



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEVIN COLEMAN,)
) No. 83, 2022
 Defendant Below-)
 Appellant,) ON APPEAL FROM
) THE SUPERIOR COURT OF THE
 v.) STATE OF DELAWARE
) ID No. 2010012644A/B
 STATE OF DELAWARE,)
)
 Plaintiff Below-)
 Appellee.)

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

REPLY BRIEF

COLLINS & PRICE

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Dated: August 9, 2022

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Devin Coleman, through counsel, replies to the State's Answering Brief as follows:

ARGUMENT

I. THE SUPERIOR COURT ERRED BY DENYING DEFENSE COUNSEL'S REQUEST FOR A MISSING EVIDENCE INSTRUCTION, RESULTING IN A DEPRIVATION OF MR. COLEMAN'S DUE PROCESS RIGHTS.

Applying *de novo* review, this Court should reverse Mr. Coleman's convictions and sentence from the "B" trial. The Superior Court erred in denying the defense request for a missing evidence instruction. A probation officer searched a bag in Mr. Coleman's hotel room. The bag contained a .40 caliber handgun with an empty magazine in it, a second empty .40 caliber magazine, and a 9mm handgun with a loaded magazine in it. The evidence-collecting probation officer failed to distinguish between the two empty .40 caliber magazines when cataloguing and preserving the evidence. This became very important at trial because Mr. Coleman's fingerprints were on one of the magazines but not the other. Due to the probation officer's negligence, it was impossible to tell which.

Mr. Coleman testified that he did not touch or possess either handgun. He did testify that when he arrived at the hotel room, he saw a .40 caliber magazine on the sink and gave it to his companion, telling him to get rid of it. The jury found Mr. Coleman guilty of one count of Possession of a Firearm by a Person Prohibited, but not the second one. The jury also found Mr. Coleman not guilty of

Possession of Ammunition by a Person Prohibited. In other words, the jury acquitted Mr. Coleman of possessing the 9mm and the ammunition in it. The only firearm without ammunition in it was the .40 caliber handgun. As such, the seizing probation officer's negligence was crucially important to Mr. Coleman's one conviction, for which he was sentenced to 29 years. This denial of due process requires reversal of his convictions and sentence.

Reply to State's arguments

The State first argues that there was more to the case than fingerprints: the recorded phone calls, the physical evidence (two handguns and three magazines), and latent fingerprints. The State asserts this evidence was sufficient to find Mr. Coleman guilty of PFPBB.¹ But were that the case, the jury would have convicted Mr. Coleman of all the charges – all the evidence was in the same bag. The jury must have given credit to Mr. Coleman's explanations regarding the phone calls and the bag he carried into the hotel room, which he testified contained sneakers. The only difference with the one charge of which Mr. Coleman was convicted is that there was the 50-50 possibility of his fingerprint being present on a .40 caliber magazine.

¹ Ans. Br. at 11-12.

Much of the State’s brief focuses on the other evidence in the case being sufficient to sustain a conviction.² But this is not a sufficiency of the evidence appeal. Besides, had the other evidence been sufficient, Mr. Coleman would have been convicted of all the evidence found in the backpack. He was not.

The State argues that a missing evidence instruction was not required because the State did collect and preserve the evidence from the backpack.³ As explained at length in the Opening Brief, there is no question the evidence was collected. It was not properly preserved, however. The probation officer’s negligence in preserving the evidence by properly labeling it made it impossible to know which magazine had Mr. Coleman’s fingerprints on it.

As noted by the State, State is constitutionally required to preserve evidence that may be material to a defendant’s guilt or innocence.⁴ A defendant has a due process right to the preservation of evidence.⁵ In fact, this Court has often held that “only if evidence is carefully preserved during the early stages of the conviction will disclosure be possible later.”⁶ That observation is particularly apt in

² See, Ans. Br. at 20, 21-22.

³ Ans. Br. at 16.

⁴ *Id.*, citing, *Lolly v. State*, 611 A.2d 956, 959 (Del 1992); *Deberry v. State*, 457 A.2d 744, 751-52 (Del. 1983).

⁵ *Deberry* at 751-752.

⁶ See, *Id.* at 752.

this case, as the evidence was improperly preserved in the earliest stage of the investigation.

The State argues that the fingerprint was not exculpatory or case dispositive, a missing evidence instruction is not required. In the case cited by the State, *Wisher*, the postconviction claim was that the police lost a scale and some cash found at a codefendant's apartment. This Court held that there was nothing exculpatory about this and the postconviction claim lacked merit.⁷ Notably, this Court cited to *Lolly*, which held that the defendant is entitled to a missing evidence instruction when the State fails to gather or preserve *material* evidence.⁸

Given the other evidence at trial, especially Mr. Coleman's testimony that he handled one of the empty magazines but did not possess the firearms, the evidence of which magazine had his fingerprint on it was certainly material.

The State argues it is hard to demonstrate prejudice when the evidence is not case dispositive.⁹ The case cited by the State, *Baynum*, was discussed in the Opening Brief¹⁰ and involves the police not leaving recording equipment running during a break in the interview of an assault victim.¹¹ This Court found that *Baynum* was not prejudiced, because the State did preserve the detective's

⁷ *Wisher v. State*, 2008 WL 4148978 at *2 (Del. Sep. 9, 2008).

⁸ *Id.*, citing *Lolly v. State*, 611 A. 2d 956, 960 (Del. 1992)(emphasis in original).

⁹ Ans. Br. at 22.

¹⁰ Op. Br. at 28-29.

¹¹ *Baynum v. State*, 133 A.3d 963 (Del. 2016).

questioning of the victim about her inconsistent statements during the break.

Moreover, the witness was questioned at trial about those inconsistencies.¹² This Court found that Baynum did not suffer prejudice or a due process violation.¹³

Mr. Coleman's case stands in sharp contrast to *Baynum*. The jury obviously gave some credit to Mr. Coleman's testimony that he was unaware of the presence of the guns but did handle one magazine. As it turned out, the State's failure to identify which magazine had Mr. Coleman's fingerprints on it was case dispositive. One was in the .40 caliber handgun and one was not. The jury convicted Mr. Coleman of possessing the .40 caliber firearm in which one of the two magazines was located.

Notably, the State does not respond to Mr. Coleman's assertion that the trial judge erred by attributing a lower standard of evidence preservation for a probation officer than to a police officer.¹⁴ This was error by the Superior Court; in fact, this Court's jurisprudence makes no such distinction.¹⁵

The State argues that giving a missing evidence instruction over fingerprint preservation "would be according more weight to fingerprint evidence than is scientifically and logically justified."¹⁶ This is based on speculation about some of

¹² *Id.* at 968-970.

¹³ *Id.* at 970.

¹⁴ *See, Op. Br.* at 33.

¹⁵ *See, Op. Br.* at 29-30.

¹⁶ *Ans. Br.* at 17-18.

the latent prints in the case not having sufficient points for comparison, and the possibility that fingerprints can be “wiped off.”¹⁷ That argument fails. Fingerprint evidence is obviously powerful evidence of identification; juries understand it and surely afford it great weight. That is why the State uses fingerprint evidence at trial whenever they have it – as in this case.¹⁸

The State notes that our jurisprudence establishes that the State has no duty to conduct forensic testing after collecting and preserving evidence. The State asserts that if the State had not tested the evidence for fingerprints, then Mr. Coleman would not be entitled to a missing evidence instruction, because he could have had the items tested himself.¹⁹ But the State did test the evidence. So, any conjecture about what would have happened had the State not tested the evidence is irrelevant. Besides, had the defense conducted its own testing, that would not solve the problem of the negligent preservation of evidence. It is still not knowable which of the two .40 caliber magazines had Mr. Coleman’s fingerprints on it.

The State argues that the “uncertainty” of the fingerprint evidence was essentially a boon to the defense because it permitted defense counsel to argue in closing that there was no physical evidence certainly connecting Mr. Coleman to

¹⁷ *Id.*

¹⁸ Ans. Br. at 21.

¹⁹ Ans. Br. at 21.

the firearms.²⁰ The State notes that counsel argued there is a “50-50 chance that that clip, the one with Devin’s fingerprint on it, was the one that was loose in the bag.”²¹ Defense counsel’s argument was obviously an attorney trying to make the best argument possible, having been denied a missing evidence instruction. Had the evidence been preserved and catalogued properly, which magazine had the fingerprint on it would have been known with certainty. That is the prejudice to Mr. Coleman flowing from the State’s negligence.

Finally, the State argues that the jury’s verdicts are “easily explained” as an example of jury lenity. That is not the case. The B trial featured no compound offenses or predicate offenses, which typically are the type of offenses out of which inconsistent verdicts may arise. For example, in *Tilden v. State*, this Court held that the jury’s verdict of guilty on lesser-included robbery offenses yet still convicting him of the predicate weapons offenses would be upheld as an exercise in jury lenity.²² Delaware law combines concepts of jury lenity with a sufficiency of the evidence examination to determine whether a rational factfinder could have found the defendant guilty of the related weapons offense despite failing to convict on the lead offense.²³ Also, this Court has held that a not guilty verdict on a

²⁰ Ans. Br. at 21-22.

²¹ Ans. Br. at 14.

²² *Tilden v. State*, 512 A.2d 1302, 1307 (Del. 1986).

²³ *Id.*

predicate felony precludes a conviction for possession of a firearm during the felony of which the defendant was convicted.²⁴

The legal precept of jury lenity has no application here.

In this case, the jury heard evidence that Mr. Coleman was in possession of a backpack containing two guns and three magazines. The State presented its evidence for possession; Mr. Coleman presented his evidence in defense. The difference was that one .40 caliber magazine had Mr. Coleman's fingerprint on it. Due to the State's negligence, it is impossible to know which one. Given those facts, the jury rendered its verdict. The jury had no compound or predicate felonies to consider. An example of jury lenity may have been if the jury had convicted Mr. Coleman of the ammunition that was in the 9mm but not the 9mm handgun itself. Nothing of the sort happened here.

Mr. Coleman's due process rights were violated by the State's failure to collect and preserve evidence properly. The Superior Court erred in denying the defense request for a missing evidence instruction. On *de novo* review, this Court should reverse.

²⁴ *Priest v. State*, 879 A.2d 575, 584 (Del. 2005).

CONCLUSION

For the foregoing reasons, as well as those stated in the Opening Brief, Appellant Devin Coleman respectfully requests that this Court reverse the judgment of the Superior Court.

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