



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE ROSE,)
)
Defendant—Below,)
Appellant)
)
v.) No. 126, 2023
)
)
)
STATE OF DELAWARE)
)
Plaintiff—Below,)
Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT’S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

Dwayne Rose was arrested on October 26, 2021, and indicted on June 21, 2022. All counts of his indictment, other than a single count of Carrying a Concealed Deadly Weapon (“CCDW”), were dismissed prior to trial. A4—5, A16.

Rose had a jury trial on March 21, 2023. A3, D.I. #20. The jury returned a guilty verdict on March 22, 2023. A3, D.I. #21. Rose was immediately sentenced to 5 years at Level 5, suspended for one year at Level 3. Exhibit A.

Trial counsel filed a notice of appeal on April 19, 2023. A3, D.I. 25. This is Rose’s Opening Brief.

SUMMARY OF ARGUMENT

1. Dwayne Rose was convicted by a jury of carrying a concealed deadly weapon. The most powerful piece of evidence was police body camera footage which showed Rose remove a gun from his person, which had not previously been observable on the video.

Rose objected to the State's introduction of the video. However, rather than hearing Rose's argument, and determining if the State even had a counter argument, the trial judge ordered the parties, in front of the jury, to discuss the issue amongst themselves and to try and work it out. The parties did so off the record, eventually informed the trial judge that they had resolved the issue, and then, the video was admitted and played.

The judge was required to hear from the parties and rule on the objection. By encouraging compromise rather than addressing what must be presumed to be a legitimate objection, the trial court violated Rose's due process rights, and left this Court unable to adequately review the merits of the objection. Therefore, Rose's conviction must be reversed.

STATEMENT OF FACTS

CORPORAL ALEXANDER MARINO

Corp. Marino is a Wilmington Police Department (WPD) officer who, on October 26, 2021, responded to a call on Sycamore Street in New Castle County. A33—34. Upon arrival he observed Dwayne Rose, and his mother, Ms. Sherjuan Williams, having an argument. A34—35. As he understood it, Williams wanted Rose to get his belongings out of her home and car and began throwing Rose’s belongings outside of the car. A35. Corp. Marino had previously been at the address regarding an identical argument between Rose and Williams. A49.

Corp. Marino claims that he heard Rose state, “I’m going to use this,” and then observed Rose pull a previously concealed gun out from under his jacket. A35—36; A40. Corp. Marino explained that the gun had been in a holster, but could not recall if the holster was inside, or outside of Rose’s waste band. A52—54. Corp. Marino then took Rose into custody. A35—36.

Corp. Marino was wearing a body camera during the incident, which captured the interaction. A38—39. Prior to introducing the video into evidence, trial counsel objected and asked to approach. The trial judge denied his request to approach, and did not hear or rule on the objection, but instead directed the parties to “[d]iscuss it first. You may be able to resolve it.” A39. Trial counsel and the prosecutor conferred as directed. The record does not contain any evidence as to the abasis of the

objection, what compromise was reached to resolve the issue, or how long the parties were engaged in this substantive issue off the record. Eventually, trial counsel indicated the parties had resolved the objection, and the video was then played for the jury. A39—40; State’s Exhibit 1.

During cross examination, Corp. Marino conceded that in his affidavit of probable cause, he swore under oath that Rose became “irate,” and that when Rose made the statement “I’m going to use this,” he was yelling. A63. During cross examination a portion of the video was played – which the State had not published for the jury – which showed otherwise. A133. The video showed it was Williams who was “irate,” that she slapped Rose in front of police, and eventually grabbed a baseball bat and approached Rose. A60, A133. Marino conceded that neither he, nor his partner did anything in response to the assault. A60. Marino conceded that part of his sworn statement, specifically that Rose was yelling, was not true. A64.

CORPORAL SEAN CONNOR

Corp. Connor is a WPD officer who, like Corp. Marino, responded to the incident involving Rose and Williams. A71. He testified that the gun was not in a holster, but “tucked in his waistband.” A72. He testified that Rose stated, “I should use this on you,” and took the gun out. A72. Prior to Rose taking the gun out, Corp. Connor had been keeping his eye on both Rose and Williams and had not seen the gun. A73. He indicated that he was trained to identify when people were hiding

weapons and confirmed that Rose had not “act[ed] in any way to indicate he had a weapon on him . . . until he grabbed it.” A74—77.

SHERJUAN WILLIAMS

Ms. Williams was called by the defense. A77. She testified that the argument ensued because she wanted Rose to get his stuff out of her car. A78—79. She was under the impression that Rose had been living out of the car. A80. Williams wanted her car back, Rose was not cooperating and, in Williams’ words, she “was at [her] wit’s end and [she] snapped out.” A80. Ms. Williams testified that she was aware that Rose had a firearm and had seen it before the cops were called, as well as when the cops were on scene. A80—81. During cross she conceded that she wants what’s best for her son. A82.

DWAYNE ROSE

At the time of the incident Rose was employed by Amazon and would use Williams’ car to get to work. A88. He was homeless, so would generally stay in the car, at public parks, or on friends’ porches. A88—89. Most of his belongings were in the car and Williams’ house. A89—90. Rose admitted that he had a firearm and testified that he generally open carries with a holster outside of his waistband. A90—91. His gun was in the holster during the incident. A92—93. He described the holster as an “open carry holster.” A93.

On the day of the incident, Rose was planning on going to the shooting range and testified that he did not intend to conceal the firearm. A94—95. He didn't realize it was concealed. A95. On cross, he did not dispute or confirm that the gun was covered by the jacket, but stated "he did not know" if it was. A96—97.

I. THE JUDGE VIOLATED ROSE’S RIGHT TO A FAIR TRIAL BY, INSTEAD OF RULING ON AN OBJECTION TO THE STATE’S CENTRAL PIECE OF EVIDENCE, ORDERING THE PARTIES, IN FRONT OF THE JURY, TO RESOLVE THE ISSUE OFF THE RECORD AMONGST THEMSELVES.

Question Presented

Whether a trial judge errs when, in front of a jury, after a defendant objects, the judge directs the State and defense counsel to resolve the issue amongst themselves, instead of hearing from the parties and ruling on the objection? A39.

Standard and Scope of Review

Constitutional violations are reviewed *de novo*.¹

Argument

Officer Marino’s body camera video, which captured the alleged crime, was unsurprisingly the most impactful piece of evidence in this short trial. A40, State’s Exhibit 1. But, prior to its introduction into evidence, Rose identified a basis to

¹ *Dahl v. State*, 926 A.2d 1077, 1081 (Del. 2007) (reviewing *de novo* claim that court violated defendant’s due process rights). As described below, this claim is made pursuant to this Court’s decision in *Alexander v. Cahill*, 829 A.2d 117, 129 (Del. 2003). The *Cahill* Court was not explicit as to the standard of review it employed. However, its description of the challenged practice as being inconsistent with “the goal of ensuring a fair trial,” suggests a constitutional due process violation, which the Court reviews *de novo*. Further, an abuse of discretion standard of review is inappropriate because a defendant like Rose would be unfairly impeded from meeting their burden because the error itself – by which a trial judge’s procedures prevent the development of the record– by definition, impedes a defendant from satisfying burden.

object, and did so. A39. What *should* have happened is routine: “[i]f a party makes the tactical decision to object, the trial judge must hear from both sides outside the jury’s hearing and definitively rule.”² However, instead of addressing and ruling on the objection, the trial court directed the parties – in front of the jury – to “[d]iscuss it first. You may be able to resolve it.” A39. The record does not indicate how long the parties discussed the issue, what the issue was, or how it was resolved;³ but ultimately, the parties resolved the issue with some undisclosed agreement and the trial court permitted the State to introduce the video into evidence. A39.

The post-objection procedure imposed upon the parties by the trial court violated court rules and has been explicitly prohibited by this Court. Just as occurred here, in *Alexander v. Cahill* a trial judge directed counsel to attempt to resolve objections amongst themselves. This Court reversed,⁴ and explained that as a result of the procedure, “issues may not have been preserved for appeal because, even though counsel may have objected and the jury heard “objection,” there may have

² *Id.*

³ In a pretrial hearing Rose objected to the State’s redaction of the video which removed a drawing of a penis that a member of the Wilmington police department – Marino claimed it was drawn not by him, but by a coworker – drew in Corp. Marino’s notepad. The trial court denied the objection and there is no indication the instant objection was in any way related. A8—27. An unredacted version was admitted as Court Exhibit 1 and is included herein at A133.

⁴ Although the *Cahill* Court reversed after finding four distinct errors, its description of the objection procedure, as “substantially hinder[ing] the goal of ensuring a fair trial” suggests the use of that procedure justifies reversal on its own. *Id.* at 130.

been no ruling.” The Court emphasized that this requirement is, at least in part, sourced in DRE Rules 102 and 103, pursuant to which, “claims of error [are] predicated upon a ruling,” but went further and sharply chastised the trial court for the policy implications of the procedure:

Credible trial practice standards demand that trial judges dispose of evidentiary objections effectively and efficiently by clear rulings on the record. We discourage a procedure that leaves the impression that it is designed to avoid ruling on timely objections. Attorneys should not be intimidated into compromising evidentiary objections and positions advocating admission of relevant evidence for the apparent purpose of relieving the trial judge of the danger of ruling erroneously on the objection. Court rules, the rules of evidence and the courtroom procedure used in the case sub judice does not advance the purpose and construction of the Rules of Evidence: “to secure fairness in administration, elimination of unjustifiable expense and delay and promotion of growth and development of law of evidence to the end that the truth may be ascertained and proceedings justly determined.” [D.R.E. 102.] A trial judge “is something more than a mere umpire between adversaries. His function is to ensure that the rules of practice and evidence are applied to insure a fair trial ... Whatever the motive, the courtroom procedure used here does not advance the goal of ensuring a fair trial and we firmly disavow the practice . . . we conclude that the trial judge's procedure for avoiding ruling on timely evidentiary objections interjects unnecessary delay into a trial, raises the spectre of intimidating counsel into compromise of meritorious evidentiary objections and the prospect of chilling proffers of relevant testimony and substantially hinders the goal of ensuring a fair trial.⁵

⁵ *Id.* 129—30 (internal citations omitted).

This trial court's treatment of Rose's objection was functionally identical to that described in *Cahill*. Therefore, this Court should conclude, just as it did in *Cahill*, that the procedure used here “*raise[d] the spectre of intimidating counsel into compromise of meritorious evidentiary objections and the prospect of chilling proffers of relevant testimony and substantially hinders the goal of ensuring a fair trial.*” Moreover, as noted above, the evidence implicated in the improperly addressed objection – Officer Marino's body camera – was the most significant piece of evidence in the entire trial.

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid conviction should be vacated.

Respectfully submitted,

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