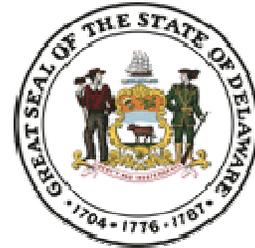

September 30, 2010

Vol.: 10.3

OFFICE OF THE PUBLIC DEFENDER



**COMPENDIUM OF RECENT CRIMINAL-LAW
DECISIONS FROM THE DELAWARE SUPREME COURT**

Cases Summarized and Compiled by

Nicole M. Walker, Esquire

Josh Inkell, Law Clerk

Lauren McCrery, Law Clerk

Michael Rose, Law Clerk



IN THIS ISSUE:

Page

BLACK V. STATE, (7/06/10): JUROR MISCONDUCT.....	1
MCCULLOUGH V. STATE, (7/8/10): JURY'S QUESTION ON EVIDENCE	1, 2
RICHARDSON V. STATE, (7/9/10): ACCOMPLICE LIABILITY/ALLEN V. STATE/ INEFFECTIVE ASSISTANCE OF COUNSEL.....	2
WOODLIN V. STATE, (7/22/10): 3507 FOUNDATIONAL REQUIREMENTS.....	2
BLAKE V. STATE, (7/22/10): 3507 FOUNDATIONAL REQUIREMENTS.....	2, 3
STEVENS V. STATE, (7/22/10): 3507 INTERROGATOR'S OPINIONS.....	3
OWNES V. STATE , (7/29/10): HOSTILE WITNESS/ CAUTIONARY INSTRUCTION.....	4
LOPEZ V. STATE, (8/2/10):LEVEL V/BOOT CAMP.....	4, 5
GUY V. STATE, (8/3/20): BATSON/ALLEN-ACCOMPLICE LIABILITY/3507	5
HALL V. STATE, (8/13/10): RIGHT TO FAIR & IMPARTIAL JURY	6
ROBINSON V. STATE, (8/16/10): BRADY/ IMPEACHMENT	6, 7

SCHNEIDER V. STATE, (8/19/10): DUI/ INFORMANT7

**HILL V. STATE, (8/25/10):RANDOM MOTOR
VEHICLE STOP.....7, 8**

**GUIFOIL V. STATE, (9/7/10): MOTOR VEHICLE STOP/
INFORMANT8**

**MILLS V. STATE, (9/20/10): CALCULATING
TIME-SENTENCING9**

**JOHNSON V. STATE, (9/24/10): DOUBLE JEOPARDY/
JOINDER&SEVERANCE.....9**

**RUSSELL V. STATE , (9/29/10): 3507 & 3513 FOUNDATIONAL
REQUIREMENTS.....9, 10**

**DELAWARE SUPREME COURT CASES
JULY 1, 2010 THROUGH SEPTEMBER 30, 2010**

BLACK V. STATE, (7/06/10): JUROR MISCONDUCT

D was convicted of PWITD and other drug offenses. After trial, it was learned that during deliberations, one juror went home and discussed with his drug-addict son the quantity & packaging of drugs at trial. The son said that was consistent with sales. That statement was consistent with the State expert's testimony. The juror shared this information with the other jurors before they convicted him.

To succeed on a claim on improper jury influence, D must prove either that he was "identifiably prejudiced" by the juror misconduct or the existence of "egregious circumstances, meaning circumstances that if true, would be deemed inherently prejudicial so as to raise a presumption of prejudice in favor of the defendant." The presumption of prejudice can be rebutted by a post-trial investigation. The Court agreed that the juror misconduct satisfied the "egregious circumstances" test. While the trial court conducted a post-trial investigation, it erred in not conducting a thorough investigation. REVERSED.

MCCULLOUGH V. STATE, (7/8/10): JURY'S QUESTION ON EVIDENCE



D met a 13 year old girl, who had identified herself online as 19 years old. After a period of time which allegedly involved sexual conduct, the girl's mother became aware of the relationship. While D was unaware at first that V was actually a minor, he learned the truth prior to some of the alleged misconduct. Mom called the police. D was arrested and at trial, the State introduced photo copies of the V's journal which contained entries on 3 days which D and V had physical encounters. Both parties agreed that the remaining pages of the original journal were blank.

During deliberations, the jury asked the judge if they could see the whole journal. The judge conferred with counsel, where D's attorney objected and asked the judge to deny the jury's request. Before the judge could answer the jury, he was informed they had reached a verdict. The judge noted for the record that the question was never answered and "one can only assume that the jury did not require an answer." D appealed on the basis that the judge committed plain error in not responding to the question submitted by the jury prior to the return of their verdict.

The Court refused to reverse the verdict due to plain error. This case involved tactical decisions of counsel that kept the original journal from admission into evidence. Further, D did not object to introduction of photocopies when the actual journal was

available, he expressly objected to providing the actual journal in response to the jury's question, and he replied "no" when the trial judge asked if "there was anything we should take up before we bring in the jury." The Court reasoned that by making these tactical decisions at trial, D waived any arguable claim of error. AFFIRMED.

RICHARDSON V. STATE, (7/9/10): ACCOMPLICE LIABILITY/ALLEN V. STATE/ INEFFECTIVE ASSISTANCE OF COUNSEL

D appealed from a denial of his motion for post-conviction relief from his convictions of attempted murder 1st, robbery 1st, burglary 1st, conspiracy 2nd and four counts of PFDCCF. After the trial court denied his motion, the Delaware Supreme Court issued its decision in *Allen v. State* which requires that, in accomplice liability cases, the jury be instructed pursuant to 11 Del. C. §274. *Allen* requires the jury to make an individualized determination of a D's mental state and culpability for any aggravating factors. D was permitted to address this issue on remand. His motion was again denied.

On appeal, D argued that *Allen* articulated a new substantive rule on the applicability of §274 and must be applied retroactively. D also argued that the trial court abused its discretion in denying his claim of ineffective assistance where he was never presented a plea. The Court held that since *Allen* does not constitute a "new rule" and is not "implicit in the concept of ordered liberty," it does not apply retroactively. D failed to show any new facts or that the trial court lacked authority to convict him. Therefore, the "interest of justice" provision of Rule 61(i)(4) does not apply and D's motion for post-conviction relief is procedurally barred. The Court also held that the trial court did not abuse its discretion by denying post-conviction relief on the ineffective assistance claim because D failed to prove any prejudice or an actual plea offer. AFFIRMED.

WOODLIN V. STATE, (7/22/10): 3507 FOUNDATIONAL REQUIREMENTS

D was convicted of several sex related charges against his minor child. On appeal he asserted that the judge abused his discretion when he allowed the introduction of V's out-of-court statement under §3507 because the State failed to lay the proper foundation. On appeal, the Court reviewed for plain error. It concluded that a proper foundation was laid. V testified that her father did "something wrong" to her and that it was "nasty." This was sufficient to "touch on the events" which is a required foundation. AFFIRMED.

BLAKE V. STATE, (7/22/10): 3507 FOUNDATIONAL REQUIREMENTS

D appealed from his conviction of murder 1st, attempted murder 1st, PFBPP, eight counts of reckless endangerment 1st, and ten counts of PDWDCF. D argued that the trial court abused its discretion by allowing the recorded police interviews of five witnesses to be presented to the jury pursuant to §3507 without a proper foundation.

The Court held that the two-part foundation was not established by the State during its direct examination of the five witnesses. Prior statements can be admitted under §3507 as long as the witness testifies about the events and indicates whether or not the events are true. The Court determined that because none of the five 3507 witnesses was asked whether or not their prior statements were true, the trial judge erroneously permitted the State to rely upon §3507 to introduce the prior out-of-court statements from five crucial witnesses even though they did not lay the proper foundation. The erroneous admission of the statements required D's convictions to be reversed because the only evidence that put the gun in the D's hand came from those statements. This erroneous admission was not harmless beyond a reasonable doubt. REVERSED and REMANDED.

STEVENS V. STATE, (7/22/10): 3507 INTERROGATOR'S OPINIONS



D was convicted of robbery 1st and related offenses. At trial the State played a DVD containing a detective's interrogation of D's juvenile co-defendant. The redacted DVD was introduced at trial under 3507. The portion of the DVD which was played for the jury contained the detective's opinion that D and co-D engaged in "some other robberies." D initially objected because the questioning was irrelevant, but after sidebar, withdrew his objection and indicated that a curative jury instruction was not necessary.

On appeal, D argued that the trial court committed plain error when it failed to issue a curative instruction or declare a mistrial. D contended that unredacted portions of the DVD contained the detective's opinion that D was involved in other robberies; opinion as to the credibility of the State's key witnesses; characterization of the evidence; and misstatement of the evidence. The Court refused to find plain error noting that D's assertions of plain error "disregard his trial attorney's initial decision not to move for a mistrial, not to accept the trial judge's offer of a curative instruction, and subsequent failure to object to the later statements in the DVD...." However, the Court did agree that portions of the DVD contained inadmissible evidence and was improper under 3507. It went on to say that no trial judge should be presented with an issue involving 3507 and a third party at trial. The State should have redacted the objectionable comments *sua sponte*, and the defense attorney should have filed a motion *in limine* to exclude if the State had not done so. AFFIRMED.

OWENS V. STATE , (7/29/10): HOSTILE WITNESS/CAUTIONARY INSTRUCTION



D was convicted of PDWBPP. During direct examination of one of its own witnesses, the State requested that the W be declared “hostile.” The trial court did so. D then requested a cautionary instruction explaining that W was declared hostile. The trial court did so. On appeal, D claimed that the trial court committed plain error by instructing the jury that the State’s witness was “hostile.” D alleged that the instruction violated Article IV, Section 19 of the Delaware Constitution, requiring that judges not instruct the jury on questions of fact. The Court held that the judge’s instruction was not an expression of opinion regarding the veracity or weight of W’s testimony. The most anyone could have taken from the instruction was that W was not favorable to the State’s case. Further, even if there were error, it would not be plain error due to the strength of the State’s case. AFFIRMED.

LOPEZ V. STATE, (8/2/10):LEVEL V/BOOT CAMP



In August 2006, D pled guilty to Trafficking Cocaine and was sentenced to 2 years and 6 months at Level V, to be suspended after 2 years for 18 months at Level III. D’s sentence was suspended for Boot Camp diversion. After completing the Level V portion of his Boot Camp sentence, D was charged with a VOP. The trial court continued his previously imposed sentence, but ordered that D be held at Level V until space became available at Level IV. D moved to modify his sentence. His motion was denied. In November 2008, D violated again and the court reimposed his deferred sentence of 2 years and 6 months at Level V.

In August 2009, the trial court modified D’s sentence to reflect that D was entitled to Level V credit for 2 months previously served. D filed another motion seeking credit for an additional 92 days of Level 5 time. The trial court amended its order crediting D with only 5 days. On appeal, D claimed the trial court abused its discretion by failing to credit him with the Level V time to which he was entitled.

The Court reversed the trial court’s ruling, citing that “[t]his Court has held that a defendant must be given credit for all time previously served at Level V when further

incarceration is imposed following the finding of a VOP. The Court also held that D was entitled to credit for time spent at Level V waiting to enter the Boot Camp program. The Court found that D was entitled to 92 days, which was representative of his time at Level V waiting to enter Boot Camp and time when he was held at Level V in default of his bond in 2007 and 2008. REVERSED/REMANDED.

GUY V. STATE, (8/3/20): BATSON/ALLEN-ACCOMPLICE LIABILITY/3507



D was convicted of murder 1st, felony murder, PFDCF, attempted robbery 1st and conspiracy. D appealed from a denial of a Rule 61 motion for post-conviction relief raising 3 claims of error. First, D argued that he was entitled to an evidentiary hearing because the trial judge failed to conduct a complete *Batson* analysis of the State's peremptory challenges of several African-American members of the juror panel. Secondly, D argued that his counsel were ineffective for allowing four W's out-of-court statements to be introduced into evidence. Lastly, D claimed that under *Allen v. State*, the court erred by failing to instruct the jury that to convict him of murder 1st, they must determine his mental state with regard to the murder charges and that the killing of the victim was foreseeable.

On appeal, the Court held that the trial court properly denied the *Batson* claim as procedurally barred under Criminal Rules 61(i)(3) and (4). Although D argued that his *Batson* claim should be reconsidered under the "interest of justice" exception, he failed to show subsequent legal developments that revealed that the trial court lacked the authority to convict or punish him, the previous ruling was clearly erroneous, or that there was an important change in the factual basis for issues previously posed. The Court said that the "miscarriage of justice" exception lacked merit.

D's ineffective assistance claim was also rejected. D's counsel agreed to allow an officer to testify about the contents of §3507 statements made by four W's as a tactical decision to undermine the credibility of those W's. Therefore, counsel's representation did not fall below an objective standard of reasonableness. Lastly, the Court held that D read *Allen* out of context. To accept D's claim that the trial court should have instructed the jury to make an individualized determination of D's accountability for causing a man's death while attempting to rob him would put the legal concept of accomplice liability into chaos and would be an incorrect interpretation of the *Allen* decision. AFFIRMED.

HALL V. STATE, (8/13/10): RIGHT TO FAIR & IMPARTIAL JURY



D was convicted of assault in a detention facility after he engaged in a fight while he was in lockup, awaiting transport to prison. When the matter proceeded to trial, a correctional officer was seated as a juror. The juror disclosed that he was a C.O., but on *voir dire*, he did not respond to the question of whether any juror members knew D. The judge questioned the C.O. as his knowledge of and relationship with the C.O.'s who would testify. Neither the judge, nor defense counsel asked if the juror had had any contact with D. The C.O. remained on the jury.

After D appealed, the matter was remanded for an evidentiary hearing. It was found that the C.O. had worked on D's prison tier four times and in the building that housed D eight times before the start of trial. His job required him to look into D's cell on 64 different occasions. Further, he was also responsible for handing out mail on D's tier. Moreover, D testified that he knew the juror prior to being incarcerated because of interactions at a Wawa store where the C.O. also worked. However, the C.O. claimed that because of the large number of inmates he had no recollection of any specific interaction with D. The trial court found that the juror "was not impermissibly biased and did not infect the jury in any way."

Back on appeal, D contended that the trial court erred by failing to remove a C.O. from a jury panel and for failing to conduct an adequate *voir dire* of the juror to establish the details of the juror's employment and previous contacts with D. The Court concluded that law enforcement officers are not automatically disqualified from serving as jurors. However, it reversed the trial court's ruling because the circumstances of the relationship between the juror and D established an impermissible probability of unfairness. The reasoning behind the holding is that the juror had an interest in the outcome of the case because he was responsible for preventing violence on D's tier. REVERSED.

ROBINSON V. STATE, (8/16/10): BRADY/ IMPEACHMENT

D was convicted of murder 1st, PFDCF and robbery 1st. Prior to trial, the State provided D with various reports. At trial, D attempted to cross examine one W with a statement he believed W made to police. The statement was arguably exculpatory. W's name had been blacked out in the report. It turns out that the statement was of someone else. D also sought to CX an officer who took an out-of-court statement of another W. The judge ruled that D would need to CX the other W for purposes of impeachment.

On appeal, D argued that the State failed to provide him with exculpatory evidence in violation of its obligations under *Brady v. Maryland*. The Court held that the

subject matter of the alleged *Brady* issue was made known on the second day of trial when it was clarified that the portion of the report D was referring to during CX belonged to another witness. D should have realized, prior to trial, that the State's police report, as redacted, was not a continuation of the same interview because the original report was also sent to D and contained information revealing who made the statement at issue.

D also argued that it was an abuse of discretion for the judge to deny him the opportunity to question an officer regarding inconsistencies or contradictions in a W's prior statement.

The Court determined that the use of prior statements for impeachment purposes under *D.R.E.* 613(b), and not its introduction as independent substantive evidence under §3507, was properly denied because the officer had no personal knowledge of the truth/falsity of facts recounted in the statement. The judge did not abuse his discretion by requiring D's attorney to follow the traditional sequencing procedures for impeaching a witness with a prior inconsistent statement. **AFFIRMED.**

SCHNEIDER V. STATE, (8/19/10): DUI/ INFORMANT

An unidentified informant called police and claimed that they saw D sitting in his car in a parking lot at a Little League field watching a game and drinking alcohol. When the officer arrived, she talked to the informant who pointed at the car and described the situation. D then drove out of the parking lot and the officer followed then stopped him. She did not observe any erratic driving or other unlawful behavior. D filed a motion to suppress arguing that the officer did not have reasonable articulable suspicion to conduct the stop and subsequent search. This motion was denied. On appeal, the Court found that the officer's stop and search was reasonable because the tip was not completely anonymous. The informant waited for the officer after making the phone call and spoke to her in person. Further, the informant seemed to have particularized knowledge about D. The Court also found there was a heightened concern for safety because the drinking occurred in the parking lot of a little league baseball field while a game was being played. **AFFIRMED.**

HILL V. STATE, (8/25/10):RANDOM MOTOR VEHICLE STOP



D was convicted of PWITD, maintaining and other offenses after an officer conducted a random vehicle registration stop of D's car. An officer was conducting random vehicle registration searches in New Castle. He learned that D was driving with a suspended license and that he lacked the proper registration and proof of insurance. D seemed nervous and fumbled with his paperwork during the stop. Further, a criminal check revealed that D "may be armed and dangerous." D was asked to step out of the car for an officer-safety pat-down. He was found to have \$390 cash in his pockets and

multiple cell phones were seen in the car, in plain view. D then gave permission to search the car. Two glassine baggies filled with 32 plastic baggies of crack cocaine and six oxycodone pills were recovered.

On appeal D asserted that the officers lacked reasonable articulable suspicion to prolong his detention after the pat-down. The Court, noted that police knew that D had driven with a suspended license and without proper registration; a license and criminal check warned that D “may be armed and dangerous”; D had \$390 cash and multiple cell phones; and that he seemed nervous. Therefore, the totality of the circumstances supported the search. **AFFIRMED.**

GUIFOIL V. STATE, (9/7/10): MOTOR VEHICLE STOP/INFORMANT



Informant told police that a white couple got into a Subaru Forester in a Super G parking lot with a child. Further information was provided that the couple was under the influence and beating the child and that the child was not restrained in the car. While police traveled to the parking lot, she obtained the license number from the informant. P stopped the car before it left the parking lot and found the child unrestrained driver. After tests, D was arrested for, among other things, DUI. D filed a motion to suppress which was denied. D was then convicted of DUI.

On appeal, D argued that the trial court erroneously relied on after acquired facts when it upheld the stop that was based on an anonymous tip. The Court held that there was reasonable suspicion to stop the car based on the facts known before the stop. The Court reasoned that a tip about readily observable criminal activity is more reliable than one concerning concealed criminal activity. An officer should be permitted to give greater credence to an anonymous report of unsafe driving when it is supported by: (a) the precise description of the car; and (b) the officer’s corroboration of the descriptive features of the vehicle and the location of its travel in close temporal proximity to when the report was made. Here, the stop occurred in a supermarket parking lot at midnight, where the car was leaving the parking lot as the informant continuously and contemporaneously relayed facts to the officer, with a detailed description of the car and its occupants. This established the reliability of the tip. The tip, as corroborated by the officer’s timely observations before the stop, established a reasonable and articulable suspicion of unsafe driving. **AFFIRMED.**

MILLS V. STATE, (9/20/10): CALCULATING TIME-SENTENCING

D was convicted of shop-lifting and sentenced to the maximum sentence of one year at Level 5. Pursuant to 11 *Del.C.* §4204 (1), the trial court's order included a 6 month transitional period, following D's incarceration, to be served for 3 months at Level IV work release followed by 3 months Level III probation. The trial court ordered that *D be held at Level V pending space availability at Level IV*. D filed a motion to modify his sentence which was denied.

On appeal, D argued that holding him at Level V until space available at Level IV exceeded the statutorily-authorized one-year sentence for his conviction. The State argued that D could be released anytime during the last 6 months of his sentence due to good time credits, thus D could not prove that his sentence would exceed the one-year maximum. However, the Court reversed the ruling because, "[o]n its face, the 'hold at Level V' provision causes the overall sentence imposed by the Superior Court to exceed the one-year maximum sentence." REVERSED.

JOHNSON V. STATE, (9/24/10): DOUBLE JEOPARDY/ JOINDER&SEVERANCE



D was convicted of burglary second degree and PFDCF. He initially requested that a third charge of PDWBPP be severed. This was granted. After the State's case and for strategic reasons, D requested that the charge be rejoined so he could concede possession without conceding guilt of the burglary. The trial court denied this request.

On appeal, D argued that conviction of burglary second degree, which includes the element of possessing a weapon, and PFDCF amounted to double jeopardy. The Court held that the language of the weapons statute itself specifically states that a D convicted of PDWDCF 'shall serve the sentence for the felony itself before beginning the sentence imposes for possession of the deadly weapon during such felony.' This is an indicator that the Legislature intended for D to be sentenced for each of those crimes. The Court also ruled that the trial court has discretion with respect to joinder of offenses and that it did not abuse that discretion in this case. AFFIRMED.

RUSSELL V. STATE , (9/29/10): 3507 & 3513 FOUNDATIONAL REQUIREMENTS

D was convicted of several sex-related offenses against a 4-year-old girl. Prior to playing the V's statement to the CAC & statement to her mom, she testified generically

and not about anything for which he was specifically indicted. Nor did her testimony address any of the incidents she talked about in her prior statements. D objected to the statements because of improper foundation. On appeal, D argued that his objection below did address the V's failure to touch on the events as required prior to introduction of a statement under §3507 & §3513 (out-of-court statements of minors). However, the Court found D's objection was only as to failure to address voluntariness. Thus, the issue on appeal was not preserved. The Court then found that the alleged error was a "material defect . . . apparent on the face of the record." AFFIRMED.