This Court agreed with the Commissioner in *Dale* that there are instances in which not moving for severance makes sense, such as when the defendant is expected to testify.⁴⁹ Although not specifically reviewing the Commissioner's finding that trial counsel's failure to move to sever the PFBPP charge was objectively unreasonable, this Court did caution that, like any ineffective assistance claim, the petitioner still must establish prejudice.⁵⁰

2. The Superior Court Erred in Finding that Mr. McDougal Was Not Prejudiced by Trial Counsel's Failure to Move to Sever the PFBPP Charge.

Moving to sever the person prohibited charge is just about the easiest thing a defense lawyer can do. It is done all the time in Superior Court, as this Court noted in *Dale*. There is no objectively reasonable explanation for trial counsel's failure. Even the stipulation itself explained that Mr. McDougal was prohibited due to a prior conviction. The jury was not even instructed to refrain from inferring a general criminal disposition to Mr. McDougal.⁵¹

⁴⁷ *Id.*

⁴⁸ *State v. Dale*, 2016 WL 1613239 at *1 (Del. Super. Ct., April 19, 2016).

⁴⁹ *Dale v. State*, 2017 WL 443705 at *2 (Del., January 31, 2017).

⁵⁰ *Id.*

⁵¹ A90-117.

The jury heard evidence that Mr. McDougal sold heroin to a buyer and that Mr. McDougal was also observed on a porch. The issue for consideration was whether Mr. McDougal possessed the firearm and unopened log of heroin under the hat on that porch. The jury was improperly permitted to factor Mr. McDougal's status as a convicted criminal into that assessment.

The Superior Court based its finding of no prejudice on the jury's verdict, finding that because the jury found Mr. McDougal not guilty of PFDCF and Receiving a Stolen Firearm that they did not infer a general criminal disposition to Mr. McDougal.⁵² But that is only one possible interpretation of the verdict. An equally plausible interpretation is that the jury decided Mr. McDougal did not possess the firearm while selling drugs, and that the State's evidence of Receiving a Stolen Firearm was insufficient. The Commissioner ignored the simple fact that a jury is more likely to infer a criminal disposition to a defendant when they have been told he is a person prohibited by way of a prior conviction, or "convictions," as the State put it in closing argument.⁵³

It was error for the Superior Court to attempt to read the tea leaves of the verdict to extrapolate the jury's deliberative process.

⁵² *State v. McDougal*, 2018 WL 1393831 at *7 (Del. Super. Ct., March 16, 2018); A258-268.

⁵³ A123.

No forensic evidence connected Mr. McDougal to the hat, the gun, or the drugs found on the porch. The jury found Mr. McDougal guilty of three possessory offenses: PWID, Trafficking, and PFBPP. They were impermissibly helped along in that finding by being informed that Mr. McDougal was a criminal—unguided by any instruction as to how to use that evidence for its proper purpose only.

Certainly, when a defendant expects to testify, it may be professionally reasonable to stipulate if the prior conviction is admissible for impeachment. Otherwise, the stipulation such as occurred here was objectively unreasonable. The question for the Superior Court was whether the failure of trial counsel caused prejudice. Mr. McDougal's burden in postconviction is to establish a reasonable probability of a different result absent trial counsel's ineffectiveness. That has been amply established here; Mr. McDougal respectfully seeks reversal of the Superior Court.

CONCLUSION

For the reasons stated herein, Mr. McDougal respectfully requests that this Court reverse the judgment of the Superior Court.

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