



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK PURNELL,)	
)	
Defendant Below,)	
Appellant,)	No. 113, 2020
)	
v.)	Court Below - Superior Court
)	of the State of Delaware in and for
STATE OF DELAWARE,)	New Castle County
)	
Plaintiff Below,)	Cr. ID No. 0701018040
Appellee.)	

APPELLANT MARK PURNELL'S SUPPLEMENTAL BRIEF

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ARGUMENTS

- I. This Court can consider Purnell's Opening Brief arguments II(B)(2)(3)(4), because Purnell's trial counsel had a disabling conflict which constitutes constructive abandonment under *Maples v. Thomas*.

Purnell demonstrates in his supplemental brief how this Court can reach Sections II(B)(2)(3) and (4) by following the rationale applied by the Supreme Court of the United States (High Court) in *Maples v. Thomas*.¹ The High Court relies in part on *Jamison v. Lockhart*, which involves a conflict of interest by trial counsel. Purnell's trial counsel also had a conflict: counsel had previously represented Dawan Harris for possessing a .38-firearm that may have later been used in the crime for which Purnell was falsely convicted.² The State's argument that *Maples* and *Jamison* are inapposite to Purnell's situation is incorrect.

First, the State takes out of context trial counsel's statement to the trial court that counsel "did not have any knowledge from his representation that would lead him to believe that Dawan's seized .38-firearm might have been involved in the homicide."³ In context, trial counsel was explaining to the trial court that the State had failed to provide him with this information *until they gave him discovery in*

¹ 565 U.S. 266 (2012).

² 975 F.2d 1377, 1380 (8th Cir. 1992).

³ Supplemental Answer at 9.

Purnell's case. Therefore, this statement does not support the State's argument that no information existed for trial counsel to believe that there was a connection.

Next, the State cites to a small portion of trial counsel's conversation with the trial court to argue that trial counsel did not suffer from a conflict because the "record reflects that trial counsel had no basis at the time of trial to claim that Dawan was the 'real culprit.'"⁴ However, a review of the 26-page conversation reveals that trial counsel provided the court with numerous bases for supporting his argument that Dawan was the real culprit.⁵ The record also reveals that during this exchange, trial counsel, who apologizes to the court several times, was grappling with his failure to notify the trial court of his conflict before the jury was picked.

The State misleadingly argues that trial counsel's "affidavit does not evidence that he had any factual basis to assert that Dawan was the 'real culprit.'"⁶ Trial counsel states in his affidavit that he "did not recall arguing *or investigating* Dawan Harris as being involved." Indeed, had trial counsel investigated Dawan

⁴ Supplemental Answer at 8-9.

⁵ A38-45 (Transcript p. 55-81).

⁶ Supplemental Answer at 9.

Harris as being involved, trial counsel would have violated the D.L.R.P.C. Rule 1.9.⁷

The State cites *Lewis v. State*,⁸ to argue that Purnell cannot prove that trial counsel's conflict "actually adversely affected his performance."⁹ In *Lewis*, this Court ruled that where there is a "possible" conflict, such as during the representation of codefendants, prejudice is presumed only where a petitioner shows that the conflict actually adversely affected counsel's performance. Here, trial counsel had an "actual" conflict as soon as he learned that his former client, Dawan Harris, and Harris's roommate, Kellee Mitchell, were initially suspected of committing the same crime that Purnell was later accused of committing.¹⁰ This is because trial counsel not only was unable to call Dawan Harris as a witness, he also was prohibited under the D.L.R.P.C., Rules 1.7 and 1.9 from fully defending Purnell by investigating Dawan Harris as a murder suspect.

The State argues that trial counsel told the trial court that he informed Purnell of his prior representation of Dawan Harris when counsel was first

⁷ Supplemental Opening at 10.

⁸ 757 A.2d 709 (2000).

⁹ Supplemental Answer at 5.

¹⁰ *Lewis*, 757 A.2d at 718.

appointed to Purnell's case.¹¹ Counsel was appointed in May 2007.¹² The State's argument is irrelevant for several reasons. First, the argument presumes that trial counsel's conflict was waivable, which it was not.¹³ Second, it appears that trial counsel did not realize he might have a conflict until eight months after his appointment to Purnell's case when, on January 10, 2008, he informed the State of this issue in a letter.¹⁴ Therefore it is unlikely trial counsel obtained informed written consent from Purnell waiving the conflict when counsel was first appointed to Purnell's case. Indeed, when trial counsel first advised the trial court of the conflict on April 7, 2008,¹⁵ he stated that he did not realize the significance of the conflict until he received Dawan Harris's recorded statement, "a couple of days ago."¹⁶

The State's argument that Purnell actively participated in his defense at trial is also irrelevant to the issue of whether Purnell consented to trial counsel's actual conflict.¹⁷ By this point, the trial court had already committed error by failing to

¹¹ Supplemental Answer at 5.

¹² Supplemental Opening, Exs. A, B.

¹³ Supplemental Opening, § II.

¹⁴ A835.

¹⁵ A36-38 (Transcript p.51-57).

¹⁶ A39 (Transcript p. 60).

¹⁷ Supplemental Answer at 5 (citing A331-32).

rule that trial counsel had an actual, non-waivable conflict. There was nothing left for Purnell to do but continue to fight for his life. That Purnell knew of the conflict before his direct appeal also is irrelevant.¹⁸ There is no indication that trial counsel obtained Purnell's consent to waive his clearly meritorious conflict claim on direct appeal. Had counsel tried, this too would have been an ethical violation, as well as invalid, since a new conflict had arisen between counsel's and Purnell's best interests on direct appeal.¹⁹

The State argues that *Jamison* and *Maples* do not apply because initial post-conviction counsel was not conflicted.²⁰ In Purnell's supplemental brief, he acknowledges that his situation does differ from that of the petitioners' in *Jamison* and *Maples* in that Purnell filed a timely pro se petition in state court where he raised his conflict of interest claim in a 133-page pro se memorandum.²¹ Post-conviction counsel inexplicably replaced Purnell's 133-page pro se memorandum with a six-page amended Rule 61 motion which presumably abandoned Purnell's meritorious conflict claim without Purnell's knowledge or permission.²²

¹⁸ Supplemental Answer at 5 (citing A840, A902).

¹⁹ Supplemental Opening at 10.

²⁰ Supplemental Answer at 4-6.

²¹ Supplemental Opening at 5.

²² A1028-1033.

Purnell’s argument is that when post-conviction counsel inexplicably abandoned Purnell’s clearly meritorious pro se conflict claim without Purnell’s knowledge or consent, this was an extraordinary circumstance where post-conviction counsel ceased to act as Purnell’s agent.²³

The State argues that Purnell’s e-signature on post-conviction counsel’s amended Rule 61 motion meant that Purnell consented to the abandonment of the conflict claims in his memorandum. However, Purnell’s e-signature does not indicate this—it indicates that the facts contained in the amended Rule 61 motion are true. Even if Purnell gave his permission for post-conviction counsel to file the amended Rule 61, this does not mean that post-conviction counsel explained that this meant Purnell was abandoning the arguments in his 133-page pro se “*memorandum.*”²⁴

The State indicates that *Maples* does not support the proposition that there are situations where a court may find that post-conviction’s counsel’s problematic

²³ Supplemental Opening at 7.

²⁴ A893.

actions are so extraordinary, that counsel no longer functions as the client's agent.²⁵ To the contrary, this is exactly what the High Court ruled.²⁶

Should this Court find, however, that initial post-conviction counsel's actions consisted of mere ineffectiveness rather than a violation of the principal-agency relationship (which it should not), Purnell argues in his supplemental brief²⁷ that this Court does not have to overrule its decisions in *Coles v. State*²⁸ and *Durham v. State*,²⁹ to find that initial post-conviction's ineffectiveness establishes cause to overcome a procedural default pursuant to *Guy v. State*³⁰ and *Martinez v. Ryan*.³¹ The State misapprehends this argument.

²⁵ Supplemental Answer at 6.

²⁶ *Maples v. Thomas*, 565 U.S. at 280-81, 283.

²⁷ Supplemental Opening at 8-9.

²⁸ 2017 Del. LEXIS 323 (Del. Jul. 31, 2017).

²⁹ 2017 Del. LEXIS 483 (Del. Nov. 13, 2017).

³⁰ 82 A.3d 710, 715 (2013).

³¹ 566 U.S. 1 (2012).

II. Trial counsel was unable to discover the majority of Mr. Purnell’s “new evidence,” because his conflicted status prevented him from investigating, developing and presenting evidence that Dawan Harris and Kellee Mitchell were the true culprits.

Citing D.L.R.P.C., Rules 1.7 and 1.9, Purnell argues that trial counsel’s actual conflict prevented counsel from investigating, developing and presenting any evidence implicating his former client, Dawan Harris, and by association, Harris’s co-conspirator, Kellee Mitchell.³² Therefore, none of the new evidence before this Court which implicates Dawan Harris and Kellee Mitchell was discoverable before trial by the exercise of due diligence.

The State does not dispute that trial counsel was precluded from investigating Harris. Instead, the State argues that trial counsel did investigate Mitchell, his girlfriend, and Dawan’s girlfriend. However, in his Rule 61 Affidavit, trial counsel states that he does “not recall investigating Kelli [sic] Mitchell and Dawan Harris in connection to a .38 caliber firearm.”³³ Trial counsel does not recall if he and his investigator attempted to locate the witnesses who implemented Dawan Harris in the murder.³⁴ Trial counsel also indicates that it “appears I did not

³² Supplemental Opening at 10.

³³ A1403.

³⁴ A1404.

ask Ronald Harris on cross-examination whether his brother [Dawan] was involved.”³⁵

The State makes a blanket assertion that Purnell’s proffered evidence will probably not change the result even if this Court finds that trial counsel’s conflicted status prevented him from investigating and presenting evidence. However, Purnell has proffered significant evidence in this Opening Brief, Supplemental Opening Brief, and in all of the pleadings in this case, that the result will probably change if a new trial is granted.

³⁵ A1404.

III. The relevant facts of this case support that Purnell is actually innocent and trial counsel had an actual conflict.

Pursuant to this Court's request, in his supplemental brief, Purnell provides this Court with the relevant facts from outside and inside the record which support he is actually innocent.³⁶ This Court should consider Purnell's facts rather than solely rely on the trial record as summarized by the State.

³⁶ Supplemental Opening at 14-36.

IV. Caselaw support’s Mr. Purnell’s claim of actual innocence; most of Purnell’s new evidence can be considered under *Sawyer v. Whitley* and related cases.

This Court cited a federal actual innocence case, *Sawyer v. Whitley*,³⁷ and asked Purnell to identify his “strongest pieces of evidence that create a strong inference of ‘actual innocence.’” In his supplemental brief, Purnell discusses *Sawyer*, *McQuiggins v. Perkins*³⁸ and related cases, and identifies his strongest pieces of evidence actual innocence. The State fails to cite any authority refuting Purnell’s argument that this Court can rely on *McQuiggins* to rule that the 2014 amendment to Rule 61 does not supplant this Court’s ability to apply the federal common law miscarriage of justice actual innocence gateway to this case.

The State’s argument that the federal actual innocence exception is consistent with Delaware’s Rule 61(d)(2) is misleading. Delaware’s preclusion of new impeachment evidence is not the same as the federal court’s statement that impeachment evidence alone rarely suffices. Further, while *Sawyer* addresses actual innocence in the penalty phase of a capital trial, *McQuiggins* addresses actual innocence of guilt.

³⁷ 505 U.S. 333 (1992).

³⁸ 569 U.S. 383, 387 (2013).

CONCLUSION

For the reasons stated herein and in all of the pleadings in this case, this Court should reverse the Superior Court's dismissal of Purnell's Rule 61 motion.

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