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

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**SHAW V. STATE, 7/6/11: WITNESS'S SPONTANEOUS STATEMENT ON THE STAND/ PROSECUTORIAL MISCONDUCT**

D and 2 Co-D's allegedly attempted to steal a car from a dealership. D was charged with Burglary 3<sup>rd</sup>, Attempted Theft of a Motor Vehicle and Conspiracy 2<sup>nd</sup>. The State *nolle prossed* the Burglary. At trial, the State presented the Co-D's as witnesses. Upon questioning by the State, each Co-D spontaneously referred to D's previous involvement in stealing cars. D made two separate motions for a mistrial which were denied. Instead, the judge gave a curative instruction following the first comment but D turned down the opportunity for another curative instruction after the second comment. D was acquitted of Attempted Theft but was convicted of Conspiracy 2<sup>nd</sup>.

On appeal, D argued that the judge erroneously denied his motions because it was improper for the State to "elicit . . . highly prejudicial testimony" from the Co-D's. The State was not permitted to present evidence of D's previous conviction for motor vehicle theft as it constitutes evidence of a "prior bad act." The Court ruled that there was no abuse of discretion because, "[a] mistrial is appropriate only when there are no meaningful or practical alternatives to that remedy or the ends of public justice would otherwise be defeated." The curative instruction presumptively cured any prejudice. Additionally, there was no prosecutorial misconduct because the prosecutor did not know that the Co-D's answer to questioning would refer to D's prior bad acts. Further, D's acquittal of the Attempted Theft shows there was no prejudice. **AFFIRMED.**

**HUDSON V. STATE, 7/6/11: DRUG-RELATED MOTOR VEHICLE STOP**



Police conducted surveillance of a suspect whom they knew had received, sold, and abused heroin. They saw the suspect drive his Nissan into a gas station parking lot. They then saw a Buick enter that lot. There were 3 people in the Buick and D was driving. One passenger exited the Buick and entered the Nissan then, shortly thereafter, got out of the Nissan and reentered the Buick. Both cars drove off in different directions. Police lost track of the Nissan but followed the Buick into another gas station parking lot. D got out of the car, went into the store then returned to the car within a minute. Police

approached the car and ordered everyone to put their hands in the air. D complied then he lowered his hands. D refused to comply with police any further so police grabbed him out of the car and put him on the ground. D continued to resist so police tasered then arrested him. Crack was found on D and a clear plastic sandwich bag and digital scale were found in the Buick. D was charged with drug-related and other charges. The trial court denied a subsequent suppression motion and D was convicted of various charges.

On appeal, D argued that police lacked the requisite reasonable suspicion to have seized him and that officer safety was not justification to support the seizure. The Court concluded that D was seized when ordered to put his hands in the air. Here, police had significant knowledge of the dealer's actions in selling drugs out of his car outside of Wilmington. The police officer's experience allowed her to testify that what they witnessed was indicative of drug activity. Police had a legitimate concern for officer safety to conduct search based on D's failure to comply with their orders. **AFFIRMED.**

**KLINE V. STATE, 7/11/11: D.R.E. 403**



D called 911 then became unresponsive. Two officers, one of whom was V, arrived at the scene where D was lying unresponsive on a sidewalk. They took her to the hospital. V interviewed D and prepared a summary of the interview. Eight months later, Delaware State Police Internal Affairs Unit received an anonymous complaint against V accusing him of physical assault. D later admitted that she was the complainant. The complaint was dismissed as unfounded. Several months later D filed another complaint against V, alleging that he had raped her. This complaint was also dismissed as unfounded. D was charged with Falsely Reporting an Incident.

At trial, the State introduced testimony that D had made another false report for which she was not tried. However, that report came after the one for which she was on trial. D argued that under *D.R.E. 403*, this evidence was unduly prejudicial. The judge agreed and instructed the jury to disregard the testimony. On appeal, D argued that the instruction was too late as the jury was already subjected to prejudicial evidence. The Court stated that it presumes that a prompt curative instruction adequately directs the jury to disregard improper statements and that the jury follows those instructions, curing any error. In this case counsel never moved for a mistrial nor objected to the curative instruction; therefore, it is presumed that the instruction cured any error. **AFFIRMED.**

**BIRCKHEAD V. STATE, 7/12//2011: SUFFICIENCY OF EVIDENCE/  
CONSTRUCTIVE POSSESSION**

Police executed a search warrant of D's home after investigating his sale of drugs out of the home. D was not present, but police questioned those who were present. The owner stated that D lived in an upstairs bedroom and that she believed he had taken one of her handguns into his bedroom. Police saw 20 small bags of crack and some marijuana in living room. They found marijuana in D's jacket pocket and in a backpack found a grinder, digital scale with white residue and numerous bags. In his bedroom, they found 15 bags of marijuana, a handgun, gun ammo and D's wallet and ID cards. Another resident told police that D sold drugs from the home while he acted as a lookout.

At trial, each W changed their story, stating that D did not live in the house, did not take the handgun, and did not deal drugs. D moved for judgment of acquittal. This was denied and D was convicted of PFBPP, PWITD Marijuana, Maintaining a Dwelling, and Conspiracy 2<sup>nd</sup>.

On appeal, the Court found evidence of constructive possession of marijuana for purposes of PWITD because: the drugs were found inside a jacket that contained D's wallet and id; and the jacket was in D's bedroom. The Court similarly ruled with respect to the Maintaining charge. There was sufficient evidence of Conspiracy based on testimony that other resident acted as look out for D's drug sales. Finally, there was sufficient evidence of possession for purposes of PFBPP based on homeowner's testimony that she believed D took her gun and that no one else would take it and because police found gun in D's bedroom close to his other items. **AFFIRMED**

**TURNER V. STATE, 7/12/2011: ACCOMPLICE LIABILITY/ CONSPIRACY/  
PRETEXTUAL STOPS**



D was front-seat passenger in a car that was pulled over for a seatbelt violation. D had a warrant for his arrest and admitted to having \$700 cash. All 3 occupants were nervous. Police saw a box of sandwich bags on the backseat. They arrested D. Police had the driver get out of car. He had a bulge in his pocket and police discerned that it was cocaine. Through a search incident to arrest of the driver, police found 4 bags of cocaine, a razor blade, and small baggies. They also found 44 baggies of cocaine and a digital scale with white residue on it.

On appeal, D argued that the judge abused his discretion when he issued an accomplice liability jury instruction. Police characterized the 3 people as being involved in a classic drug arrangement where 1 carries the cash; 1 carries the drug supply; and the

other carries individual baggies of drugs. Under this theory, D was a principal and not an accomplice because he carried the cash. Thus, D argued, the instruction was improper because he was charged with conspiracy and the culpability level for accomplice liability is lower than that required for conspiracy. The Court found that the judge did not err and the jury was able to decide whether D was an accomplice or a principal.

D also argued that the stop was pretextual. In his argument to the trial court, D cited *State v. Heath*, 929 A.2d 390 (Del. Super. 2006) which holds that such stops are unlawful under the Delaware Constitution. The trial court ignored this issue and did not address it in its decision. Astonishingly, the Supreme Court held that D's reliance on another Superior Court decision which was never appealed was not sufficient to preserve his claim of a violation of the state constitution for appeal. The Court has side stepped this issue before. This decision, however, contains the biggest effort to avoid the issue. [Editorial Comment] AFFIRMED.

### **MATOS V. STATE, 7/13/11: DEFINITION OF "BUILDING"**



D had lived with V1, in her apartment for about 1 ½ years. They had a falling out then a recent reconciliation over the course of a weekend. D left again. D returned a few days later while V1 was at work and her kids were at school. The dog was in a crate in the apartment. D set fire to bedding in the bedroom and watched as the flames grew. He left. The fire and smoke destroyed the apartment and killed the dog. The building in which the apartment was located contained 3 separate apartment units, 1 on each floor. V1's apartment was on the 1<sup>st</sup> floor. V2's apartment was on the 3<sup>rd</sup> floor. V2 noticed the smoke and called the fire department, by the time the fire was put out the 2<sup>nd</sup> and 3<sup>rd</sup> floor apartments had also suffered damage. D was arrested on, among other charges, Arson 1<sup>st</sup>, Burglary 2<sup>nd</sup>, Reckless Endangering 1<sup>st</sup> and Cruelty to Animals.

At trial, the judge found that the statutory definition of "building" applied to Arson 1<sup>st</sup> which deemed V2's apartment a separate building. Thus, the Arson charge was reduced to 2<sup>nd</sup> degree. As to the Reckless Endangering, the indictment alleged that D "... did recklessly engage in conduct which created a substantial risk of death to [V2], by starting a fire or causing an explosion in an occupied building." For this charge, the judge held that the ordinary definition of "building" applied, reasoning that, unlike Arson, "building" is not an element of the offense and the section 222 statutory definitions apply only where the specific defined term is used in the criminal code. D was found guilty and appealed. On appeal, the Court agreed with the judge and reasoned that "building" was only added to the indictment to provide specific context, and is not an element of the charge and therefore the statutory definition does not apply. AFFIRMED

**GOMEZ V. STATE, 7/28/2011: PRIOR CONVICTIONS/ 3507/ INTERPRETERS/ SPECIAL ACCOMMODATIONS FOR WITNESSES**

D was charged with raping his 5-year old niece and sentenced to 40 years in prison. The judge ruled that evidence of prior allegation by V's cousin of similar conduct was not admissible. However, at trial, V's mom alluded to the prior conviction. D did not request a curative instruction. D did move for a mistrial which the trial court denied.

On appeal, D argued that the judge abused its discretion in denying the motion. The Court concluded that mom's testimony created an impermissible inference that D had committed the offense for which he was being tried. A mistrial was required because the testimony was so closely related to the evidence that had been excluded. This was so prejudicial that it far exceeded the threshold where a curative instruction could have remedied the prejudice suffered. The Court provided guidelines on other issues for purposes of retrial.

3507: "We recognize the temptation for the State to ask relatively benign questions to comply -- but only technically -- with the foundational requirements of section 3507. The consequence is that that tactic may force defense counsel to attempt to vigorously cross examine the witness, which in turn may antagonize the jury." Thus, the State must make a good faith effort to adhere to the requirements of 3507. Interpreter: must be sworn in before participating in proceedings. Special accommodations for child witnesses: is permissible if the state moves for and demonstrates a substantial need for relief. (ie, v child carrying teddy bear to stand).REVERSED.

**WRIGHT V. STATE, 8/1/2011: INSUFFICIENCY OF EVIDENCE/ V'S PRIOR CONVICTIONS IN SELF-DEFENSE CASE/ REBUTTAL EVIDENCE**

D struck V in the head causing severe trauma. D claimed he was acting in self-defense and did not strike until V grabbed his arm, but V claimed that D struck him without provocation. After a 2-day trial, the Family Court found that D had failed to show that he had acted in self defense and found him delinquent of Assault 1<sup>st</sup>, Reckless Endangering 1<sup>st</sup> and Offensive Touching.

On appeal, D claimed there was insufficient evidence to support his adjudications. He also challenged 2 of the judge's evidentiary rulings. The first ruling permitted the State to present rebuttal evidence that had not been offered in its case-in-chief and that had not been produced to defense counsel before the second day of trial. The second ruling excluded evidence of V's violent past, which would have supported D's claim of self-defense.

D's sufficiency-of-the-evidence claim was not specific as to which elements the State failed to prove. Under a plain-error standard, the Court upheld the judge's delinquency findings. The judge properly exercised his discretion in deciding which

testimony to accept and reject and in finding that D failed to produce credible evidence that he subjectively believed that punching V was immediately necessary.

D also argued that the State's rebuttal evidence, maps and diagrams of the crime scene made by police between the first day of trial and the second day which occurred two months later, was discoverable. D argued that Rule 16(f) dictated the State had a continuing discovery obligation to produce rebuttal evidence and its failure to do so warranted its exclusion. The Court held that even if the State was obligated to turn over its rebuttal evidence D was not prejudiced because he did not seek a continuance to further investigate the evidence, and because the judge considered all legal and factual arguments pertaining to the new evidence.

Finally, the Court concluded that the judge did not err in denying D's motion to re-open his case and present evidence of V's prior convictions. D claimed he hit V because V swung at him not because he was aware of V's "violent" past. The Court concluded that, under *D.R.E.* 405(b), the evidence was inadmissible because D failed to show that he had a subjective belief that V had a history of violent conduct. **AFFIRMED.**

#### **PRESSEY V. STATE, 8/2/11: EXCITED UTTERANCE**



V was walking home from school when he was robbed at gun point by 3 men. As soon as the men were out of sight V ran home and banged on the door. His sister answered the door, and his mother testified that V was "scared", "hysterical" and "crying." She went in search of V's assailants and enlisted the help of 2 police officers. When the mom id'd D as an assailant, police took him into custody. D had V's student id, cell phone and house key. V was taken to the scene and id'd D as one of the assailants. This was between 20 and 60 minutes after the robbery. V's mom testified that V was "still shook up, scared" and "still crying.". D objected to D's id by V as inadmissible hearsay. The judge overruled and allowed the statement in under the "excited utterance" exception to the hearsay rule.

On appeal, D argued that the trial judge abused her discretion in admitting V's out-of-court id of D. The Court looked to the 3 requirements for the "excited utterance" exception laid out in *Gannon v State*: (1) the excitement of the declarant must have been precipitated by an event; (2) the statement being offered ... must have been made while the excitement of the event was continuing; and (3) the statement must be related to the startling event. D conceded that the first and third had been satisfied, but argued that the act of returning V to the scene was a superseding event which caused V to be excited, not the prior robbery. The Court held that the all three factors were satisfied and found that

V's return to the scene was not a superseding event which caused his excitement. V was continuously excited from the robbery. AFFIRMED

**MILLER V. STATE, 8/11/2011: CONFIDENTIAL INFORMANTS/  
REASONABLE SUSPICION**

A C.I., who was not past proven reliable, told police that between 11 am and 1 pm 2 men would arrive at an apartment complex and back into 1 of 4 specific spots and deliver heroine to him. He said that the one man was darker skinned than the other and went by "O." The C.I. was in the parking lot and informed police when D pulled into the lot. Police then parked a cruiser nose-to-nose with D's car. D fled from the driver's side and was immediately arrested. Drugs and a handgun were then found in plain view in his car. D was charged and convicted of PWITD Heroin and PFDCF.

On appeal, D argued that his warrantless seizure was not supported by either probable cause or reasonable suspicion of criminal activity because police relied on an unproven, unreliable and possibly unknown C.I. and the information was not sufficiently corroborated. The Court concluded that D's seizure, which occurred at the time police parked in front of D, was supported by a reasonable suspicion of criminal activity. The tip predicted future behavior and was contemporaneously confirmed by the C.I. on the phone. Additionally, while the C.I. had not provided information to police before, police were familiar with him from prior interactions. AFFIRMED.

**BYRD V. STATE, 8/11/11: IN-COURT IDENTIFICATIONS**



Police responded to a house after a call about a burglary in progress involving 3 black males. Police saw 2 men fleeing from the house. One of the men was arrested and the other got away. Meanwhile, police arrested a 3<sup>rd</sup> man who was found running through the neighborhood. D was not arrested until 17 days later. At no time in the 6 months before trial did the officer at the scene attempt to do a pre trial ID. At trial, the State presented no physical evidence linking D to the burglary. However, the officer testified that D was 1 of the 2 men whose face he had caught a glimpse of for 1 second at the scene. D filed a motion to strike P's in-court ID as it was obtained under impermissibly suggestive circumstances. The motion was denied.

On appeal, the Court rejected D's proposed test for admissibility of first-time in-court IDs. It refused to apply the *Neil v. Biggers* standard used in pre-trial ID's. The Court noted that the inherent suggestiveness in the normal trial setting does not rise to the level of constitutional concern, and the remedy for any alleged suggestiveness of an in-

court ID is cross-examination and argument. Because the reliability of an in-court ID affects only the weight of the evidence and not its admissibility, the court held that the lower court properly admitted this evidence. AFFIRMED.

### **SULLIVAN V. STATE, 8/12/11: PROSECUTOR'S GOOD-FAITH BELIEF THAT WITNESS COULD LAY PROPER FOUNDATION**

D and Co-D were indicted for Robbery 1<sup>st</sup>, Conspiracy 2<sup>nd</sup>, Kidnapping and Wearing a Disguise During the Commission of a Felony. They allegedly conspired to rob V's after watching them retrieve \$2500 in winnings at Dover Downs. At D's trial, which was separate from Co-D's trial, the State sought to introduce into evidence a black cell phone recovered from Co-D during an unrelated arrest. The State's initial W could not offer first-hand testimony to confirm that the phone was found on Co-D at the time of his arrest, and was therefore granted a recess to find a W who could. The State then offered testimony from a second W who, as it was discovered on cross examination, also could not offer first-hand testimony placing the phone on Co-D when he was arrested.

D moved for a mistrial. The trial judge denied his motion concluding that the references to the phone were not worthy of a mistrial and that granting a mistrial would allow the State to track down the proper W for a new trial. The judge did instruct the jury to ignore any reference to the phone during their deliberations.

On appeal, the Court held that a mistrial is only appropriate in the absence of meaningful alternatives, and that normally judges can overcome errors with a curative instruction. The Court further held that to the extent the claim for a mistrial was based on prosecutorial misconduct, it was unsupported by the record, finding a good faith belief on the part of the prosecutor that one or the other officer would have been able to lay the proper foundation. AFFIRMED

### **JOHNSON V. STATE, 8/18/11: LOLLY INSTRUCTIONS**

D was a passenger in a car stopped for motor vehicle violation. The owner of the car, Co-D, was driving. Police knew that Co-D was associated with weapons. In the car, police found a handgun wrapped in a shirt and ammo in a sock. Subsequently a probation officer conducted an administrative search of D's bedroom and found a shotgun wrapped in sweatpants and more ammo. None of the clothing that hid the guns and ammo was collected. The charges against Co-D were dropped but the State proceeded against D.

On appeal, D argued that the State violated his right of access to evidence guaranteed by the due process clause by failing to gather the clothing that concealed each of the weapons, and that the court committed reversible error when it denied his request to give the jury a *Lolly* instruction. The Court applied the analysis used in *Deberry v. State* and concluded that the clothing would have been subject to disclosure under Criminal Rule 16 or the *Brady* Rule because it was material to D's defense and police had

a duty to preserve the clothing. Additionally, the Court held that the prosecution was not barred because the clothing was not case dispositive. However, D was entitled to a jury instruction requiring the inference that the missing clothing would have been exculpatory. Because of the possibility of D establishing that the clothing did not belong to him and the significant influence that may have had on the jury's decision, the court was unable to hold that the judge's failure to give D a *Lolly* instruction was harmless error. REVERSED AND REMANDED.

### **RAMIREZ V. STATE, 8/25/11: HEARSAY LIMITING INSTRUCTIONS**

D was charged with Burglary 2<sup>nd</sup>, Attempted Robbery 2<sup>nd</sup>, Wearing a Disguise During the Commission of a Felony, Conspiracy and Criminal Mischief. At trial, one of the V's of a home invasion identified D as the suspect. Police took D into custody and interrogated him. During the interrogation, police lied to D. However, D steadfastly denied any involvement. D stipulated to the presentation of the taped interview at trial. However, D requested a limiting instruction which the trial court denied. The State *nolle prossed* the Conspiracy and a jury convicted D of Criminal Trespass 1<sup>st</sup> (LIO of Burglary), and Criminal Mischief.

On appeal, the Court concluded that even though D agreed with the admission of the statements, he is still entitled to a limiting instruction upon request. In this case, the jury should have been told that the statements were not to be considered for their truth. Without the instruction, the jury likely misused this information. This potential for misuse required D's convictions to be REVERSED.

### **MAULO V. STATE, 8/30/11: PROBABLE CAUSE FOR DUI**



Around 9:00 am, a police officer saw D in his car and believed him to be speeding. The officer followed D and saw him make a right turn into a private residence without using its turn signal. D got out of the car and knocked on the door. The officer pulled into the driveway and asked to speak with D who claimed that he did tree work for the homeowner. However, he was unable to state the owner's name or the address of the house. The homeowner came outside and told the officer that she did not know D and had not hired anyone to do tree work. According to the officer, there was "a strong odor of alcohol" on D's breath and his eyes were "glassy, watery and bloodshot." D stated that he had been drinking until about 2:00am the night before. D had outstanding warrants and his license had been revoked. After his arrest and at the police station, D

failed 3 sobriety tests. A PBT revealed that D's blood alcohol content was 0.147. Subsequently, the trial court denied a suppression motion.

On appeal, D argued that the officer lacked sufficient probable cause to administer a breathalyzer. The Court concluded that, contrary to D's argument, he did fail the "counting test when he was asked to count backwards from 72 -53 and he counted back to 50. In addition, the totality of the circumstances included: (a) officer's belief that D was speeding; (b) D failed to use his turn signal; (c) the smell of alcohol on D; (d) D's speech was mumbled and slurred; (e) D's eyes were glassy, bloodshot and watery. The Court found these circumstances sufficient to support a finding of probable cause that D had been driving under the influence. AFFIRMED

### **SWAN V. STATE, 9/6/11: RULE 61/PROCEDURAL BARS/DEFENDANT'S BURDEN**

D and Co-D broke into V's house, shot and killed V in front of his wife and child and stole money. He was convicted of murder and sentenced to death. The conviction and sentence were upheld on direct appeal. D then sought post conviction relief on the following grounds: (1) trial judge erred in admitting the out of court statements of his co-defendant; (2) defense counsel was ineffective in failing to properly investigate DNA issues; (3) certain evidence was unavailable or was not presented to the jury which demonstrates his innocence and a new trial is required in the interest of justice; (4) defense counsel was ineffective in failing to rehabilitate certain jurors, or in failing to object to the trial judge's dismissal of said jurors; (5) his sentence is unconstitutional because it was not unanimously recommended by the jury and because the trial judge and jury did not find that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt; and finally, (6) defense counsel was ineffective in failing to conduct and adequate mitigation investigation, and failing to present that mitigation evidence to the trial judge and jury.

On appeal from the denial of post conviction relief under Rule 61, the Court found that D was not entitled to relief on any of his claims. His claim that the admission of Co-D's statements violates the confrontation clause of the 6<sup>th</sup> Amendment was procedurally barred because it was considered and rejected on direct appeal. D's claim that he was prejudiced by his counsel's failure to deliver on DNA evidence promised during his opening statement failed because the Court found that the DNA evidence would have been far from exculpatory and weighed against the fact that other evidence incriminating D was significant. The Court also concluded that the failure to present the DNA evidence coupled with the failure to present documentation of D's preexisting shoulder deformity [which would have undercut a theory that he had been shot in the shoulder during the crime] and his Co-D's exculpatory testimony did not satisfy the prejudicial prong of *Strickland*. Taken together that evidence did not "clearly establish" his innocence, nor create a "fair probability" that the jury would have entertained a reasonable doubt of his guilt.

The Court also concluded that D was unable to show that defense counsel was ineffective in failing to rehabilitate or object to the trial judge's exclusion of 6 prospective jurors who unequivocally stated that they would not impose the death penalty under any circumstances. As a matter of law those jurors were excludable. D was unable to overcome the strong presumption of counsel's competency as to the failure to rehabilitate 2 jurors who were "not sure" if they could recommend a death penalty because there was no showing that the trial court abused its discretion when it excused those two jurors. As to D's fifth claim, the Court concluded that Delaware's death sentence, which does not require the jury to find beyond reasonable doubt that the aggravators outweigh the mitigators, does not violate *Ring*. Additionally, this issue had been considered and rejected on direct appeal. Finally, D did not meet his burden of showing a reasonable probability that he would have received a different sentence had the jury and judge considered the following additional mitigators: life history; brain injury and mental health deficits. AFFIRMED