EFiled: Mar 18 2020 01:45PM EDT
Filing ID 64840115
Case Number 491,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

REGINALD WATERS, Defendant Below-Appellant, v. STATE OF DELAWARE, Plaintiff Below-Appellee.	)	No. 491, 2019 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE ID No. 1602019886A/B

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

APPEALLANT'S OPENING BRIEF

COLLINS & ASSOCIATES

Patrick J. Collins, ID No. 4692
8 East 13th Street
Wilmington, DE 19801
(302) 655-4600

Attorney for Appellant

Dated: March 18, 2020

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules and Statutes

EXHIBITS

EXHIBIT A – Sentence Order, November 15, 2019

EXHIBIT B – *State v. Waters*, 2019 WL 2486753 (Del. Super. June 13, 2019).

NATURE OF THE PROCEEDINGS

Arrest and Indictment

On March 29, 2016, police arrested Reginald Waters in connection with the homicide of Clifton Thompson, which occurred on February 27, 2016.[1] Darryl Rago, Esquire, was appointed to represent Mr. Waters. At the preliminary hearing calendar on April 8, 2016, Mr. Waters indicated he was not "Reginald Waters"[2] and he did not want to "do commerce" with the courts.[3] He asserted the court had no jurisdiction over him[4] and that he did not consent to representation by Mr. Rago.[5] The Commissioner ordered a competency evaluation; the hearing did not go forward.[6]

On June 6, 2016, grand jury returned an indictment against Mr. Waters, charging him with Murder First Degree, Possession of a Firearm During Commission of a Felony (PFDCF), Possession of a Firearm by a Person Prohibited (PFBPP) and Possession of Ammunition by a Person Prohibited (PABPP).

---

[1] A42-45.
[2] A57.
[3] A51.
[4] A55.
[5] A52.
[6] A76.

Pretrial matters and change of counsel

This case was specially assigned to the Honorable Andrea L. Rocanelli, who held an initial office conference on June 27, 2016.[7] Counsel indicated that Mr. Waters had been found competent.[8] In fact, Mr. Waters had declined to participate in the evaluation. Rather, he explained to the examiner that he was a "sovereign citizen" and that the courts did not have any jurisdiction over him.[9] The examiner opined that Mr. Waters' claim of sovereign citizen status was not the product of a psychological condition, but rather a means to not be held accountable by the courts.[10] The Court scheduled the trial for September 21, 2017.[11]

At a bail hearing on June 29, 2016,[12] Mr. Waters continued to assert his "sovereign citizen" status and deny that he fell under the jurisdiction of the Court.[13] In pursuit of a dismissal on the basis of his sovereign citizen status, Mr. Waters attempted to file affidavits and letters. These were returned by the Court as he was represented by counsel.[14] At the first case review, counsel indicated that he would review Mr. Waters' filings first and docket them with the Court.[15]

---

[7] A84-94.
[8] A86.
[9] A111-114.
[10] A114.
[11] A90.
[12] A95-108.
[13] *See*, A95-100.
[14] A116.
[15] A131.

At the final case review on May 22, 2017, Mr. Waters continued to assert that he was not the Reginald Waters listed in all capital letters on the indictment[16] and generally continued to assert that the Court had no personal or subject matter over him.[17] He also indicated that he had filed a lawsuit against his attorney and others;[18] Mr. Rago indicated that it appeared no suit had yet been filed.[19] The State did not offer a plea and the case was set for trial.[20]

The Court held a pretrial hearing on September 8, 2017. Defense counsel noted the ongoing difficulties between Mr. Waters and himself.[21] For that reason and because the State had not yet provided witness statements, defense counsel sought a continuance of the trial.[22] The Court engaged in a lengthy discussion with Mr. Waters regarding the penalties for the charges and his constitutional right to a trial.[23]

Mr. Waters addressed the Court on several topics. He stated he had no interest in taking a plea if one was offered.[24] He further asserted that his speedy

[16] A134.
[17] A134-136.
[18] A134.
[19] A136.
[20] A137.
[21] A140-141.
[22] A144.
[23] A154-176.
[24] A179, A193.

trial rights had been violated[25] and expressed his continued displeasure with defense counsel's performance.[26] Mr. Waters then continued to assert his rights as a sovereign citizen. The trial judge, noting relevant case law, rejected this claim.[27]

The judge granted the State's motion for a protective order with modifications after a lengthy argument as to its terms.[28] The Court also granted the defense motion to sever the PFBPP and PABPP charges.[29] The Court denied the trial continuance request but agreed to revisit it if defense counsel could not get ready in time after receiving the materials subject to the protective order.[30]

On September 12, 2017, defense counsel renewed his motion to continue the trial; the judge granted the request.[31]

On January 9, 2018, Mr. Rago wrote to the trial judge seeking to withdraw as counsel.[32] Counsel asserted that Mr. Waters' behavior caused him to forfeit his right to counsel under prevailing case law.[33] According to Mr. Rago, Mr. Waters' behavior escalated during a prison visit on January 5, 2017, which culminated in more physical threats and Mr. Waters reaching through the slot in the safety glass

[25] A181.
[26] A187.
[27] A199-200.
[28] A230-269; A281.
[29] A224.
[30] A272.
[31] A289-290.
[32] A299-301.
[33] A299.

in the visitation room to grab for his files.[34] The State responded by email, asserting that trial with a *pro se* Mr. Waters would be highly problematic. The State urged the appointment of new counsel.[35]

At the hearing on the motion that same day, the judge asked Mr. Waters whether he was prepared to represent himself. Mr. Waters said there was an "irreconcilable conflict" between him and Mr. Rago.[36] He felt he was being forced into self-representation and had to file a motion to compel evidence.[37] Mr. Waters asserted that he was not waiving his right to counsel, but that he did not want Mr. Rago to represent him.[38]

With that established, the Court next turned to whether Mr. Waters through his behavior had forfeited the right to counsel.[39] Prior to the Court recessing so Mr. Rago could confer with Mr. Waters, the State asserted that Mr. Waters representing himself would be untenable and likely result in a mistrial.[40] Mr. Rago indicated that it may be possible for a different attorney to have a better relationship with Mr. Waters.[41]

---

[34] A300.
[35] A303.
[36] A310.
[37] A311; A291-297. The motion was referred to counsel. A298.
[38] A315.
[39] A324-325.
[40] A326-328.
[41] A337.

Ultimately, the Court decided to continue the trial again and to grant the State's request that new counsel be appointed for Mr. Waters,[42] based on a finding of a conflict of interest between counsel and client.[43] The Office of Conflicts Counsel appointed the undersigned attorney to represent Mr. Waters. The Court issued a new scheduling order with a trial date of May 10, 2018.[44]

On April 25, 2018, the State provided the defense with thirteen of Mr. Waters prison phone calls the State planned to use at trial.[45] These were provided pursuant to a protective order until that order was lifted on May 9, 2018.[46] On that date, defense counsel sought a continuance of the trial so counsel could review all the calls, not just the 13 that have been provided.[47] Counsel asserted that reviewing all the calls was necessary to effectively prepare to cross-examine the State's witnesses.[48] The Court denied the continuance request, noting it was "the defendant's own actions which put him in this position."[49]

---

[42] A343.
[43] A346.
[44] A360.
[45] A11-12; D.I. 56
[46] A12; D.I. 60.
[47] A364.
[48] A364.
[49] *Id.*

Trial

The day of jury selection began with a plea offer and colloquy.[50] The State offered a plea[51] to Mr. Waters, which he rejected. Jury selection was completed on May 10, 2018.

On May 14, 2018, with trial about to begin, Mr. Waters decided he wanted a bench trial.[52] He also had an alternate proposal for a plea offer.[53] The judge recessed to allow the parties to confer.

After the recess, a new plea offer was put on the record,[54] which Mr. Waters rejected after a colloquy.[55] Counsel next submitted a Waiver of Jury Trial to the Court.[56] The judge conducted a thorough colloquy with Mr. Waters and determined his waiver was knowing, intelligent, and voluntary. The Court agreed to approve the waiver.[57]

The trial proceeded from May 14, 2018 to May 23, 2018. The Court filed Instructions for Bench Trial that day.[58] After three hours of deliberation, the Court returned with a verdict: guilty as to the lesser-included offense of Manslaughter,

---

[50] A373-377.
[51] A414.
[52] A421.
[53] *Id.*
[54] A415.
[55] A425-426.
[56] A416.
[57] A427-429.
[58] A718-738.

and guilty of the other charges of PFDCF, PFBPP, and PABPP.[59] The Court scheduled sentencing for August 10, 2018.[60]

Motion for a New Trial

Prior to sentencing, Mr. Waters informed defense counsel he wanted to proceed *pro se*.[61] The Court scheduled a colloquy. However, counsel identified a legal issue potentially relating to a posttrial motion.[62] With Mr. Waters' agreement, counsel sought and received approval to postpone the colloquy regarding self-representation.[63] On September 17, 2018, counsel wrote to the Court requesting a continuance of the sentencing to determine if a potential motion should be litigated based on *United States v. Carpenter*,[64] which issued on June 22, 2018.[65] The Court approved the request.[66]

To allow the defense to gather documents needed for the motion, the Court granted an application for certain documents to be unsealed.[67]

---

[59] A717.
[60] *Id.*
[61] A740.
[62] A746.
[63] A747.
[64] 138 S.Ct. 2206 (June 22, 2018).
[65] A748-749.
[66] A750.
[67] A754.

On December 17, 2018, the defense filed a Motion for a New Trial.[68] The motion alleged that *Carpenter* rendered the State's use of cell site location information (CSLI) at trial unconstitutional, and that the police improperly used a pen register application to obtain CSLI without probable cause. The Court held a hearing on the motion.[69]

The Court denied the Motion for a New Trial on June 13, 2019.[70] The Court found that Mr. Waters was not entitled to a new trial despite the exclusion of the CSLI evidence.[71]

Habitual offender motion and sentencing

The State filed a motion to declare Mr. Waters an habitual offender,[72] followed by a revised motion on July 25, 2019.[73] On September 13, 2019, counsel sent the Court a letter acknowledging that Mr. Waters was subject to a 75 year minimum mandatory sentence.[74] After review with the State, however, defense counsel sent another letter asserting Mr. Waters was eligible for concurrent sentencing on the Manslaughter charge by operation of 11 *Del. C.* § 3901.

---

[68] A757-980.
[69] A1040-1146.
[70] *State v. Waters*, 2019 WL 2486753 (Del. Super. June 13, 2019).
[71] A1152.
[72] A1156-1160.
[73] A1161-1164.
[74] A1165.

The judge ruled by letter that the amended § 3901 did not apply to Mr. Waters based on a case decided by another Superior Court judge, *State v. Thomas*.[75] On November 6, 2019, defense counsel again wrote to the judge stating that *Thomas* should not apply because the defendant in that case was a sentenced inmate seeking retroactive application.[76] However, counsel stated that since the statute states that no concurrent-eligible crime can be sentenced concurrently with a consecutive-only crime, Mr. Waters was not eligible for concurrent sentencing.[77]

Then another development occurred. A defense attorney received a continuance of a sentencing, because as a legislative attorney, she was aware that the General Assembly did not intend to prohibit concurrent sentencing with consecutive-only crimes. Counsel wrote to the trial judge again on November 14, 2019 explaining the new development and asking the Court to retain jurisdiction over the sentencing until it could be determined whether the General Assembly will amend § 3901.[78]

The Court signed the habitual petition[79] on November 15, 2019 and sentencing proceeded that day. The Court approved the defense application to retain jurisdiction over the sentence through the 2020 session of the General

---

[75] A1173-1174; *State v. Thomas*, 2019 WL 5704287 (Del. Super. Oct. 31, 2019).
[76] A1175.
[77] *Id.*
[78] A1177-1178.
[79] A1179-1180.

Assembly.[80] The judge sentenced Mr. Waters to 75 years unsuspended Level V time.[81]

Counsel filed a timely Notice of Appeal. This is Mr. Waters' Opening Brief.

[80] A1190, A1216.
[81] Exhibit A; A1214-1216.

SUMMARY OF ARGUMENT

CLAIM I: THE TRIAL JUDGE'S DENIAL OF A DEFENSE CONTINUANCE REQUEST TO ENABLE REVIEW OF ALL MR. WATERS' PRISON CALLS COMPROMISED HIS RIGHT TO A FAIR TRIAL.

Three weeks before trial, the State provided thirteen prison phone calls to the defense, but counsel was not allowed to discuss them with Mr. Waters until the day before trial due to a protective order. After discussion with Mr. Waters, defense counsel sought a continuance in order to review all the hundreds of calls in the State's possession for impeachment and exculpatory evidence. The Court denied the request, holding that Mr. Waters created the situation, that he had caused delays earlier in the case, and that he already knew what was on the calls. The judge erred in denying the continuance request, depriving Mr. Waters his Sixth Amendment right to a fair trial.

CLAIM II: THE TRIAL JUDGE ERRED IN DENYING THE DEFENSE MID-TRIAL MOTION TO EXCLUDE MR. WATERS' PRISON PHONE CALLS.

When the State attempted to lay a foundation at trial, the only basis was that key witness Rapha Moore was difficult to contact. But Moore was recalcitrant from the first day of the investigation. The State was unable to point to anything Mr. Waters did that would form a reasonable basis for a subpoena for prison calls – even the judge so stated. However, after a recess, she denied the motion to exclude

the calls from trial. This decision violated Mr. Waters' rights under the Fourth Amendment.

<u>CLAIM III:</u> THE TRIAL JUDGE ERRED IN DENYING THE DEFENSE MOTION FOR A NEW TRIAL.

The trial judge applied an incorrect legal standard, incorrectly viewing the evidence in a light most favorable to the State, as though the motion was for judgment of acquittal. Moreover, without the corroborating cell site information, the evidence at trial was insufficient. Finally, Mr. Waters' due process rights require a new trial.

STATEMENT OF FACTS

This trial pertained to the shooting of Clifton Thompson at Prides Court apartments in Newark, Delaware on February 27, 2016.

Civilian eyewitnesses to the incident

Jean Cameron

Jean Cameron is the mother of the decedent, Clifton Thompson. She lived at 10 Chatham Lane in Prides Court apartments in a first floor unit with a granddaughter.[82] Thompson stayed at Cameron's apartment several nights a week,[83] but typically not on the weekends.[84]

Around 6:45 PM on Saturday, February 27, 2016, Cameron was surprised to receive a phone call from Mr. Thompson asking her to come outside.[85] She did so, and saw Thompson's car parked there and Thompson and his girlfriend Cassie Brown near the car.[86] She also saw a person standing in the bushes between Buildings 10 and 15.[87] She could not see his facial features, but noted that he was

[82] A466.
[83] A465.
[84] A466.
[85] A466-467.
[86] A469.
[87] A470.

wearing dark clothing and had a hoodie on.[88] Cameron and her son went into the apartment; Brown stayed outside.[89]

Thompson was upset and scared. He got on the phone with a person known to Cameron as "Six,"[90] who was an acquaintance of Thompson.[91] Thompson was animatedly complaining to Six that "you got this guy at my mom's house."[92] He also spoke to a Tony Griffin on the phone.[93] While this was going on, Cassie Brown came back into the house.[94] Thompson got a gun he kept under the kitchen sink and went back outside.[95] Thompson said to Cameron, "mommy, I'm not going to let them shoot me."[96] A moment later, she heard gunshots.[97]

Cameron and Brown ran outside. Thompson lay wounded in front of Building 15. Brown went into Thompson's pocket and retrieved his phone and gave it to Cameron to call 911.[98] Thompson's gun was lying by his side; Cameron did not see what happened to it.[99]

---

[88] *Id.*
[89] *Id.*
[90] Six's real name is Rapha Moore. A496.
[91] A470-471.
[92] A472.
[93] *Id.*
[94] A473.
[95] *Id.*
[96] A478.
[97] A474.
[98] A475.
[99] *Id.*

Cameron testified that Tony "Tone" Griffin was an associate of both Thompson and Six.[100] Thompson was a middleman for marijuana sales; Tone supplied marijuana to Thompson, who delivered it to one of "Six's people."[101] She heard Thompson say to Tone that the guy was outside and wanted his money.[102] Thompson told her the issue was that Tone has provided "moldy weed" to someone and the guy outside wanted his money back.[103]

Cameron was not aware of the thousands of dollars in cash as well as cocaine and marijuana that Thompson had in her apartment.[104] When executing a search warrant after the homicide, police seized 59 grams of marijuana, eight morphine pills, 66 grams of cocaine, a money counter, a digital scale with cocaine residue, and $10,140 in cash.[105]

Cassie Brown

Cassie Brown was Clifton Thompson's "on and off" girlfriend for 17 years and the mother of all four of his children.[106] They had been evicted from an

[100] A479.
[101] *Id.*
[102] *Id.*
[103] A480.
[104] *Id.*
[105] A644-645.
[106] A550-551.

apartment in Prides Court and each moved in with their mothers.[107] Although there were difficulties, Brown and Thompson were on good terms.[108]

On February 27, 2016, Brown and Thompson were together most of the day. They were headed to Cameron's house to drop off their daughter[109] as they were planning on going out for dinner.[110] During the drive, Thompson had several phone calls with Six, during which time he was upset and yelling.[111] They pulled up to Cameron's apartment and their daughter had to run in and use the bathroom. But she came back to the car because she saw someone outside the apartment in the bushes.[112] The three of them then got out of the car; the man outside said to Thompson, "tell your family to go in the house, let me talk to you."[113]

Thompson called his mother to come out, then they all went inside, but Brown was left outside because the apartment door locked.[114] Brown identified Mr. Waters as the person outside. She tried to engage him in discussion about what he was doing there and asking what his business was with Thompson but he

[107] A551.
[108] *Id.*
[109] *Id.*
[110] A552.
[111] A561.
[112] A552-553.
[113] A553.
[114] A554.

was not responding much.[115] According to Brown, the man then got on the phone with Six, who Brown testified was an acquaintance of hers and Thompson's.[116]

Brown eventually got into the apartment, where everyone was upset.[117] Thompson went back out of the apartment, and then gunshots ensued.[118] She stayed with Thompson with a crowd gathering until police and EMTs arrived.[119] While with Thompson, she took the gun and everything from his pockets and put it all in her coat pocket.[120] She then put her coat in her car when the police arrived.[121] The police later searched the car and found what she had taken was the gun, two bags of marijuana, a set of keys, a lighter[122] and close to $4,000 in cash.[123] Brown did not disclose her removal of this evidence with the police during her initial interview with the police.[124]

Brown admitted she was not truthful in several respects during that interview.[125] She also did not tell the police that Thompson ever went into the

---

[115] *Id.*
[116] A555.
[117] *Id.*
[118] A556.
[119] A557.
[120] A558.
[121] A566.
[122] A450.
[123] A453.
[124] A558.
[125] A564.

apartment and left out the part about her being alone with the person outside and talking to him for 10-15 minutes.[126]

At the scene, Brown was approached by Six, but she told the police she did not want him near her because "I'm in threat of this person."[127] She thought Six might have been involved.[128]

Although Brown identified Mr. Waters at trial, she did not do so when shown a photo array. In her initial interview with police, she said she had recognized the person standing outside the apartment from meeting him at a barbershop a week or two before the incident.[129] She did not identify anyone from the photo lineup as being this person, even though Mr. Waters' photo was in the lineup.[130] Likewise, even in her second interview she did not identify anyone.[131] The detective pressed her, asking if she recognized someone in the lineup but just did not want to tell him, and she still replied "no."[132]

---

[126] A566.
[127] A557.
[128] A561.
[129] A571-572.
[130] A572.
[131] A645.
[132] *Id.*

Brown admitted that she knew Thompson was selling both marijuana and "powder," and that Rapha Moore/Six and Tony Griffin were involved in the drug dealing with Thompson.[133]

Nina Frisby

Nina Frisby is the girlfriend of Rapha Moore/Six.[134] She knew Thompson and Brown; the couples had socialized together.[135] She also knew Reginald Waters.[136] She was not aware that Thompson was involved in drug sales, but knew him to engage in sports betting.[137]

Frisby was with Moore all day; they planned to go to Philadelphia that evening.[138] According to Frisby, Moore was getting frustrated because both Thompson (who was also known as Kip)[139] and Mr. Waters kept calling him.[140] Eventually, Moore told Frisby that they had to go to Kip's.[141]

They parked; Frisby stayed at the car while Moore walked towards Kip/Thompson, who was outside.[142] They conversed, but Frisby was too far away

---

[133] A574.
[134] A520. She and others refer to Moore as "Ray" also. A522.
[135] A521.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] A521.
[140] A522.
[141] *Id.*
[142] A523.

to hear.[143] She heard shots and started running. She thought Moore had been shot.[144] Thompson approached her and they tried to get in a nearby building, but he fell. At the time, she saw Thompson with a gun in his hand.[145] A passerby walking his dog called 911.[146] Frisby was present when Brown began removing things from Thompson's pockets.[147] While there with Thompson, Frisby heard Brown's brother approach and ask who did this to his brother. Brown replied, "Ray."[148] But Frisby stated that Ray would never do anything like this and Moore also denied shooting Thompson.[149]

Frisby did not see Mr. Waters at the scene; she identified him from a photo lineup, but just to say she knew him through Moore and had seen him last at the Christiana Mall.[150]

Rapha Moore

Moore knew Thompson because they were involved in sports gambling together.[151] He had known Mr. Waters since he was a teenager.[152] Moore

---

[143] A525.
[144] *Id.*
[145] A527.
[146] A526.
[147] A529.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] A486.
[152] *Id.*

introduced Thompson and Mr. Waters "for a business proposition."[153] But he claimed he did not know what the business was.[154] On February 27, 2016, Moore was getting calls from each of them complaining about the other.[155] Thompson was asserting to Moore that he had already paid Waters over the dispute, and Waters was telling Moore that he was waiting around to discuss it with Thompson. Moore encouraged them separately to meet up and handle their dispute in person.[156]

Thompson called Moore and told him someone was in the bushes outside his apartment and that it might be "your boy."[157] Moore tried to reach Mr. Waters to no avail, then decided to go over there to "de-escalate the situation."[158] He parked a bit away from the apartment because he wanted to keep his girlfriend Frisby out of it.[159] When Moore arrived, he saw Thompson and a few other men but not Mr. Waters.[160]

Thompson was irate; Moore thought he was holding his hand and posture as though he had a gun.[161] Moore testified a person in his peripheral vision walked up

---

[153] A488.
[154] A490.
[155] A489.
[156] *Id.*
[157] A492.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] A494.

with a hood up, and Thompson said, "there he goes right there."[162] The person told Thompson to get his hand out of his pocket. Thompson replied, "chill, I got my kids here."[163] Then Moore heard the shots. He hit the ground, then got up and ran around the back of the building.[164] Moore heard the gathered crowd asking "who did this?" and people were saying his name.[165] Moore went over to where Thompson lay, and Thompson's mother began punching him, saying it was his fault.[166] He said he did not see who did it but whoever did was a coward.[167]

Moore went to the police station to be questioned; he wanted to clear his name.[168] He wanted to give the police information in order to not become a suspect.[169] However, the State called Corporal Biehl of the New Castle County Police, who interviewed him at the scene first.[170] The statement was not recorded, nor did Biehl preserve his notes, but he did draft a police report.[171] Moore told Biehl that he had received a call from Kip/Thompson that "Shawn" was outside his

---

[162] *Id.*
[163] A495.
[164] *Id.*
[165] *Id.*
[166] A496.
[167] *Id.*
[168] A497.
[169] A499.
[170] A512.
[171] A513.

building.[172] He explained to Biehl that Shawn shot Kip.[173] Moore provided Shawn's number to Biehl – a number associated with Mr. Waters.[174]

Moore testified that he did identify Mr. Waters from a photo lineup but not as the shooter, because he did not see the actual shooting.[175] During his police station interview, Moore was interviewed by two detectives. Detective Escheman read him the standard protocol for photo identifications. Moore signed a form indicating he did not identify anyone.[176] Then Detective Sendek took over the interview, at which time he identified Mr. Waters.[177] Sendek did not use the standard protocol for photo identifications, because the procedure had already been explained to him.[178]

During his police interview, Moore provided a false phone number and was very reluctant to turn over his phone.[179] When the police downloaded the phone's contents, the results revealed that between February 10, 2016 and February 27, 2016, Moore exchanged more than 1500 text messages.[180] Detective Sendek

---

[172] *Id.*
[173] A514.
[174] *Id.* The phone number is also listed as "Reg" and "Reg 3" in the contacts section of Moore's phone. A630.
[175] A499.
[176] A645.
[177] A646.
[178] *Id.*
[179] A638.
[180] *Id.*

testified that based on his training and experience, many of the messages indicated that Moore was a drug dealer.[181] Besides Thompson and Tony Griffin, Moore was engaged in drug dealing with quite a number of other people as well.[182]

On January 5, 2018, Moore signed an "Affidavit of Truth" which was admitted at trial.[183] The affidavit states that Moore was frightened of going to prison when he identified Mr. Waters as the shooter. It further states that he falsely accused Mr. Waters because he wanted to clear himself as a suspect.[184]

Detective Sendek, the chief investigating officer, interviewed Moore about the affidavit on February 28, 2018.[185] That interview was also played as a 3507 statement. Moore claimed he did not know who wrote the affidavit.[186] He reiterated he felt pressured to make an identification or he would be charged.[187] He told the detective he did not see the shooting then "two seconds later….I'm hearing Ray…did it. They're all saying me."[188] Moore said he was feeling pressure from both sides, including being threatened by Thompson's mother, Jean Cameron.[189]

---

[181] A638.
[182] *Id.*
[183] A359.
[184] *Id.*
[185] A507.
[186] A1219.
[187] A1220.
[188] A1221. (Ray is short for Rapha.)
[189] A1220.

Civilian witnesses regarding post-incident events

Brittney Dixon

Ms. Dixon is the mother of one of Mr. Waters' children.[190] She testified on several topics. She loaned Mr. Waters a sum of money from her tax return; he returned it to her when he was arrested at the Best Western Hotel.[191] When police arrived at the hotel, she broke one of the phones that was in the room; she could not say why.[192] As to the affidavit signed by Moore, she testified she received it from a friend named Shawn Bowers.[193] She mailed the affidavit to the Department of Justice and others.[194]

One night Mr. Waters visited Dixon at a residence where she was working as a home health aide. She gave him the money from her tax return.[195] Dixon told police that Mr. Waters told her, "I need you to have my back," but this was a phrase that was not out of the ordinary for Mr. Waters to say to her.[196] This meeting occurred before Dixon was told that Mr. Waters was going to be charged with murder.[197] Dixon testified Mr. Waters was acting like himself during this

[190] A610.
[191] A611.
[192] A612.
[193] A613.
[194] A614.
[195] A625.
[196] *Id.*
[197] A625.

meeting.[198] In her phone calls with Mr. Waters when he was in prison, she did not recall him ever asking her not to come to court.[199]

Latoya Johns

Ms. Johns is the mother of one of Mr. Waters' children.[200] On Sunday, February 28, 2016, Mr. Waters was dropped off at her house and they went to a family event in Philadelphia.[201] Johns also testified that Mr. Waters' phone was registered in her name; on February 28, 2016, Mr. Waters said he had lost the phone.[202] That day, he called her from a different number.[203]

Police and forensic witnesses

Jennie Vershvovsky, MD, performed the autopsy and testified at trial. She found neither soot or stippling in the gunshot wounds, so the shooter was not at very close range.[204] Dr. Vershvovsky noted a gunshot wound to the right clavicle,[205] one to the chest,[206] and one to the upper leg.[207]

---

[198] *Id.*
[199] A626.
[200] A581.
[201] A583.
[202] A585.
[203] A586. Records for one of the phones seized from the Best Western room showed two calls to Johns' number on February 28, 2016.
[204] A441, 444.
[205] A441.
[206] A442.
[207] *Id.*

Detective Ronald Phillips collected evidence for the investigation. He collected several bullets and casings, as well as the items Cassie Brown took from the pockets of Thompson.[208]

Stephen Deady, a forensic firearms expert, analyzed the firearm toolmark evidence. He found no evidence that the .38 special that Thompson was carrying had fired any of the recovered casings or projectiles.[209] One projectile from the scene and one from Thompson's body were both fired from the same firearm, according to Deady.[210] He also testified that four casings recovered from the scene were fired from the same firearm.[211] He could not say that the two projectiles and the four casings were fired from the same firearm.[212] Besides Thompson's handgun, no other weapon was recovered.[213]

DNA analysis was performed on the ballistics and other evidence, but insufficient DNA was present to conduct comparison testing.[214]

On March 29, 2016, a US Marshals task force made entry into a Best Western Motel room in Dover to effect an arrest on Mr. Waters.[215] The room door

---

[208] A449-450.
[209] A459.
[210] *Id.*
[211] *Id.*
[212] A462.
[213] A461.
[214] A636.
[215] A627.

remained locked and the marshals had to conduct a forced entry.[216] A month earlier, Detective Sendek had drafted an arrest warrant for Mr. Waters.[217] Sendek was present for the arrest. His team recovered three cellphones, over $5,000 in cash, and a laptop computer from the motel room.[218] One phone was activated on February 28, 2016, and the other two were activated on March 4, 2016.[219] Police found no subscriber information for the phones. Brittney Dixon, who was present in the room, broke one of the phones.[220] The money was seized from Dixon, not Mr. Waters.[221]

Cell site location evidence (CSLI)

Department of Justice (DOJ) investigator Brian Daly examined the cell tower data on the phone used by Mr. Waters. Although the police obtained a month of records (January 28, 2016—February 28, 2016), Daly only analyzed February 27-28, 2016.[222] Mr. Waters' phone hit towers in Dover on the afternoon of February 27.[223] The phone moved north through Townsend[224] and up to the Newark area. Eventually, the phone for a number of calls used the west facing

---

[216] A629.
[217] A436.
[218] A437.
[219] A438-439.
[220] A439.
[221] *Id.*
[222] A536.
[223] A537.
[224] A539.

portion of the tower at 902 Old Harmony Road.[225] Nine calls used that tower between 6:43 PM and 7:33 PM.[226] This tower is about a mile from the homicide scene.[227] The homicide occurred at about 7:35 PM.[228] By 7:50 PM, the phone was using towers south of the crime scene in the Newark area near Interstate I-95.[229] The CSLI showed that for a data access event at 7:58 PM, the phone was using towers south of Newark and headed south.[230] Many of the analyzed calls were to or from Rapha Moore.[231]

On cross-examination, Daly was asked to review the calls for the entire month of data between Mr. Waters and Rapha Moore. That total was 163 calls in 30 days.[232] For several calls on other dates, Mr. Waters phone was using the same tower – 902 Old Harmony Road – that the phone used on the evening of February 27, 2016.[233]

Motion to exclude Mr. Waters' prison phone calls

The State sought to introduce certain of Mr. Waters' prison phone calls through Detective Sendek. He testified he sought Mr. Waters' calls because

---

[225] A542.
[226] A542-543.
[227] A543.
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] A539.
[232] A546.
[233] A547-549.

"efforts to speak with and contact regularly with one of the main witnesses, Rapha Moore, proved difficult."[234] The defense objected, stating if that was the only foundation, then reasonable grounds for the DOJ to obtain the calls was not established.[235] The judge gave the State the opportunity to lay additional foundational elements.[236] Counsel noted the subpoena was silent as to the reasons for seeking the calls.[237]

Detective Sendek went into further detail regarding his attempts to secure Moore's cooperation for trial. Moore was making any possible excuse to not meet with Sendek and the prosecutors.[238] But Sendek added no new reasons for seeking the prison calls. The defense asked *voir dire* questions of Sendek. Sendek confirmed that Mr. Waters and Moore were friends, and that Moore was reluctant to cooperate. As far as Sendek could recall, this was in September 2017, before Moore told Sendek he was getting pressure from both sides.[239] Sendek testified, "my interest was peeked [sic]"[240] and that he was curious to see what Mr. Waters could be saying to Moore on the phone.[241]

---

[234] A589.
[235] A589-590.
[236] *Id.*
[237] A590, A1275-1276.
[238] A590-591.
[239] A591-592.
[240] A591.
[241] A592.

The judge found that "what I haven't heard, is that there is some specific fact, some information or fact that the detective had that gave him…reason to be concerned there were phone calls."[242] The Court went on: " the detective says he's concerned, and it's just one of the things he wants to explore. I don't know if that's enough or not."[243]

Finally, the prosecutor asked the Court to consider that Mr. Waters had a prior conviction for witness tampering.[244] He asked the judge to consider that under D.R.E. Rule 404(b) as a factor in reasonable grounds for the subpoena.[245] Defense counsel noted that conviction was for written communications, to which the judge replied, "I think it is relevant to note. It takes it out completely."[246]

The judge took a recess to consider the motion, then came back to the bench and denied it.[247]

Mr. Waters' prison phone calls

In the first call, which was very brief, Mr. Waters states to an unknown male, "I don't know if I want it to be an opportunity for them to be able to try to say that I'm tampering with a witness."[248]

---

[242] A593.
[243] *Id.*
[244] *Id.*
[245] A594.
[246] *Id.*
[247] *Id.*
[248] A1238 (incorrectly transcribed as "on camera with a witness").

In the second call, Mr. Waters is discussing with an unknown person his research of case law and whether a person can get charged with contempt of court for refusing to testify.[249] He goes on to say that he did not want witnesses to not appear, because the case could get continued.[250] Sendek interpreted Mr. Waters' statement, "that is the only piece. There is no other piece"[251] as a reference to Rapha Moore.[252]

In the third call, Mr. Waters tells the other person "I want to send you this joint"[253] and to "make copies and send it to my babe."[254] Sendek took that to be a reference to the affidavit that Moore eventually signed.[255]

The fourth call was a reference to a strategic time frame around Mr. Waters' next court date of January 10, 2018,[256] with Sendek interpreting it as a reference to a filing date for the affidavit.[257]

In the fifth call, Mr. Waters discusses what happens when a person takes the stand and whether they can be charged with perjury.[258] He goes on to say that

---

[249] A1240.
[250] A1241.
[251] A1242.
[252] A598.
[253] A1243.
[254] A1244.
[255] A598.
[256] A1245-1246.
[257] A598-599.
[258] A1251.

"everything that he said they done proved to be a lie."[259] Mr. Waters goes on to discuss that "he" could just "plead the fifth."[260] Sendek believed the "he" being referred to was Moore.[261]

In the sixth call, Mr. Waters speaks to Rapha Moore. Moore states, "everything cool. I'm going to get with it…I told them to type that jawn up."[262] Moore reiterates that it is he who is going to have the affidavit typed: "I told him…type that jawn up, make it official."[263] Moore further states to Mr. Waters that he will get with "him" tomorrow so he can type it up.[264] Moore had looked into not coming to court, and stated, "the only thing they can do, I looked it up…is contempt."[265]

In the seventh call, Mr. Waters references having something typed up for him, and after the holidays, to get with "her" and go snatch it up and go meet with him.[266] Sendek believed "her" was Brittney Dixon and the "him" was Rapha Moore.[267]

---

[259] *Id.*
[260] A1252.
[261] A599.
[262] A1260.
[263] A1261.
[264] A1265-1266.
[265] A1263.
[266] A1268.
[267] A600.

In the eighth call, Mr. Waters tells Dixon his trial date and says "because you don't come, Toya don't come, Dude don't come…it's over."[268]

In the final call, Brittney Dixon informs Mr. Waters that she sent the affidavit to Matt "Daniels" (likely "Denn"), the Prothonotary, and the head of defense.[269] Mr. Waters replies, "whew, God is good."[270]

Sendek testified that he reviewed calls beginning September 2017 and did not go back farther in time. He stated that there were hundreds of calls reviewed.[271] The work of listening to the calls was divided among Sendek and various DOJ investigators.[272] Sendek did not request that copies of Mr. Waters outgoing mail be reviewed.[273]

Defense case and verdict.

After a colloquy, Mr. Waters elected not to testify.[274] The defense called Detective Sendek for brief testimony,[275] discussed elsewhere in this section. The State did not put on a rebuttal case.[276]

---

[268] A1270-1271.
[269] A1273.
[270] A1274.
[271] A602.
[272] A609-610.
[273] A603.
[274] A642-643.
[275] A644-647.
[276] A646.

The judge found Mr. Waters guilty of the lesser-included offense of Manslaughter, and guilty of the other charges of PFDCF, PFBPP, and PABPP.[277]

[277] A717, A739.

ARGUMENT

CLAIM I: THE TRIAL JUDGE'S DENIAL OF A DEFENSE CONTINUANCE REQUEST TO ENABLE REVIEW OF ALL MR. WATERS' PRISON CALLS COMPROMISED HIS RIGHT TO A FAIR TRIAL.

A. Question Presented

Whether the trial judge erred in denying a defense continuance request for the purpose of reviewing all Mr. Waters' prison phone calls rather than the selected few the State planned to play at trial. This issue was preserved at an office conference on May 9, 2018.[278]

B. Standard and Scope of Review

Constitutional violations pertaining to a trial court's evidentiary rulings are reviewed *de novo* by this Court.[279] This Court reviews a trial judge's interpretation of discovery rules *de novo*, and the judges application of those rules under an abuse of discretion standard.[280] Moreover, "when a discovery violation prejudices substantial rights of the defendant, his conviction must be reversed."[281] Finally, *Brady* violations and legal errors are reviewed *de novo*.[282]

---

[278] A362-369.
[279] *Johnson v. State*, 878 A.2d 422, 425 (Del. 2005).
[280] *Valentin v. State*, 74 A.3d 645, 648 (Del. 2013).
[281] *Johnson v. State*, 550 A.2d 903, 913 (Del. 1988).
[282] *Atkinson v. State*, 778 A.2d 1058, 1061 (Del. 2001).

C. Merits of Argument

The State provides prison calls and the Court denies a defense continuance request

On April 25, 2018, the State provided 13 prison call recordings and transcripts to the defense, subject to a protective order.[283] According to trial testimony, these calls occurred between October 4, 2017[284] and January 9, 2018.[285] Yet they were not provided until April 25, 2018. The State sought to admit the calls as proof of Mr. Waters' scheme to get Rapha Moore to swear out an affidavit, as well as Mr. Waters' efforts to stop witnesses from testifying.[286] After review of the calls, defense counsel emailed the trial judge seeking an office conference.[287]

When the protective order lifted on May 9, 2018,[288] defense counsel was permitted to discuss the calls with Mr. Waters.[289] Mr. Waters believed the State was selecting certain calls helpful to the State and not providing others.[290] Moreover, there were many other calls, some to potential State witnesses like Brittney Dixon.[291]

---

[283] A362.
[284] A597.
[285] A601.
[286] A362-363.
[287] A362.
[288] A12; D.I. 60.
[289] A363.
[290] *Id.*
[291] A364.

Defense counsel phrased the continuance request as follows:

> So the bottom line is I think when the State informed me in April they were going to play calls, I think I made a mistake by essentially delegating review of those calls to the Department of Justice is, in effect what I did. And I think to be properly prepared for trial, now that the phone calls are in play as of…April 26th…I need to review all Reginald Waters' prison calls to determine what, if anything, may be useful to the defense at trial. So that necessitates my continuance request.[292]

Defense counsel went on to state that he was not alleging a *Brady* violation *per se*, but had an obligation to review all calls for "fruitful cross-examination areas."[293] Based on his understanding of the basis for obtaining the calls, counsel did not move to exclude the calls.[294]

The Court asked the prosecutor, "These are the defendant's own calls…so how are those blocked from the defendant?"[295] The prosecutor responded that the calls were not made to a State agent or a police officer, so they were not covered by Rule 16.[296]

The judge remarked that the trial has been delayed by the defendant's own actions, and that Mr. Waters almost had to represent himself, "when I was pulled back from the brink by the State."[297] The judge stated Mr. Waters knows the

---

[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] A362.
[296] A363.
[297] A364-365.

content of the calls because they were his own phone calls, and if trial were delayed, he would continue to create evidence by making more calls.[298] Defense counsel countered that Mr. Waters may know the content of calls, but he has a right not to testify; the actual evidence for impeachment are the calls themselves.[299] Moreover, counsel noted that the continuance request was being made the same day counsel was permitted to discuss the calls with Mr. Waters, albeit the day before trial.[300]

After recessing to confer with another judicial officer, the trial judge denied the continuance request.[301] She held that it was the defendant's own actions that put him in this position, and that the evidence will continue to grow because he will keep creating evidence.[302]

The State did not provide the remaining hundreds of prison phone calls.

Applicable legal precepts

In *State v. Hill*,[303] the Superior Court granted a motion for a new trial due to the State's failure to provide 164 prison phone calls to the defense. The day before trial, the State produced six phone calls to the defense.[304] At trial, the State

[298] A365.
[299] A366.
[300] A367.
[301] A369.
[302] *Id.*
[303] 2011 WL 2083949 (Del. Super. Apr. 21, 2011).
[304] *Id.* at *1.

investigator testified he had reviewed over 170 phone calls by the defendant; on *voir* dire, the investigator testified he reviewed them all for potential Brady material.[305] The Court ordered the remaining 164 to be turned over to the defense, who did not have time mid-trial to review them. The jury convicted Mr. Hill the next day.[306]

As in Mr. Waters' case,[307] the defense had requested all written or recorded statements made by the defendant in a discovery letter.[308] The defense further argued that the failure to provide the calls prejudiced both the plea process as well as trial strategy.[309] The State argued that the defendant was not prejudiced because he was a party to the phone calls.[310]

The Superior Court noted that a defendant has a due process right of access to discoverable evidence.[311] The Court held that the State had an obligation to provide the defendant's statements in its possession and to "respond specifically and accurately to discovery requests made by the defense."[312] The Court further held that the State's claim that the defendant knew what he said on the calls was an

---

[305] *Id.*
[306] *Id.*
[307] A1277.
[308] *Id.* at *2.
[309] *Id.*
[310] *Id.*
[311] *Id.* at *4.
[312] *Id., citing Fuller v. State*, 2007 WL 812752 at *2 (Del. Mar. 19, 2007).

"attempt[] to sidestep its clear obligation under Rule 16 to disclose the recordings and produce all of Defendant's statements."[313] Besides the fact that the defendant could not be expected to remember everything he said, the Court held it would be difficult if not impossible for the defense to cross-examine witnesses about the alleged exculpatory statements in the calls.[314]

The Court granted the motion for a new trial, holding that the State's discovery violation deprived the defendant of his Sixth Amendment right to a fair trial.[315] Even though substantial evidence existed for a guilty verdict, that was irrelevant to the ruling because the State's discovery violation prejudiced substantial rights of the defendant.[316]

In *State v. Johnson*,[317] the defense sent the prosecution a discovery request in numbered paragraphs, among them a request for any oral or written statement by the defendant.[318] At trial, a detective testified to a statement the defense had made to him. Then on rebuttal, he took the stand again; his notes of the conversation were admitted. This was the first time the defense had seen these notes, despite the discovery request.[319]

---

[313] *Id.* at *5.
[314] *Id.*
[315] *Id.* at *6.
[316] *Id.*, *citing Johnson v. State*, 550 A.2d 903, 913 (Del. 1988).
[317] 550 A.2d 903 (Del. 1988).
[318] *Id.* at 909.
[319] *Id.* at 909-910.

This Court noted the State's contention that it had no duty to provide officer notes missed the mark; it was obligated to provide those portions that contained the statements of the defendant.[320] As in *Hill*, the *Johnson* Court held that the substantial evidence against the defendant was of no moment when a discovery violation prejudices the substantial rights of the accused.[321]

The State has an ongoing obligation independent of discovery rules to provide exculpatory and impeachment evidence to the defense. A *Brady* violation has three components: (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant.[322] The prosecutor must disclose all *Brady* evidence in its possession or in the possession of others acting on the government's behalf.[323]

The trial judge erred in not continuing the trial so defense counsel could review all Mr. Waters' prison calls in the State's possession

The State subpoenaed and obtained hundreds of prison phone calls from the Department of Corrections. It disclosed thirteen to the defense on April 25, 2018, even though the State had the calls for months. Moreover, counsel was precluded

[320] *Id.* at 911.
[321] *Id.* at 913.
[322] *Starling v. State*, 130 A.3d 316, 333 (Del. 2015).
[323] *Id.*

by a protective order from discussing the calls with Mr. Waters until May 9, 2018, the day before trial.

Against this backdrop, the trial judge's ruling that Mr. Waters created this problem for himself is unavailing. The State created the problem by not disclosing the calls for months, then only providing thirteen calls at the last minute. Mr. Waters certainly caused issues and delays for the Court. But it was error for the Court to base its decision on difficulties with Mr. Waters rather than on the obvious discovery violation committed by the State.

The Court's holding that Mr. Waters knew what he said on the calls was misguided and contrary to *Hill*. The admissible evidence from the calls would be in the form of impeaching State witnesses and potentially by calling defense witnesses who were parties to the calls. To hold otherwise would force a defendant to take the witness stand to testify to the content of the calls.

As held in *Hill* and *Johnson*, when discovery violations prejudice the substantial rights of the defendant, a new trial must be the remedy. Such is the case here.

According to trial testimony, the hundreds of calls were reviewed by Sendek and several other unnamed investigators. There can be no confidence that these people knew of the State's obligation to turn over impeachment evidence to the State and there is no evidence the calls were reviewed by an attorney for such a

review. Defense counsel was simply asking for a continuance so that he could perform an independent review of the calls for exculpatory evidence, impeachment material, prior inconsistent statements, and the like. The request was reasonable and should have been granted.

CLAIM II: THE TRIAL JUDGE ERRED IN DENYING THE DEFENSE MID-TRIAL MOTION TO EXCLUDE MR. WATERS' PRISON PHONE CALLS.

A. Question Presented

Whether the trial court committed legal error in denying the defense motion to exclude Mr. Waters' prison phone calls because the Attorney General's subpoena did not meet the Fourth Amendment test for reasonableness. This issue was preserved by an oral motion during trial to exclude the calls.[324]

B. Standard and Scope of Review

This Court reviews constitutional violations *de novo*.[325]

C. Merits of Argument

Applicable legal precepts

Prisoners have a diminished expectation of privacy in their communications by letter or phone.[326] The Attorney General has statutory subpoena power to compel evidence in connection with its duty to investigate matters involving the public peace, safety, and justice.[327] The AG subpoena need not meet probable cause but must instead be reasonable. This Court has interpreted the reasonableness of a subpoena as furthering an important government interest and

[324] A589-594.
[325] *Morris v. State*, 2019 WL 2123563 at *5 (Del. May 13, 2019)(reviewing denial of motion to suppress defendant's prison phone calls).
[326] *Whitehurst v. State*, 83 A.3d 362, 367 (Del. 2013).
[327] *Johnson v. State*, 983 A.2d 904, 919 (Del. 2009).

no greater than necessary for the protection of that interest.[328] In *Johnson* and more recently, this Court has held that to be reasonable in furthering the governmental interest under the Fourth Amendment, the subpoena must (1) "specify the materials to be produced with reasonable particularity," (2) "require the production only of materials relevant to the investigation," and (3) "not cover an unreasonable amount of time."[329]

In *Whitehurst*, *Johnson*, and *Morris*, the subpoenas were based on a legitimate government investigation into witness tampering. In *Whitehurst*, the defendant's girlfriend told an investigator in a trial preparation meeting that the defendant had "reached out" to her to persuade her not to go to court.[330] In *Johnson*, the defendant's girlfriend told an investigator that Johnson was trying to persuade a key witness not to appear.[331] In *Morris*, the victim reported that Morris had made two calls to her in violation of the no contact order. The State then sought to introduce calls by Morris attempting to convince her to drop the charges.[332]

---

[328] *Whitehurst* at 367.
[329] *Morris* at *5, *citing Johnson* at 921.
[330] *Whitehurst* at 366.
[331] *Johnson* at 911.
[332] *Morris* at *3.

In a separate case, also *Johnson v. State*,[333] the predicate for the call monitoring was that Johnson's girlfriend told police that he had asked her to provide him with an alibi.

The Court erred in denying the defense motion to exclude the prison calls

Based on the pretrial filings and protective orders, it seemed the State had some basis to obtain Mr. Waters' prison calls. However, the State was unable to lay a foundation for the reasonableness of the subpoena. The only reason offered is that Rapha Moore was being uncooperative with police inquiries. But that was the situation from the night of the homicide onward, as Sendek testified.[334] In stark contrast to the other cases involving prison calls, there was no precipitating action by Mr. Waters, such as a witness coming forward telling police that Mr. Waters was attempting to interfere.

The judge correctly noted there was no specific fact giving rise to the concern that Mr. Waters was using the phone to tamper with witnesses.[335] The State made a last attempt to persuade the judge, arguing that Mr. Waters had a conviction for witness tampering. But when the judge heard that conviction was for

[333] 2012 WL 3893524 (Del. Sep. 7, 2012).
[334] A589.
[335] A593.

written communications, the judge replied, "that takes it out completely."[336] Yet, inexplicably, the Court admitted the phone calls anyway.

While reasonableness is not a high standard to meet, clearly the standard was not met in this case. Unlike every other case cited, there was no important governmental interest being protected and no reasonable basis to subpoena the calls. The subpoenas themselves are mere boilerplate and give no clue to the actual reason.[337] The foundation for admissibility laid by the state fared no better. Merely because a witness who was recalcitrant from the beginning remained recalcitrant is no reasonable basis to obtain and admit prison phone calls. The trial judge erred.

[336] A594.
[337] A1275-1276.

CLAIM III: THE TRIAL JUDGE ERRED IN DENYING THE DEFENSE MOTION FOR A NEW TRIAL.

A. Question Presented

Whether the trial judge erred in denying the defense motion for a new trial. This claim was preserved by the defense filing and litigating a motion for a new trial.[338]

B. Standard and Scope of Review

This Court reviews the grant or denial of a motion for a new trial for abuse of discretion.[339] Errors in formulating or applying legal precepts are reviewed *de novo*.[340]

C. Merits of Argument

The Court erred in its application of legal precepts

The Court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.[341] Rule 33 further provides, "if the trial was by the court without a jury the court…may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment."[342] A motion for new

[338] A757-780.
[339] *Burroughs v. State*, 988 A.2d 445, 448-449 (Del. 2010).
[340] *Lopez-Vasquez v. State*, 956 A.2d 1280, 1284-1285 (Del. 2008).
[341] Super. Ct. Crim. R. 33.
[342] *Id.*

trial will not be granted "if there was some probative evidence upon which a verdict of guilty could reasonably be based."[343]

The trial judge held that the evidence must be viewed in a light most favorable to the State.[344] Although that is true for a motion for a judgment of acquittal, it is not the case on a motion for new trial. The judge cited to three cases, none of which support the proposition. The oldest is *Hutchins v. State*,[345] an appeal of a murder conviction. But that case did not hold that the evidence must be viewed in a light most favorable to the State. The issue in *Hutchins* was whether a recent change to Rule 33 allowed judges to grant new trials even when there is substantial evidence to support a conviction.[346] *Hutchins* goes on to state that a "weight of the evidence" motion for new trial is addressed to the discretion of the trial court and that it is reviewed for abuse of discretion.[347]

The trial judge also cited to this Court's decision in *Price v. State*.[348] That case has nothing to do with a motion for a new trial. It is a straightforward direct appeal involving an alleged error in jury instructions and an alleged inconsistent

[343] *State v. Biter*, 119 A.2d 894, 898 (Del. Super. 1955).
[344] *State v. Waters*, 2019 WL 2486753 at *2 (Del. Super. June 13, 2019).
[345] 153 A.2d 204 (Del. 1959).
[346] *Id.* at 206.
[347] *Id.*
[348] 1996 WL 526013 (Del. Aug. 19, 1996).

verdict.[349] The trial judge also cites *State v. Rebarchak*,[350] which decided a motion for new trial due to a denied application for a mistrial. The judge in *Rebarchak* cites only to *Price* for the proposition that the evidence must be viewed in a light most favorable to the State.[351] More recent cases adopt the same legal precept, but they circle back to *Price*, *Rebarchak*, and *Hutchins* – none of which support the proposition.[352]

As such, there is no basis for the trial judge's legal formulation that the evidence must be considered in the light most favorable to the State. For example, in *State v. Johnson*,[353] the judge explained the difference in legal standards for a motion for judgment of acquittal and motion for new trial. The former views evidence in a light most favorable to the State; the latter does not.[354]

The trial judge also held that Mr. Waters' new trial motion "should not be granted unless the verdict 'appears to be against the great weight of the evidence.'"[355] Again, the judge refers to *Rebarchak*, which in turn cites to *Storey v. Camper*.[356] *Storey* was a civil car accident case tried before a jury. The judge

---

[349] *Id.* at *1.
[350] 2002 WL 1587855 (Del. Super. June 20, 2002).
[351] *Id.* at *1.
[352] *See, e.g., State v. Ward*, 2019 WL 6170844 at *1 (Del. Super. Nov. 19, 2019); *State v. Pardo*, 2015 WL 6945310 at *3 (Del. Super. Nov. 9, 2015).
[353] 1999 WL 458627 at (Del. Super. Apr. 29, 1999).
[354] *Id.* at *1.
[355] *Waters* at *2.
[356] 401 A.2d 458 (Del. 1979).

granted the defense motion for a new trial; defendant appealed.[357] After a thorough discussion of the roles of judge and jury, Justice Quillen held, "on weight of the evidence motions, we hold that a trial judge is only permitted to set aside a jury verdict when in his judgment it is at least against the great weight of the evidence."[358]

The inapplicability of *Storey* is readily apparent. It was a civil case tried by a jury on a preponderance standard, not beyond a reasonable doubt. Moreover, the corollary civil rule to Criminal Rule 33 lacks the language "in the interest of justice."[359] Finally, unlike *Storey*, Mr. Waters did not file a "weight of the evidence" motion. The motion sought a new trial because important evidence was heard by the factfinder that was excluded. Mr. Waters did not file a motion for judgment of acquittal.

Given the foregoing, the Superior Court should be reversed because the motion was decided by erroneously applying legal precepts.

The trial judge erred in denying the motion

The trial judge properly held that *Carpenter* applied because Mr. Waters' conviction was not yet final.[360] Because the State obtained cell site information

---

[357] *Id.* at 459.
[358] *Id.* at 465.
[359] *See*, Super. Ct. Civ. R. 59(a).
[360] *Waters* at *2.

improperly by way of a pen register application, and because the application lacked probable cause, the judge correctly held that the CSLI must be excluded.[361] However, the interest of justice demanded a new trial and one should have been granted.

The Court erred in establishing the motive for murder.[362] There was no evidence that Mr. Waters was a drug dealer or involved in some dispute with Thompson over drug money. The "moldy weed" dispute was between Thompson and Griffin. Moore declined to say for what purpose he introduced Mr. Waters to Thompson.

The judge erred in holding that the evidence placed Mr. Waters at the scene.[363] Without the CSLI, it does not do so beyond a reasonable doubt. The judge ignored the fact that Cassie Brown looked at the person for 10-15 minutes and knew him from a prior encounter but could not pick Mr. Waters out of a lineup – twice. The judge also disregarded Rapha Moore's obvious interest in blaming Mr. Waters for the homicide. Everyone at the scene was pointing the finger at Moore as being involved. He was a self-interested witness who tried many times after his initial statement to explain that he did not see who shot Thompson. It was

[361] *Id.* at 2-3.
[362] *Id.* at *3.
[363] *Id.* at *4.

Moore who told Mr. Waters he was having an affidavit typed up, not the other way around.

The trial judge noted correctly that Mr. Waters being found in a motel room may be used as evidence of consciousness of guilt.[364] However, the Court also relied on prison phone calls that never should have been admitted into evidence. Such as they are, the calls demonstrate that Moore was on board with having an affidavit drafted that recanted his earlier statements to police.

The Court attempts to minimize the importance of the CSLI evidence,[365] but it permeated the trial. The evidence demonstrated Mr. Waters' phone near the scene at the crucial time, and then leaving the scene afterwards. Certainly, the State featured the evidence in its closing argument.[366] A fair reading of the record demonstrates that the CSLI was not merely cumulative,[367] but crucial.

Finally, a defendant has important rights in a criminal trial. The CSLI changed the landscape of the case; it is unjust to simply excise it and examine the rest of the evidence. Were it not for the CSLI, Mr. Waters may have elected to have a jury trial and he may have elected to testify. Had the exclusion of the evidence occurred pretrial, he would have been able to knowingly and intelligently

---

[364] *Id.*
[365] *Id.* at *5.
[366] *See*, A973-974.
[367] *Waters* at *5.

make those decisions. Under the unique circumstances of this case, in that *Carpenter* issued after the verdict but before sentencing, the Court's ruling deprived Mr. Waters of that opportunity.

For the foregoing reasons, it is evident that the trial judge erred as a matter of law and on the merits. Mr. Waters respectfully seeks reversal in the interest of justice.

CONCLUSION

For the foregoing reasons, Appellant Reginald Waters respectfully requests that this Court reverse the judgment of the Superior Court.

COLLINS & ASSOCIATES

/s/ Patrick J. Collins
Patrick J. Collins, ID No. 4692
8 East 13th Street
Wilmington, DE 19801
(302) 655-4600

Attorney for Appellant

Dated: March 18, 2020