



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL RODRIGUEZ,)
)
 Defendant Below-)
 Appellant)
)
 v.) No. 25, 2013
)
 STATE OF DELAWARE,)
)
 Plaintiff Below-)
 Appellee)

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

STATE'S CORRECTED ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On March 25, 2009, Michael Rodriguez was arrested, and he was later charged by Indictment with attempted first degree murder, first degree burglary, second degree assault, aggravated menacing, two counts of first degree reckless endangering, first degree conspiracy, four counts of possession of a firearm during the commission of a felony, and one count of possession of a deadly weapon by a person prohibited ("PDWBPP"). Superior Court Docket Item ("DI") 4; Indictment. (A-1; B-1-5). Prior to trial, the PDWBPP charge was severed. (DI 56; A-5).

Rodriguez trial lasted five days, concluding on March 15, 2010. (DI 59, 66; A-5-6). A Sussex County jury found Rodriguez guilty of second degree assault, as a lesser-included offense of attempted first degree murder, and conspiracy second, as a lesser-included offense of conspiracy first. (DI 59; A-6). The prosecutor entered a *nolle prosequi* on the offense charged as second degree assault and the related weapon offense. (DI 59; A-6). Rodriguez was convicted of the remaining crimes as charged. (DI 66; A-6). The Superior Court denied his two motions for judgment of acquittal—one filed during trial and one filed after trial. (DI 59, 67-68; A-5-6).

On April 23, 2010, Rodriguez was sentenced to: (1) for PFDCF, as an habitual offender pursuant to 11 Del. C. § 4214(a), to 25 years at Level V, the first 5 years of which are mandatory, with credit for 395 days served; (2) for second degree assault (as a lesser of attempted murder) as an habitual offender, to 8 years at Level V; (3) to five years mandatory Level V time under Section 1447A for each of two

additional counts of PFDCF; and (4) for all the remaining convictions, to a total of 13 years at Level V, suspended after 11 years for 1 year at Level III probation. Sent. Ord. (B-76-82). On May 10, 2010, the prosecutor entered a *nolle prosequi* on the severed person prohibited charge.

On direct appeal, Rodriguez argued that the Superior Court erred when it denied his motion to strike the jury panel after a court clerk had informed them that Rodriguez had been charged with PDWPP (the severed charge).¹ This Court affirmed Rodriguez's convictions and sentences, finding that the trial court gave a prompt curative instruction, and did not err as a matter of law in denying Rodriguez's motion.²

On September 12, 2011, Rodriguez filed a motion for post-conviction relief in Superior Court, alleging one ground: that Rodriguez's trial counsel was ineffective because he "failed to assert a claim that the seizure and subsequent scientific testing of a bullet allegedly recovered from the defendant's body during a surgical procedure was obtained in violation of the defendant's rights under the 4th Amendment to the U.S. Constitution and Article I, § 6 of the Delaware Constitution." (A-12). On December 28, 2012, after extensive supplemental briefing, the Superior Court denied Rodriguez's motion on the merits.

Rodriguez raises the same issue on appeal. This is the State's answering brief.

¹ *Rodriguez v. State*, 2010 WL 3549863, *1 (Del. Sept. 13, 2010).

² *Id.* at *2.

SUMMARY OF ARGUMENT

I. DENIED. Rodriguez consented to being examined by the forensic nurse, consented to turning over any evidence, which included his clothing and the bullet, and consented to the surgery, which included removing the bullet. He has failed to establish that his counsel was ineffective for failing to seek suppression of the bullet. He fails to affirmatively prove prejudice where the suppression motion would have failed if it were filed.

STATEMENT OF FACTS

In its decision denying Rodriguez's motion for post-conviction relief, the Superior Court summarized the facts as follows:

The convictions arose out of the invasion by two people of Lamont Johnson's home in Bridgeville, Delaware, around 10:00 p.m. on March 17, 2009. Johnson and his family were at home watching television when he heard someone trying to "kick in" his front door. Johnson looked out a window and saw two people standing outside his front door. Johnson then ran into a bedroom and grabbed a pistol. After hearing gunfire, Johnson shot his pistol in the direction of the intruders, causing them to run away. Johnson testified at trial that he disposed of the gun before the police arrived at his house because he was prohibited from possessing a gun. Johnson was unable to identify the two intruders.

Later that evening, the Wilmington Police responded to a call from Christiana Hospital that a man had been dropped off with what appeared to be a gun shot wound in the upper chest. That man was the defendant, Michael Rodriguez. Rodriguez told the hospital personnel that he had been shot in Wilmington. Rodriguez's girlfriend testified at his trial that she had received a call from Rodriguez around 10:20 p.m., asking her to pick him up in Harrington. When she arrived in Harrington, she saw that Rodriguez had been shot and was bleeding. She was going to take him to Kent General Hospital in Dover, but he told her to instead go to Wilmington. She took him to Christiana Hospital and dropped him off without talking to anyone. Rodriguez underwent surgery and had the bullet removed. The hospital personnel turned the bullet over to the Wilmington Police upon their request for it. The Wilmington Police turned the bullet over to the Delaware State Police. Before trial, the police recovered a bullet that Johnson had shot into his home and one he had shot into a nearby trailer during the home invasion. At trial, the State's firearm expert testified that the bullet recovered from Rodriguez's body matched the two bullets recovered from Johnson's home and nearby trailer.³

³ *State v. Rodriguez*, Del. Super., No. 0903019123A, 1-2, Bradley, J. (Dec. 28, 2012) (Op. Br. Ex. A).

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING RODRIGUEZ'S MOTION FOR POST-CONVICTION RELIEF.

Questions Presented

Whether the Superior Court abused its discretion in denying Rodriguez's post-conviction motion where his counsel was not ineffective for failing to raise a losing argument? Whether Rodriguez's own actions of having his girlfriend drive him to Christiana Hospital from Harrington, after a shooting in Bridgeville, show that he had no expectation of privacy related to the bullet lodged in his chest?

Scope and Standard of Review

The standard and scope of review on appeal of the denial of a motion for post-conviction relief is abuse of discretion.⁴ "An abuse of discretion occurs when 'a court has . . . exceeded the bounds of reason in view of the circumstances,' [or] . . . so ignored recognized rules of law or practice . . . to produce injustice."⁵ Issues not preserved below, however, are reviewed for plain error.⁶

Argument

The victim in a Bridgeville home invasion returned fire at his assailants. Bullet fragments from the scene matched the fragment removed from Rodriguez, who sought care for a gunshot wound at Christiana Hospital the night of the shooting, claiming to have been shot in Wilmington. Rodriguez argues that his trial counsel was ineffective for not objecting to the introduction of the bullet

⁴ *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996); *Shockley v. State*, 565 A.2d 1373, 1377 (Del. 1989).

⁵ *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

⁶ *Czech v. State*, 945 A.2d 1088, 1098 (Del. 2008).

fragment removed from him at Christiana Hospital. Rodriguez has failed to meet his burden to prove that his attorney's performance was deficient causing him prejudice, because, *inter alia*, Rodriguez consented to the surgery which resulted in the bullet being removed, and he consented to turn over any evidence, including his clothing and the bullet, to police.

When considering a motion under Superior Court Criminal Rule 61, the Court must apply the procedural requirements before reaching the merits of the claim.⁷ Rodriguez's convictions became final on September 13, 2010, when this Court issued its mandate.⁸ (DI 87-88; A-8). Rodriguez filed his Rule 61 motion on September 9, 2011. (DI 91; A-8). As such, his motion is timely under Rule 61(i)(1). This is Rodriguez's first post-conviction motion; therefore, the Rule 61(i)(2) bar on repetitive claims does not apply. Claims Rodriguez did not raise prior to his judgment of conviction are procedurally defaulted pursuant to Rule 61(i)(3). Generally, any claims of ineffective assistance of counsel overcome this bar if they could not have been raised for the first time on direct appeal.⁹ Arguably, the record below in this case was sufficient for Rodriguez to raise this issue on direct appeal, as outlined in detail below, and the Rule 61(i)(3) bar does apply.

Rodriguez's motion fails on the merits for numerous reasons, most notably that he consented to the collection of evidence and its release to police. In addition, the case law supports trial counsel's

⁷ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁸ Superior Ct. Crim. R. 61(m)(2).

⁹ See *Duross v. State*, 494 A.2d 1265, 1266 (Del. 1985).

determination that Rodriguez's motion would fail on the merits (were consent not obtained). And where his motion would have failed, there is no prejudice.

As reflected in State's Exhibit 11, Rodriguez orally consented to the release of evidence. (B-60-72). State's Exhibit 11 is a thirteen-page document with a cover page, "Certification of Medical Record Copy." The thirteen pages are the "forensic chart" completed by the Forensic Nurse Examiner, Amy Compton-Hensel, who encountered Rodriguez when he arrived at the emergency room. (B-36-28, 54). It includes a "Consent For Collection and Release of Evidence" which states:

I give permission to the Forensic Nurse Examiners to perform a physical examination and to collect evidence. I understand that evidence collection may include taking photographs, blood, body fluids, clothing and anything on or near my person.

I give permission to the Forensic Nurse Examiner to release all items obtained and collected to law enforcement representative. [sic]

State Ex. 11, at 2. (B-61). On this document, the forensic nurse examiner wrote "Verbal consent given." *Id.* On page 3, the forensic nurse checked "Gunshot wound" for "Type of forensic examination," checked "yes" for "Consent for evidence collection" and checked "Verbal" for "Type of Consent." (B-63). There is no reason to doubt the credibility of the forensic nurse, who at this time believed she was dealing simply with the victim of a gunshot wound. (B-43, 57-58). In addition to the bullet, she collected all of Rodriguez's clothing. (B-40-41). Nothing in the record indicates that Rodriguez's oral consent was not voluntary.

There is nothing contained in the testimony of the physician who performed the surgery to support an inference that the bullet was removed for any reason other than to attempt to repair Rodriguez's injuries. Dr. Katherine Sahm testified that she performed the surgery within an hour of Rodriguez presenting at the hospital. (B-24, 33). Rodriguez's symptoms were "[a] bullet wound to the right-chest cavity and shortness of breath, as well as some fluid . . . found on an ultrasound and some abdominal pain." (B-24). Dr. Sahm explained the surgery:

DR. SAHM: We had put in a chest tube in his chest cavity because of when the entry wound he was short of breath, and we knew he had a collapsed lung and that gave back blood immediately. Because of his abdominal extension and pain, we opened his abdomen, and we found a hold in the right diaphragm, a liver injury, which was easily repairable. And we would have explored the rest of his abdomen and found no other injuries.

PROSECUTOR: And so this bullet essentially went in through his back and basically hit his liver, went through his diaphragm?

DR. SAHM: Correct.

PROSECUTOR: While you were conducting this surgery, did you happen to locate the projectile?

DR. SAHM: We did because when it went through the abdomen through the liver on as we were prepping out his abdomen, we felt a hard bump, very superficial under the skin, which was consistent with the bullet. And the tract, once we got into the abdomen, the tract went right in that direction, and at that point, we made a small counter-skin incision right over the top of it and extracted the bullet.

(B-30-31). Rodriguez has not argued or offered any expert analysis that this surgery was not medically necessary or was performed only to extract the bullet. The record reflects that extracting the bullet was a by-product of the surgery that was

necessary to treat Rodriguez's injuries, and not the point of the surgery.

Rodriguez's assertions below that "Drejka testified that the defendant's consent to turn the bullet over to law enforcement was neither sought after or obtained," and in his Opening Brief, that the patient's consent "is not required for the evidence collection procedure to be carried out," are taken out of context. (A-16, B-105-06, 113, 118; Op. Br. at 11). The forensic nurse examiner who encountered Rodriguez when he arrived at the hospital, Ms. Amy Compton-Hensel (B-36-45, 54-59), did obtain Rodriguez's consent to those actions when she initially spoke to him. State Ex. 11. (B-38, 40, 60-72). Ms. Amy Wright-Drejka, another member of the forensic team, obtained the bullet from the operating room and released it to police, (A-28-30, B-72-73; State Ex. 12-13), testified that she did not approach Rodriguez when she collected the bullet to obtain further consent prior to releasing the bullet to police. (A-33-35). Nor was she required to. The consent Rodriguez gave Ms. Compton-Hensel encompassed all the collection of evidence and disclosure to police, as discussed in detail above. Even if it did not, Rodriguez's failure to affirmatively object to the hospital retaining the bullet and providing it to police constitutes implied consent under these facts.¹⁰ Factually, Rodriguez's claim fails.

To prevail on a claim of ineffective assistance of counsel,

¹⁰ See *Scott v. State*, 672 A.2d 550, 553 (Del. 1996) (where defendant "failed to countermand" consent by party with equal or greater authority to consent to search, defendant's "failure to object constituted his implied consent to the search authorized by" the other party).

Rodriguez must show: (1) counsel's representation fell below an objective standard of reasonableness, and (2) deficiencies in counsel's representation caused actual prejudice.¹¹ The performance of counsel is entitled a strong presumption of reasonableness.¹² When considering counsels' decisions and investigations, it is established that:

strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.¹³

Further, "actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice."¹⁴ Finally, "[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."¹⁵

Rodriguez fails to establish that trial counsel's performance was deficient. Prior to trial, Rodriguez filed several *pro se* motions,

¹¹ *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

¹² *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990).

¹³ *Strickland*, 466 U.S. at 690-91.

¹⁴ *Id.* at 693.

¹⁵ *Id.* at 697.

including a motion to suppress the bullet evidence as the fruit of an illegal Fourth Amendment search, citing the United States Supreme Court case of *Winston v. Lee*.¹⁶ (B-6-8). The Superior Court forwarded these motions to Rodriguez's trial counsel. On the first day of trial, the prosecutor raised the issue with the Superior Court, in anticipation of a future Rule 61 motion by Rodriguez were he to be convicted:

PROSECUTOR: And the defendant, it's my understanding, has been pushing for the defense counsel to file a motion to suppress. I only bring it up in the context of . . . if we try this case and he is convicted, this is going to be an issue that he's going to raise on a Rule 61. I want to bring it to the Court's attention. . . . I don't know if there is anything we can really do about it. I've spoken to [defense counsel] about it. He has his reasons for not filing it.

. . . . [H]e wrote something and forwarded it to the Court. Obviously, the Court's standard practice is to forward it to the defense attorney.

(B-9-10, 16-18). Rodriguez's trial counsel explained that he did not file the motion because he felt it had no merit:

DEFENSE COUNSEL: And I guess the final issue is the bullet. He has made some applications to the Court that a suppression be filed. I guess my analysis of it, just on a thumbnail is, you know, one, he shows up at Christiana Hospital with a bullet wound, walks in. He doesn't sign the consent because obviously he's taken to the emergency room. But I think it's reasonable to say that there is implicit consent that he is seeking treatment. He seeks treatment. They perform what they determine to be reasonable and necessary surgical intervention and remove the bullet. I don't think Christiana Health, Christiana Hospital is a State actor, so I don't think the Constitution applied to them.

And then it's my understanding that their policy is, okay, we have a bullet wound, they contact the police, which is what they do. They then turn the bullet over to police. At that point, Mr. Rodriguez is the victim of a

¹⁶ 105 S. Ct. 1611 (1985).

shotgun, and, you know, if he was shot in the streets of Wilmington, they would have used that to investigate the crime.

As it turned out, they used it to match up with the shooting down here and they are using it against him. However, I don't think he had a reasonable expectation of privacy [in] the bullet that was extracted. I don't think Christiana was a State actor. And I think that . . . when it comes down to whether the State, the police lawfully had possession of that bullet . . . transfer [sic] I think it was a critical question.

I think lawfully they were giving it to them, and what they do with it at that point is really a constitutional issue. . . . I think it's clear that there was at least implicit consent that he showed up for surgery.

I guess the next issue was . . . he believed it was not medically necessary for them to remove the bullet and the[y] only needed to do what minimal care they had to without removing the bullet.

Again, I did not think that rose to a constitutional issue. I thought that there was a discretionary medical decision that would be made by the doctor. So I think that's, in a thumbnail, the argument for the suppression issue. If Your Honor sees something--and the case law there is a case that my client cited But in that case I think an actual warrant was obtained, and then they took this person to the hospital, did a surgical procedure and removed something.

. . . And I think it's factually and legally distinct than the facts of our case. And those were essentially the basis for not filing the motion.

. . . . Along with some other . . . issues that are, I guess at this point, privileged.

PROSECUTOR: In the second set of the medical records, there is also a form that's completed by one of the forensic nurses who will be testifying that says she received verbal consent from him. He obviously didn't sign it, but she writes verbal consent.

SUPERIOR COURT: All right. Well, you've laid that on the record, you've done what you've done and I understand that. If it becomes an issue for a later day, we will deal with it.

(B-19-23). On the second day of trial, when the Christiana Hospital forensic nurse examiner testified, the State sought a ruling that Rodriguez's counsel could not delve into detailed testimony about whether Rodriguez consented to providing evidence to police. The prosecutor argued this line of questioning was irrelevant. The following sidebar discussion took place:

PROSECUTOR: Your Honor, this is Ms. Compton. She is the witness who first encountered Mr. Rodriguez. Based upon [defense counsel's] questioning of [Ms. Drejka, the nurse who obtained the bullet from the operating room], the State is going to ask Your Honor to limit his questioning with regard to consent to remove the item. I don't really see how it's relevant, and I don't know if it really helps this jury as the finder of the case whether or not consent is achieved to remove the bullet and send it off to police.

. . . .She completed a consent form.

SUPERIOR COURT: Well, I mean for where we are, the stage of things, what is the relevance of it? Is it a defense that he didn't consent to the removal of the bullet that presumably he didn't even own?

PROSECUTOR: I don't see how it could be a defense.

DEFENSE COUNSEL: Well, it . . . ties into the suppression issue, Your Honor. My client is instructing me to ask.

SUPERIOR COURT: We are past all that.

DEFENSE COUNSEL: I understand, Your Honor. My client is instructing me to question Your Honor on the consent.

SUPERIOR COURT: Well, you have to ask questions that are relevant If there was any relevance, it would have been pretrial. Like I said, it's not even his bullet, Mr. Johnson's. Although, Mr. Johnson probably wanted to give it to him.

(B-34-35).

At trial, none of the prosecutor, trial judge or defense counsel appeared to believe Rodriguez had any standing to contest the

Hospital's act of turning over the bullet to police. The trial judge noted that the bullet was not Rodriguez's property. (B-35). Defense counsel indicated a host of reasons why he did not believe there was a Fourth Amendment violation, including "privilege" reasons which appear to relate to his trial strategy. In response to Rodriguez's post-conviction motion, defense counsel reiterated the many reasons he did not file a motion to suppress that he had explained prior to trial. (B-91-92, 99-100).

Once Rodriguez filed his motion for post-conviction relief, the Superior Court judge obtained extensive briefing on the issue. Rodriguez's trial counsel filed two responding affidavits, Rodriguez supplemented his arguments three times, and the prosecutor filed three responses. The Superior Court ordered the prosecutor to obtain an affidavit from Christiana Hospital "explaining (1) the procedure for preserving a bullet taken from a patient believed to be the victim of a crime at the time of the offenses in this case, and (2) the reasons for the procedure."¹⁷ (B-108). The hospital affidavit (B-111) was consistent with the trial testimony of the forensic nurse examiner and others who treated Rodriguez. (A-34-36).

The Superior Court identified relevant cases that undermine Rodriguez's claim. (B-108). In *Webb v. State*, a Texas court found that the operation was not performed for the purpose of securing evidence for police.¹⁸ Instead, as in this case, surgeons "were simply performing a medical operation, for which they had obtained permission

¹⁷ It appears that the second item of that Order, in this context, potentially calls for a legal conclusion that the forensic nurse who provided the affidavit was not qualified to provide.

¹⁸ 467 S.W.2d 449 (Tex. Crim. App. 1971).

from the appellant. There was no unpermitted invasion of appellant's body . . ."¹⁹ The court held, "We know of no rule of law which prohibits an individual from submitting to police officials objects which are lawfully in his possession, and the bullet was lawfully obtained from appellant."²⁰

In *Craft v. Commonwealth*, another similar case, a Virginia court rejected the argument that the surgeon who removed the bullet from the victim was a state agent.²¹ In that case, the doctor testified that "'appropriate surgical therapy' was carried out during which he removed the bullet. . . . He said the operation occurred shortly after defendant's admission to the hospital" and "[t]he doctor said he took no 'special steps' to preserve the bullet because of the request made by police, its preservation being standard procedure in gunshot cases."²² The court held that the defendant "impliedly consented to be given necessary medical attention" when he "voluntarily presented himself in the emergency room," that "[t]here is no evidence that police played a role in the decision made by the surgeon to operate and remove the bullet."²³ The court concluded, "There was no 'search' of defendant's body for the bullet, or 'seizure' of the bullet by the doctor as an agent of police."²⁴ "As evidence of criminal agency the clothing and bullet were seizable objects, and . . . were appropriate objects to be voluntarily surrendered by the doctor who was in lawful

¹⁹ *Id.* at 450.

²⁰ *Id.* at 451.

²¹ 269 S.E.2d 797 (Va. 1980).

²² *Id.* at 799.

²³ *Id.*

²⁴ *Id.*

control of them."²⁵ The same holds true in this case.²⁶

The case law Rodriguez cites below and on appeal is distinguishable. First, Rodriguez's reliance on *Winston v. Lee*²⁷ is misplaced because in that case, the surgery was performed for the purpose of obtaining the bullet. The record in this case reflects the surgery was performed because it was medically necessary.

Second, *Viridin v. State*,²⁸ does not aid Rodriguez. He cannot establish either part of the two-part test used to determine if Christiana Hospital was acting on behalf of the State: (1) nothing in the record reflects that the police knew of the surgery when it was being performed; and (2) the record shows that the surgery was performed to treat Rodriguez, not to recover the bullet or otherwise assist police, who were not involved at the time of the surgery.²⁹ At the time of the surgery, the only facts hospital personnel knew were that Rodriguez was the victim of a shooting in Wilmington. As in *Viridin*, under the totality of the circumstances, Rodriguez has not carried his burden to establish that hospital personnel were acting as instruments of the government.³⁰

²⁵ *Id.* at 800.

²⁶ See also *Commonwealth v. Storella*, 375 N.E.2d 348, 351 (Mass. App. 1978) (finding doctor who removed bullet not a state agent where "operation was necessitated by good medical practice, was advised as necessary . . . from the outset, was performed for medical reasons only and only incidentally resulted in the recovery of evidence for police use").

²⁷ 470 U.S. 753 (1985).

²⁸ 780 A.2d 1024 (Del. 2001).

²⁹ See *id.* at 1030.

³⁰ See *id.* at 1031. See also *State v. Onumonu*, 2011 WL 695539 (Del. Super. June 18, 2001) (hospital not a state actor because did not draw blood for police purposes); *State v. Robinson*, 2006 WL 1148477 (Del. Super. May 1, 2006) ("Defendant's blood was not drawn at the direction or request of police, the prosecutor, or state agents. Christiana

Third, Rodriguez's reliance on the trespass theory under *United States v. Jones*³¹ is misplaced because, as the trial court correctly pointed out, the bullet was not one of Rodriguez's "effects."³² Were it, Rodriguez's failure to affirmatively state his desire to retain the bullet once it was removed rendered the bullet abandoned property, rightfully in the possession of the hospital for it to determine the appropriate course.

Finally, section 1762 of title 24 of the Delaware Code does not support Rodriguez's claim. That section is found within the law governing medical professionals, not within the criminal law. It requires medical professionals to report gunshot wounds. It does not require them to collect evidence, and it does not turn them into State actors. In *Commonwealth v. Storella*, the Massachusetts Court of Appeals dismissed a similar argument, finding that the state statute only required that doctors *notify* police if they are treating a bullet wound.³³

Rodriguez presented himself in the emergency room as a victim of a Wilmington shooting. A victim of a shooting has no property interest in the bullet removed from him or her, nor does a victim have a reasonable expectation of privacy in an emergency room, in an operating room,³⁴ or in retaining the instrument of a crime. Nor would

Hospital is not a governmental agent or a government-owned hospital and there is no policy or agreement with police authorities in effect to obtain and screen blood samples for potential prosecution. . . . [T]he Fourth Amendment was not implicated in this case.")

³¹ 132 S. Ct. 945 (2012).

³² *State v. Rodriguez*, Del. Super., No. 0903019123A, Bradley, J., 9-10 (Dec. 28, 2012) (Op. Br. Ex. A).

³³ 375 N.E.2d at 352.

³⁴ *Id.*

hospital personnel expect a victim to object to turning evidence over to police. Rodriguez does not explain what the hospital should have done with the bullet. It appears he believes the hospital staff should have disposed of it as medical waste or given to the patient. But that end does not serve the interests of most crime victims, or the interests of justice. These items are as likely to be exculpatory as inculpatory for a particular defendant. It is in the interests of justice not to undermine the hospital's decision to retain the bullet, which it rightfully possessed, and turn it over to police.³⁵

In sum, Rodriguez's claim fails because he consented to the surgery, consented to the collection of evidence, and consented that the evidence be turned over to police. He has not provided any case law that firmly supports an error on behalf of his counsel in not raising the issue, and it appears from the record that counsel had additional strategic reasons not to file the motion. Rodriguez has not met his burden to affirmatively prove prejudice because he has not established that the bullet would have been suppressed had the motion been filed. The Superior Court did not abuse its discretion in denying Rodriguez's motion. This Court can affirm on grounds other than those articulated below.³⁶

³⁵ In *Storella*, the Massachusetts Appeals Court found that notifying officers of the surgery and turning over the bullet "were merely praiseworthy acts of citizen cooperation. '[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.'" 375 N.E.2d at 351 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971)).

³⁶ *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

CONCLUSION

The judgment of the Superior Court should be affirmed.

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