



IN THE SUPREME COURT OF THE STATE OF DELAWARE

COREY PATRICK,)
)
 Defendant-Below,)
 Appellant,)
)
 v.) No. 355, 2020
)
 STATE OF DELAWARE)
)
 Plaintiff-Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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DATED: April 13, 2021

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I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE STATE TO PRESENT EVIDENCE THAT, PRIOR TO HIS ARREST, PATRICK HAD BEEN THE TARGET OF A LENGTHY DRUG INVESTIGATION CONDUCTED BY MEMBERS OF THE GOVERNOR’S TASK.

The State agrees that the proper standard of review is abuse of discretion. However, it erroneously concludes there was no abuse of discretion when the trial court allowed the State to present the jury with unfairly prejudicial evidence that Patrick had been the target of an ongoing drug investigation that culminated in the issuance of two search warrants. And, the State fails to explain the relevance of the unfair and unnecessary introduction of the specific facts of that investigation, including: the drug investigation was conducted by the Governor’s Task Force, (GTF); the GTF is a unit comprised of police and probation officers who specialize in drug investigations; the GTF did not conduct the investigation alone, it teamed up with the Dover Police Department Drug Unit; multiple officers were involved in the investigation; the investigation lasted from early May, 2019 through late August 26, 2019, close to 4 months; and Patrick’s activities were monitored on a daily basis with the aid of GPS monitoring.

Inadmissible Testimony About The Lengthy Drug Investigation

In reciting the objectionable testimony of Detective Holl, the State fails to note that, after the initial portion of that testimony was sustained, Holl was

permitted to inform the jury that the GTF, of which he was a member, “target[s] probationers and conduct[s] drug investigations.”¹ He also explained that he was working with the Delaware State Police Kent County Drug Unit when Patrick was arrested.² Thus, on cross examination, when, as the State noted, defense counsel asked Holl whether he was conducting a drug investigation the day he arrested Patrick, it was in the context of clarifying which of two reasons, already presented over objection, he targeted Patrick that day.³

Any Probative Value of Evidence of the Lengthy Drug Investigation Was Substantially Outweighed by The Danger of Unfair Prejudice

The State simply restates the general rule of law that Patrick quoted in his opening brief: “Background information may sometimes be necessary to give the jury a complete picture at trial and to ensure the jury is not confused in a way that would be unfavorable to the prosecution.”⁴ Op.Br. at 15; Ans.Br. at 10. And, Patrick has already acknowledged that, “it was arguably necessary to provide the jury with an understanding as to why Patrick was being followed and then arrested on August 26th[.]” Op.Br. at 18. So, it is quite telling that the State chooses to spill its ink restating this very notion 6 times,

¹ A-29.

² A-29.

³ A-31.

⁴ *Sanabria v. State*, 974 A.2d 107, 112 (Del. 2010).

⁵ rather than addressing the actual issue which is: whether the evidence of the investigation presented by the State in this case, although relevant, could still, like that of uncharged crimes, “arouse prejudice that [Patrick wa]s more likely to have committed the alleged crime.”⁶ Here, the trial court was required to consider whether there was a less prejudicial means by which the jury could be provided the same information contained in the unfairly prejudicial evidence presented by the State.⁷ The trial court failed to do that. And, the State makes no attempt to explain why that failure was not an abuse of discretion. Nor does it try to explain why no lesser prejudicial alternatives⁸ existed that had substantially the same or greater probative value but a lower danger of unfair prejudice[.]”⁹ Perhaps this is because it is unable to do so.

Proper context for the jury regarding the conduct of police on the actual day of Patrick’s arrest could still have been provided without giving the jury details into the investigation, by, for example, informing the jury that police

⁵ Ans.Br. at 10.

⁶ *Pena v. State*, 856 A.2d 548, 551 (Del. 2004).

⁷ *Sanabria*, 974 A.2d at 113.

⁸ See Op.Br. at pp. 17-19.

⁹ See *Old Chief v. United States*, 519 U.S. 172, 182–83 (1997) (“If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.”).

obtained information from State records and that detaining an individual is standard procedure when conducting a “court authorized search.”¹⁰ Assuming, *arguendo*, there was any need for disclosing the existence of the investigation, there was no relevance to the disclosure of the unfairly prejudicial facts underlying the investigation that were introduced.

The State also completely fails to address the fact that, in addition to the significant details provided to the jury, no limiting instruction was provided. Even if the trial court had properly conducted a balancing test and concluded “that the probative value of the background information is not substantially outweighed by its unfair prejudice to the defendant” it *must* issue a limiting instruction to the jury as to the proper purpose for which that evidence must be used.¹¹ Therefore, the jury was free to use that evidence to establish that Patrick was engaging in drug dealing from his house and car for several months.

Thus, Patrick’s convictions must be reversed.

¹⁰*State v. Smith*, 2014 WL 1757881, at *3 (N.J. Super. Ct. App. Div. May 5, 2014). *See also Pena*, 856 A.2d at 551 (affirming conviction as testimony did not reveal defendant “was the target of the investigation, or that the traffic stop was a part of the investigation” and judge to mitigating steps).

¹¹*Sanabria*, 974 A.2d at 116.

II. NO RATIONAL TRIER OF FACT COULD FIND PATRICK GUILTY BEYOND REASONABLE DOUBT OF POSSESSION OF A DEADLY WEAPON BY A PERSON PROHIBITED, PURSUANT TO 11 DEL. C. §1448 (a) (9), AS THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT HE POSSESSED A FIREARM AT THE SAME TIME AS HE POSSESSED A CONTROLLED SUBSTANCE.

The State fails to explain how the analysis in *Lecates*, which only addressed the provisions in 11 Del.C. §1448 that render possession of a firearm or ammunition unlawful based solely on a defendant’s status, is applicable to a subsequently enacted provision that prohibits the possession of certain types of deadly weapons only under certain circumstances.¹² Instead, the State simply parrots the holding in *Lecates* then says that 11 Del.C. §1448 (a) (9) “contains no nexus requirement between a prohibited person’s possession of a semi-automatic firearm and also a controlled substance *other than that the two possessions occur ‘at the same time.’*”¹³

¹² None of the Delaware cases upon which the State relies in its effort to support its position involve §1448 (a) (9). Rather, they address situations where the defendant was prohibited due to his record or where the defendant either stipulated to or failed to contest his prohibited status. State’s Ans.Br. at 17-18. However, there does exist one case, *Van Vliet v. State*, 148 A.3d 257 (Del. 2016), in which this Court addressed a conviction under §1448 (a) (9). There, the defendant argued that there was insufficient evidence to support his conviction. This Court found sufficient evidence of simultaneous possession after police executed a search of the defendant’s home which was being operated as a meth lab. When police arrived, Van Vliet was sitting in a chair next to a coffee table from which police seized drugs. Police also seized a revolver from his nightstand in the nearby master bedroom.

¹³ State’s Ans.Br. at 18 (emphasis added).

This essentially translates to: the statute “contains no nexus requirement other than that there be a nexus.” The entire rationale of *Lecates* turns on whether the statute prohibits the possession of a weapon or ammunition at any time or its availability under certain circumstances. In *Lecates*, this Court explained its rationale with regard to section 1448 as then enacted as follows:

Unlike the statute defining the crime of PWDCF, Section 1448(a)[at it existed at that time] contains no requirement of temporal possession. The PWDCF statute prohibits weapon possession *during* the felony. In contrast, Section 1448(a) makes it a crime for a prohibited person to possess a weapon or ammunition *at any time*. Therefore, under Section 1448(a), the State need only prove that a defendant possessed or controlled a weapon at some point, not necessarily at the time of his arrest.¹⁴

Thus, because subsequently enacted 1448(a)(9) is like the PDWDCF statute in that it forbids the availability of the deadly weapon only under certain circumstances, “the general ‘dominion, control, and authority’ definitions of possession are too broad.”¹⁵ Thus, the “State must establish physical availability and accessibility *in addition to* proving actual or constructive possession.”¹⁶ Because the State failed to present sufficient evidence that a firearm was physically available or accessible to Patrick at the same time that

¹⁴ *Lecates v. State*, 987 A.2d 413, 420 (Del. 2009) (quoting *Miller v. State*, 2005 WL 1653713*3 (Del.)).

¹⁵ *Lecates*, 987 A.2d at 421 (quoting *Mack v. State*, 312 A.2d 319, 322 (Del. 1973)).

¹⁶ *Lecates*, 987 A.2d at 421.

he possessed a controlled substance, his third count of PDWBPP should be reversed.

III. THE TWO CHARGES OF POSSESSION OF A DEADLY WEAPON BY A PERSON PROHIBITED, BASED ON POSSESSION OF ONE FIREARM BUT PREDICATED ON DIFFERENT REASONS FOR PROHIBITION, ARE MULTIPLICITOUS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION.

The State offers only *ipse dixit* when claiming there is no double jeopardy violation in *this* case. While the State correctly sets forth the general law of double jeopardy, it fails to address this Court’s law as applied to §1448 – that each handgun and the ammunition constitute a different offense for purposes of §1448.¹⁷ In other words, two charges under §1448 were appropriate in our case (1 for the firearm and 1 for the ammunition). And, while the State spends much time on plain error, it must be aware this Court finds the principle of double jeopardy so fundamental that it has routinely found plain error when it is violated.¹⁸

¹⁷ *Buchanan v. State*, 26 A.3d 213 (Del. 2011).

¹⁸ See, e.g., *Williams v. State*, 796 A.2d 1281 (Del. 2002); *Handy v. State*, 803 A.2d 937, 940 (Del. 2002); *Zugehoer v. State*, 980 A.2d 1007, 1013 (Del. 2009); *Mills v. State*, 201 A.3d 1163, 1168 (Del. 2019).

CONCLUSION

For the reasons and upon the authorities cited herein, Patrick's convictions must be reversed.

Respectfully submitted,

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DATED: April 13, 2021