



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAYMOND BLAKE,)
)
 Defendant-Below,)
 Appellant)
) NO. 282, 2012
 v.)
)
)
 STATE OF DELAWARE)
)
 Plaintiff-Below,)
 Appellee.)

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF NEW CASTLE
COUNTY

Nicole M. Walker, Esquire [#4012]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5121

Attorney for Appellant

DATE: SEPTEMBER 12, 2012

TABLE OF CONTENTS

TABLE OF CITATIONS ii

NATURE AND STAGE OF THE PROCEEDINGS 1

SUMMARY OF THE ARGUMENT 2

STATEMENT OF FACTS 3

ARGUMENT

I. BLAKE’S CONVICTIONS OF TRAFFICKING IN COCAINE AND TRAFFICKING IN HEROINE VIOLATED THE DOCTRINE OF THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND DELAWARE CONSITUTIONS AS HE HAD ALREADY BEEN CONVICTED OF TWO COUNTS OF THE LESSER INCLUDED OFFENSE OF POSSESSION BASED ON THE SAME ALLEGED CONDUCT... 9

II. THE TRIAL COURT DENIED BLAKE DUE PROCESS OF LAW WHEN IT DENIED HIS MOTION TO DISMISS COUNT 1 OF THE REINDICTMENT AS THE STATE FAILED TO OVERCOME THE REBUTTABLE PRESUMPTION THAT THE REINDICTMENT WAS THE RESULT OF VINDICTIVE PROSECUTION..... 19

CONCLUSION 23

Sentence OrderEXHIBIT A

Written Decision Denying Motion to
Dismiss Count I of the ReindictmentEXHIBIT B

McRae v. State, 2001 WL 1175349 (Del.)EXHIBIT C

State v. Honie, 1999 WL 167733 (Del.Super. 1999) ...EXHIBIT D

State v. Sullins, 2008 WL 1922292 (Del.)EXHIBIT E

TABLE OF CITATIONS

Cases

Ashe v. Swenson, 397 U.S. 436 (1970) 10

Banther v. State, 884 A.2d 487 (Del. 2005) 15

Blackledge v. Perry, 417 U.S. 21 (1974) 20

Blockburger v. United States,
284 U.S. 299 (1932) 11

Brown v. Ohio, 432 U.S. 161 (1977) 10, 11, 13

Fuller v. State, 788 A.2d 527 (Del. 2002) 12

Hickman v. State, 801 A.2d 10 (Del. 2002) 12

Johnson v. State, 396 A.2d 163 (Del. 1978) ... 20, 21

McRae v. State, 2001 WL 1175349 (Del.) 12, 13

North Carolina v. Pearce, 395 U.S. 711 (1969) 21

Williams v. State, 796 A.2d 1281 (Del. 2002) 9

State v. Honie, 1999 WL 167733 (Del.Super. 1999) . 21

State v. Moran, 820 A.2d 831
(Del.Super. 2002) 19, 20, 21

State v. Skyers, 560 A.2d 1052 (Del. 1989) 12

State v. Sullins, 2008 WL 1922292 (Del.) 12

State v. Willis, 673 A.2d 1233
(Del. Super. 1995) 10, 11

Yeager v. U.S., 557 U.S. 110 (2009) 14, 15, 16

Constitutional Provisions

Amend.V, U.S.Const 10

Art. I, § 8, Del.Const. 10

Statutes

11 *Del.C.* § 201 (1)16

11 *Del.C.* § 206 (a)11

11 *Del.C.* § 208 (1) (a)14, 15

16 *Del.C.* § 4751(a)11

16 *Del.C.* § 4753A (a) (2).12

Rules

Delaware Supreme Court Rule 89

NATURE AND STAGE OF PROCEEDINGS

On March 14, 2011, Raymond Blake was indicted on: Possession With Intent to Deliver, ("PWITD"), Cocaine, PWITD Heroin, Maintaining a Vehicle, Trafficking in Cocaine and Trafficking in Heroin. A-2, 16. On August 10, 2011, the State *nolle prossed* the Trafficking in Heroin believing there were insufficient drugs to prove that charge. A-6.

On October 5, 2011, Blake was acquitted of the Maintaining and the two PWITD charges. For each of the PWITD's, he was convicted of the lesser included offense of Possession. The jury hung on the charge of Trafficking in Cocaine. Right after this verdict, the State announced that it would reindict Blake on the trafficking charge upon which the jury hung and on the trafficking charge that it had previously *nolle prossed*. A-54.

After Blake was reindicted, the trial court denied his motion to dismiss the revived Trafficking in Heroin charge.¹ He then went to trial on and was convicted of both trafficking offenses. A-11. He was sentenced to 8 years in prison on those offenses and to probation on the two Possession charges.² This is Blake's Opening Brief in support of a timely-filed appeal.

¹ See Written Decision Denying Motion to Dismiss Count I of the Reindictment, Ex.B.

² See Sentence Order, Ex. A.

SUMMARY OF ARGUMENT

1. Because the State was unhappy that it had only obtained misdemeanor convictions of Possession of Cocaine and Possession of Heroin along with a hung verdict on Trafficking in Cocaine, it tried Blake again for possessing those same drugs at a trafficking weight. Since Possession is a lesser included offense of Trafficking, the State was barred from seeking convictions of Trafficking based on the same possession upon which the lesser included offenses rested. Additionally, the issue as to the weight of the drugs that Blake possessed was resolved when the jury at the first trial rejected the argument that Blake possessed the drugs that were found in a house and acquitted him of the PWITD charges. Thus, the State was collaterally estopped after the first trial from arguing that Blake possessed trafficking weight of the drugs. Because the trafficking convictions were obtained in violation of the principles of double jeopardy, the convictions should be vacated.

2. The trial court denied Blake due process of law when it denied his motion to dismiss Count 1 of the reindictment as the State failed to overcome the rebuttable presumption that the reindictment was the result of vindictive prosecution.

STATEMENT OF FACTS

On November 8, 2010, Wilmington Police had a criminal informant make a phone call to set up a controlled drug buy. A-10. Police claimed that the call was made to Raymond Blake, ("Blake"). Meanwhile, surveillance was set up at 5th and Lincoln Streets. A-28. Within 20 to 30 minutes of the call, Blake grabbed his brother's jacket, left the house at 1821 W. Fourth Street, got into his mother's Nissan³ and headed out to pick up his sister. A-43. Police saw the Nissan drive westbound on 5th Street and pull to the southside of the road. A-40-41. About six to seven police officers converged on the car and aimed their guns at Blake who was the only occupant of the car. A-33. They ordered him to put the car in park, put his hands in the air and get out of the car. A-40-41.

Police searched the coat that Blake was wearing and found 31 clear knotted bags containing a white chunky substance, 4 clear vials with green caps that contained an off-white chunky substance and 52 Ziploc baggies marked "Taliban" each containing a blue wax paper envelop with an off-white powdery substance inside. A-29. These drugs

³ The car was registered to Whitney Blake. A-49.

amounted to about 3.52 grams of cocaine⁴ and about 1.2 grams of heroin.⁵

After police searched Blake, they put him in the back of an unmarked car with four officers. A-33. They drove to a nearby parking lot where they discussed for about 20 to 35 minutes whether Blake would assist them in obtaining arrests. During this discussion police got Blake's signature on a consent to search form for the residence at 1821 W. Fourth Street. A-30, 35, 44. While police denied it, Blake told the jury at his first trial that one officer had a gun on his lap and that he was threatened to sign the form. A-44, 51. Blake told the jury that he did not live at that address for over a year and that when he did live there he stayed in the basement. A-45. The address on his current State identification card (2411 Tatnall Street) supported Blake's testimony. A-43, 48.

After the form was signed, four officers took Blake to 1821 W. Fourth Street. They jumped a fence and went to the back door as Blake was afraid others in the neighborhood would see him assisting police. Blake's stepfather, mother and sister lived at that house. A-34. Once inside, police went up to the second floor and searched the middle bedroom. A-30. Inside a small

⁴ A-29, 38-39, 77, 79.

⁵ A-29, 38-39, 77, 79.

refrigerator in that room, they found 65 small clear Ziploc baggies each containing wax paper envelopes with a white powdery substance inside. Nine of those baggies were stamped with the brand label of "A Plus," 4 were stamped "Who Wants This" and 52 were stamped "Taliban." A-31. Also in the room, police found a cardboard box full of empty unused wax paper envelopes, a glass jar with off-white chunky substance, a digital scale and 4 Ziploc bags each containing smaller unused baggies. A-31.

Detective Wilkers later opined in court as an expert that the evidence revealed that Blake possessed the totality of the cocaine and heroin with an intent to deliver. His opinion was on the sale paraphernalia as well as the amount of drugs which included those found in the house. Items such as the unused baggies and the digital scale are commonly used for packaging drugs. A-32. Additionally, there was the same branding on the baggies found on Blake's person as was found in the house. A-37. Additionally, no "use" paraphernalia was found on Blake or in the house. A-36-37.

Blake was not charged that night with any crimes. Instead, after processing him at the station, police gave him their card and allowed him to leave with the understanding that he would "help" them obtain further

arrests. A-50. In fact, that night, due to Blake's help, police were able to get a gun off the street. A-46, 52.

Over the next few weeks, Blake helped police. A-47. He kept in contact with them, provided credible information and participated in controlled drug buys that led to two other arrests. However, according to police, about 2 to 3 weeks after the incident, Blake "fell off the face of the earth." A-52-53. In January, 2011 Blake was arrested on another set of charges. Police then chose to pursue charges against Blake for the totality of the drugs found on his person and in the house on November 8, 2011. A-52.

Blake was originally indicted on March 14, 2011 on the charges of: Possession With Intent to Deliver, ("PWITD"), Cocaine, PWITD Heroin, Maintaining a Vehicle, Trafficking in Cocaine and Trafficking in Heroin. However, the indictment was defective in that it alleged that the crimes occurred on or about January 19, 2011 instead of November 8, 2010. At a pre trial motion hearing on another matter, the trial court instructed the State to file a motion to amend the indictment. That motion was filed on or about August 12, 2011. A-21-22, 24. Defense counsel did not object and the motion was later granted. A-6.

At the same pre trial hearing, the State, incorrectly believing that the Controlled Substances Report provided by

the Office of the Chief Medical Examiner showed an insufficient amount of heroin for it to obtain a conviction on Trafficking in Heroin, entered a *nolle prosequi* on that charge. A-23. Two months later, Blake had a jury trial on the remaining offenses.

At the conclusion of trial, Blake was found not guilty of the Maintaining and the two PWITD's. Instead, he was found guilty of 2 counts of Possession as lesser included offenses of each of the PWITD's. However, the jury hung on the charge of Trafficking in Cocaine. A-7.

After the jury's verdicts were announced, the judge ordered:

The State has 10 days to let me know what you're going to do with the Trafficking charges.

To this the prosecutor announced:

I'll tell you right now, I'm going to try it. I'm going to reindict him on the heroin trafficking, because it was *nolle prossed* in error. It weighs actually more than 2.5, and I made an error in math when I *nolle prossed* it, so you can expect a Rule 9 on that.

A-54.

On October 24, 2011, the State reindicted Blake on the Trafficking In Heroin offense which it had previously *nolle prossed*, (Count I), and on the Trafficking In Cocaine offense upon which the jury hung after the first trial,

(Count II). A-19. Blake moved to dismiss Count I based on an allegation of vindictive prosecution. A-55. The State denied the allegation and Blake replied. A-67-76. The trial court denied the motion. Ex.A.

In the motion, defense counsel informed the trial court that the prosecutor told her before trial that it had incorrectly computed the weight of the heroin and that it was, in fact, of trafficking weight. A-58. The State responded by asserting that the inaccuracy was discovered during trial prior to the testimony of the chemist from the Office of the Medical Examiner. A-68. In any event, the State did not ask for any continuance to reinstate the charge or the reindict Blake before the first trial.

Blake was tried on the new indictment in January, 2012 and was convicted of both trafficking offenses. He received 5 years in prison for the heroin and 3 years in prison for the cocaine. As for the two possession offenses - he received probation.

- I. **BLAKE'S CONVICTIONS OF TRAFFICKING IN COCAINE AND TRAFFICKING IN HEROIN VIOLATED THE DOCTRINE OF THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND DELAWARE CONSTITUTIONS AS HE HAD ALREADY BEEN CONVICTED OF TWO COUNTS OF THE LESSER INCLUDED OFFENSE OF POSSESSION BASED ON THE SAME CONDUCT.**

Question Presented

Whether double jeopardy bars the State from trying a defendant on trafficking of a controlled substance when he has already been convicted of the lesser included offense of possession based on the same conduct. *Delaware Supreme Court Rule 8.*

Standard and Scope of Review

Issues not raised below are reviewed by this Court for plain error. See *Williams v. State*, 796 A.2d 1281 (Del. 2002) (finding violation of double jeopardy to be apparent on the record, basic, serious and fundamental thus requiring reversal).

Argument

Because the State was unhappy that it had only obtained misdemeanor convictions of Possession of Cocaine and Possession of Heroin along with a hung verdict on Trafficking in Cocaine, it tried Blake again for possessing those same drugs at a trafficking weight. Since Possession is a lesser included offense of Trafficking, the State was barred from seeking convictions of Trafficking based on the

same possession upon which the lesser included offenses rested. Additionally, the issue as to the weight of the drugs that Blake possessed was resolved when the jury at the first trial rejected the argument that Blake possessed the drugs that were found in a house and acquitted him of the PWITD charges. Thus, the State was collaterally estopped after the first trial from arguing that Blake possessed trafficking weight of the drugs. Because the trafficking convictions were obtained in violation of the principles of double jeopardy, they must be vacated.

"The protection against double jeopardy is fundamental to our criminal justice system. It is found in the Fifth Amendment to the United States Constitution, in Article I, § 8 of the Delaware Constitution, and in the Delaware criminal statutes." *State v. Willis*, 673 A.2d 1233, 1235 (Del. Super. 1995). The protection of double jeopardy "forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown v. Ohio*, 432 U.S. 161, 169 (1977). It also protects the defendant "from attempts to relitigate the facts underlying a prior acquittal." *Ashe v. Swenson*, 397 U.S. 436 (1970).

Retrying Blake On Trafficking In Cocaine And Trying Him On Trafficking In Heroin Was Barred By Blake's Prior Possession Convictions

Generally, a defendant can be convicted of more than one offense that arises from the same conduct. See 11 Del.C. § 206 (a). However, a defendant who has been tried and convicted of a lesser included offense cannot be subsequently tried in a separate prosecution for the greater offense without violating double jeopardy principles. *Brown*, 432 U.S. at 166-167; *Willis*, 673 A.2d at 1235. "An offense is included [in a greater offense] when [...] it is established by the proof of the same or less than all the facts required to establish the commission of the offense charged." 11 Del.C. § 206 (b) (1). See *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (holding that a single act or transaction may constitute two separate offenses only where each offense requires proof of an element which the other does not).

Consistent with the principles prohibiting putting the defendant twice in jeopardy, this Court has concluded that Possession is a lesser included offense of both PWITD and Trafficking. The elements of PWITD are: 1) possession of a controlled substance and 2) intent to manufacture or deliver that substance. 16 Del.C. § 4751(a). The elements of Trafficking are: 1) possession of a controlled substance

and 2) the quantity possessed. 16 Del.C. § 4753A (a) (2). As it did in this case, the State can use the same drugs to prove the possession element of each of these offenses. See *State v. Skyers*, 560 A.2d 1052, 1054 (Del. 1989). Yet, PWITD and Trafficking are two separate offenses because they each contain an element that the other does not. *Id.* at 1054-1055. However, conviction of either of these offenses and Possession "constitutes double jeopardy under both the United States and Delaware constitutions." *Hickman v. State*, 801 A.2d 10 (Del. 2002) (noting that the State "agreed that the trial court erred by allowing the jury to return guilty verdicts on charges of both trafficking and possession of cocaine").⁶

In *McRae v. State*, the defendant, like Blake, was charged with both PWITD and Trafficking based on the same

⁶ See *Skyers*, 560 A.2d at 1054 ("Defendant correctly asserts that double jeopardy prohibits convictions of both Trafficking in Cocaine and Possession."); *State v. Sullins*, 2008 WL 1922292 (Del.) (Ex. C) (finding double jeopardy violation based on conviction of both possession and trafficking); *Fuller v. State*, 788 A.2d 527 (Del. 2002) (finding convictions of both trafficking and possession impermissible because there is "an identity of statutory elements between the two offenses"); *McRae v. State*, 2001 WL 1175349*4 (Del.) (Ex.D) (finding violation of principles of double jeopardy for defendant to be sentenced for possession as a lesser included offense of PWITD and trafficking).

possession.⁷ The trial court instructed the jury on both of those offenses. It also instructed the jury on Possession as a lesser included offense of PWITD. McRae was acquitted of PWITD but convicted of the lesser included offense of Possession and the charged offense of Trafficking. This Court ruled, as it has in several cases, that a defendant's "dual convictions of Trafficking in Cocaine and Possession of Cocaine subjected him to double jeopardy." 2001 WL 1175349 *4.

Unlike Blake, McRae had obtained both convictions at the same proceeding. As a result, the available remedy was merger. Here, however, Blake was convicted of both possession offenses prior to a subsequent trial that yielded his trafficking convictions. "Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, [like in *McRae*] the prosecutor is forbidden to strive for the same result in successive proceedings [like in our case]." *Brown*, 432 U.S. at 166. Thus, once Blake was convicted of the lesser included offenses at one proceeding, the State was forbidden from seeking a conviction on either of the trafficking offenses at a subsequent trial. Since the subsequent prosecution violated the principles of double

⁷ McRae was also charged with simple possession which was dismissed based on double jeopardy principles.

jeopardy, Blake's two trafficking convictions and their accompanying sentences must be vacated.⁸

Retrying Blake on Trafficking In Cocaine And Trying Him On Trafficking In Heroin Was Barred By Collateral Estoppel

Assuming, *arguendo*, this Court finds the State was not precluded by Blake's possession convictions from obtaining convictions on the greater offenses of trafficking, it must conclude that the State was collaterally estopped from making the argument underlying the State's theory in support of a trafficking conviction.

Typically, when "the State seeks a second trial after its first attempt to obtain a conviction results in a mistrial because the jury has failed to reach a verdict" the defendant is not placed in jeopardy twice. *Yeager v. U.S.*, 557 U.S. 110, 118 (2009). However, the acquittals from the first trial can "unquestionably terminate[] petitioner's jeopardy with respect to the issues finally decided in those counts." *Id.* at 119. The *Delaware Code* embraces the principle of collateral estoppel and dictates when a prosecution can be barred by a prior acquittal of a different offense:

Although a prosecution is for a violation of a different statutory provision or is based on

⁸ To the extent this Court concludes that vacating the convictions and sentences is not a proper remedy, it must merge each of the possession convictions and sentences with each of the trafficking convictions and sentences.

different facts, it is barred by a former prosecution in a court having jurisdiction over the subject matter of the second prosecution under the following circumstances: (1) The former prosecution resulted in an acquittal which has not subsequently been set aside or in a conviction as defined in 207 of this title and subsequent prosecution is for: a) Any offense of which the defendant could have been convicted on the first prosecution.

11 *Del.C.* § 208 (1) (a). See *Banther v. State*, 884 A.2d 487, 492 (Del. 2005).

To determine whether collateral estoppel precludes retrial, this Court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Yeager*, 557 U.S. at 120 (internal quotations omitted). However, "consideration of hung counts has no place in the issue-preclusion analysis. Indeed, if it were relevant, the fact that petitioner has already survived one trial should be a factor cutting in favor of, rather than against, applying a double jeopardy bar." *Id.* at 122.⁹

⁹ See *Banther*, 884 A.2d at 492 (finding that an earlier acquittal on a charge of conspiracy "collaterally estopped the State from arguing to the jury that Banther acted as an accomplice in committing [murder] by agreeing to aid the principal in 'planning' the murder).

In *Yeager v. United States*, 557 U.S. 110 (2009), the Court dealt with a situation similar to ours. There, the defendant was indicted and went to trial on 6 fraud counts and several insider trading counts. He was acquitted on the fraud counts but the jury failed to reach a verdict on the insider trading counts. *Id.* at 115. The Government obtained a new indictment which recharged the defendant with some, but not all of the counts upon which the jury had been previously hung. The defendant moved to dismiss all counts in the new indictment on the ground that the acquittals on the fraud counts precluded a retrial on the insider trading counts because reprosecution "would require the Government to prove that critical fact" alleged in the fraud counts for which he was acquitted. The Court agreed and concluded that issue-preclusion barred a second trial of that issue and mandated dismissal of all of the insider trading counts. *Id.* at 115.

In our case, the evidence presented at the first trial reveals that the jury did reject critical facts upon which the State relied to establish the trafficking offenses at the second trial. When the original jury found Blake guilty of the lesser included offenses of Possession, it necessarily acquitted him of the greater offenses of PWITD. 11 *Del.C.* § 201 (1). Additionally, this Court must

not engage in speculation as to why the jury hung on the trafficking offense at the first trial. The State's argument at that trial that Blake intended to deliver the drugs in his possession was based on the entirety of the drugs and alleged sale paraphernalia found on his person and in the house.

Wilkens provided expert testimony that the scale, unused baggies and totality of the value of the drugs revealed that the drugs were for sale. All of the paraphernalia used for packaging drugs for sale were found at the house with a significant amount of drugs. Wilkens also noted that it was significant that some of the drugs in the house were of the same brand as those found on Blake. Thus, when it rejected the State's argument that Blake intended to sell the drugs, it rejected a finding that he possessed the drugs and paraphernalia in the house. The jury also rejected that he used his mother's car as an instrument for keeping drugs. Thus, the Possession convictions were based solely on the drugs found on his person.

In order to establish each of the trafficking offenses at the second trial, the State was required to prove that Blake possessed the drugs in the house. He only had about

3.52 grams of cocaine on his person.¹⁰ Thus, to reach the requisite 10 grams for a trafficking conviction, the State needed to prove that the cocaine in the house belonged to him. Similarly, he was found with about 1.2 grams of heroin on his person.¹¹ Thus, the State needed to prove that the heroin in the house belonged to him to reach the requisite 2.5 grams for a trafficking conviction.¹² Since the jury at the first trial rejected the argument that Blake possessed the drugs in the house, the State was precluded from trying him on the trafficking charges at the second trial. Therefore, the subsequent prosecution violated the principles of double jeopardy and Blake's two trafficking convictions and sentences must be vacated.¹³

¹⁰ While it is possible that Counsel's math could be "off," there is no dispute that each of the trafficking convictions required a finding that Blake possessed both the drugs on his person and the drugs in the house. A-29, 38-39, 77, 79.

¹¹ A-29, 38-39, 77, 79.

¹² A-31, 38-39, 78-79.

¹³ To the extent this Court concludes that vacating the convictions and sentences is not a proper remedy, it must merge each of the possession convictions and sentences with each of the trafficking convictions and sentences.

II. THE TRIAL COURT DENIED BLAKE DUE PROCESS OF LAW WHEN IT DENIED HIS MOTION TO DISMISS COUNT 1 OF THE REINDICTMENT AS THE STATE FAILED TO OVERCOME THE REBUTTABLE PRESUMPTION THAT THE REINDICTMENT WAS THE RESULT OF VINDICTIVE PROSECUTION.

Question Presented

Whether reindictment of a serious felony charge, not presented to the jury at a first trial, amounted to vindictive prosecution when the jury at the first trial acquitted the defendant of three serious felony offenses and hung on a fourth felony and when the new charge carried a severe penalty. A-55.

Standard and Scope of Review

Constitutional issues are reviewed *de novo*.

Argument

Typically, the State's decision to reindict new or additional charges, even after trial, is left to the discretion of the prosecutor. However, as the trial court noted in the decision below, "[w]hen the State reindicts a defendant after a mistrial, there is good cause for concern." Ex.B (*quoting State v. Moran*, 820 A.2d 831 (Del.Super. 2002)).

In *State v. Moran*, the judge reviewed the evolution of the law with respect to vindictive prosecution, and concluded that an analysis involving a "'rebuttable presumption' of vindictiveness in a case like ours is most

in keeping with the lofty notions of due process which animated *Blackledge*¹⁴ and *Johnson*¹⁵ and yet also is in step with the realities of criminal prosecutions.” 820 A.2d 381, 388 (Del.Super. 2002). Thus, Blake was not required to establish actual bad faith or vindictiveness on the part of the State and the State was faced with the rebuttable presumption of vindictiveness in its reindictment.

Here, the Trafficking In Heroin charge was presented to the first grand jury after police decided that Blake had not lived up to his end of the bargain with respect to providing assistance. Two months prior to trial, the State *nolle prossed* that charge. At trial, the prosecutor purportedly discovered a mathematical error upon which he relied when he entered the *nolle prosequi*. Unlike the State's immediate effort to amend the indictment to correct its errors with respect to the date of the offense, the State did not try to bring the charge “back to life” until after Blake had been acquitted of the Maintaining and two PWITD charges.

Here, the fear of vindictive prosecution is legitimate. Had he been convicted of both of the PWITD's, Blake would have faced 8 to 50 years in jail. He also would have faced a 3 year maximum sentence if convicted on the

¹⁴ *Blackledge v. Perry*, 417 U.S. 21 (1974).

¹⁵ *Johnson v. State*, 396 A.2d 163, 164 (Del. 1978).

Maintaining offense. Instead, he received probationary terms for the two possession offenses. The trafficking offense added in the reindictment subjected Blake to a minimum of 5 years in prison - which he subsequently received.

A vindictive prosecution is one which results "from specific animus or ill will[.]" *State v. Honie*, 1999 WL 167733 (Del.Super. 1999) (Ex. E). Here, even though Blake did assist in obtaining arrests, police were not happy that Blake stopped assisting them. Additionally, the State did not obtain the result it wished at the conclusion of the first trial. Probation was a far cry from 8 to 50 years in jail. "[I]n the context of a colorable claim of prosecutorial vindictiveness by an 'upping the ante' situation, the prosecutor must justify bringing a more serious charge in the same manner as would a judge under *Pearce*¹⁶ when inflicting increased punishment on retrial." *Johnson*, 396 A.2d at 166. Contrary to the trial court's conclusion, the State failed to set forth sufficient facts to overcome the presumption of vindictive prosecution. Thus, the trial court was required to dismiss the indictment "as a violation of [Blake]'s due process rights. *Moran*, 820 A.2d at 384. Since it failed to do so, this

¹⁶ *North Carolina v. Pearce*, 395 U.S. 711 (1969).

Court must vacate Blake's conviction of Trafficking In Heroin.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that each of Blake's trafficking convictions must be reversed.

\s\ Nicole M. Walker
Nicole M. Walker, Esquire

DATE: September 12, 2012