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

Cases Summarized and Compiled by

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**DELAWARE SUPREME COURT CASES
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FELICIANO V. STATE, 10/5/11: CCDW



D was evicted from his apartment. The landlord took a constable with him to ensure D had left. After no response to his knocks on the door, the constable entered and searched three open bedrooms to no avail. Finally, he knocked on the door to the master bedroom. D eventually answered. While the constable was talking with D, D pulled a gun out from under his t-shirt and threw it on sofa cushions. D was arrested then admitted that he knew he was evicted prior to that date but had returned to pick up some of his belongings. In fact, he stated that he was living somewhere else. D was charged with and convicted of Carrying a Concealed Deadly Weapon.

On appeal, D argued, for the first time, that the CCDW offense, as applied, violated his right to keep and bear arms for the defense of self, family, home and state. D argued that this provision of the Constitution permits him to keep a concealed weapon in his home. The Court rejected his appeal for 2 reasons: D failed to raise the issue below; and the factual predicate to D's argument was non-existent. Because D was evicted from the apartment and he was no longer living in the apartment, it was not his home. So, even if D were permitted to carry a concealed deadly weapon in his home, he was not permitted to do so in that apartment. AFFIRMED.

**KNOX V. STATE, 10/7/11: JURY SELECTION/ JUROR AS VICTIM IN
CONTEMPORANEOUS PROCEEDING**



D was charged with 3 counts of issuing a bad check > \$1000. During jury *voir dire*, the jury panel was asked if they knew either the prosecutor or defense attorney or anyone in their offices. There was a negative response by the potential jurors. However, the panel was never asked if they had been a victim in a case. About 5 days after D's

conviction of the 3 charges, the prosecutor told the court that he had just met with a victim in another case he was handling. That victim happened to be Juror #8 in D's case. D filed a Motion for a New Trial. The court ordered the parties to depose the juror. The questions focused on whether he knew the prosecutor or anyone in his office, not whether he was influenced by his experience as a victim of a crime. One and ½ years later, the judge denied D's motion.

On appeal, the Court concluded that “[w]hether the victim believes that justice would be performed or that the defendant might escape punishment in his case, can impact the victim’s ability to serve as an impartial juror in a contemporaneous proceeding.” “When a juror serving on a criminal trial is an alleged victim of a crime and is contemporaneously represented by the Attorney General’s office in the prosecution of the alleged perpetrator of the crime against the juror ‘victim,’ a mere inquiry by deposition into whether the jury knew the prosecutor or anyone in his office insufficiently probes the ability of that “juror/victim” to render a fair and objective verdict as a matter of law.” The Court stated that it believed that “a decision to inquire into juror bias solely by deposition is without precedent and should not happen again.” The Court found plain error and REVERSED.

GREGORY V. STATE, 10/19/11: IMPROPER PROSECUTORIAL COMMENTS

Police conducted a search warrant of a residence in which D was present. They claimed that D told them he kept drugs in a dresser in his bedroom. Police found an ID and receipt in D's name, two boxes of clear sandwich bags, four bags of marijuana, several bags with marijuana residue, a scale and over \$1,000 USC. D was charged on multiple drug offenses. At trial, D testified that he told police that the room in which they could, and eventually did, find the drugs was his brother's room. D argued there were other receipts in the room that did not have D's name on it and the State should have disclosed those. In closing, the prosecutor told the jury: it was their duty to assess D's credibility; D “tried to recharacterize and alter” the officer's testimony; and “the other issues raised by the defense . . . try to confuse and obscure the evidence, based on the physical evidence.” The judge overruled D's objection to the first comment. However, he sustained objections to the second and third statements. The judge then denied a motion for a mistrial.

On appeal, the Court found nothing improper in the statement regarding D's credibility. It found the statement regarding defense counsel attempting to “confuse and obscure the evidence” was improper. It assumed the statement regarding D's altering of the testimony was improper for argument purposes. However, the Court found that there was overwhelming evidence of D's guilt (D was in the room where drugs were found) and the statements did not go to a central issue in the case. The State's comments were in response to D's sort of “*Brady*” argument in his closing which did not appear to be supported by the record. AFFIRMED.

GANN V. STATE, 10/19/11: RESTITUTION



D was guardian for his relatives V1 & V2. D sold their house to pay for their residence at a nursing home. The house sold for \$320,000, and D deposited \$274,743.05 into the proper account. Eventually, his checks to the nursing home began to bounce. Then, he completely stopped making payments. D was removed as guardian and subsequently pled guilty to 2 counts of misdemeanor exploitation of V1 & V2 and 1 count of misdemeanor theft. The parties asked for a PSI to determine restitution. D claimed he owed no restitution and provided the Presentence Office with at least 10 exhibits.

At a hearing the court reviewed D's claim he owed no restitution and the DAG request that D pay restitution in certain amounts to various parties. Because the judge found D's documentation "haphazard and unreliable, she ordered restitution. However, she told D that if he had an independent accountant provide evidence otherwise, she would modify the amount. D filed a motion to modify but did not provide any independent accounting.

On appeal, D claimed he was denied due process in that he was not given a proper hearing and that the judge acted arbitrarily and capriciously in setting restitution. The Court found that D was given plenty of notice and opportunity to plead his case regarding restitution at a hearing. Additionally, the judge considered the reports and arguments by both counsel in arriving at restitution. While she awarded the nursing home more than presentence requested, she followed the request of the DAG who established that they were owed more money. Restitution to the State's Medicaid Fraud Unit was appropriate even though the State is not generally considered a victim for restitution because D agreed in his plea agreement to pay restitution generally – it did not state which parties. Finally, restitution for V2's funeral expenses was also appropriate. **AFFIRMED.**

TAYLOR V. STATE, 10/25/11: RULE 61/MITIGATION INVESTIGATION

D strangled his girlfriend whom he knew was pregnant with another man's child. D was later convicted of Murder. Defense counsel told the court that D did not want a mitigation case presented. D reviewed each of the mitigators with the court in detail and waived their presentation. However, counsel were permitted to put on his mother and other witnesses for "humanizing touches." D was sentenced to death. His conviction and sentence were upheld on direct appeal. Subsequently, he filed a motion for post

conviction relief. Of the several claims raised, only that involving the investigation of mental health issues for the guilt phase and additional evidence for the penalty phase is worthy of note. Several of his claims were procedurally barred.

D claimed that counsel were ineffective for failing to present an EED claim. The Court found that counsel's performance far exceeded that of attorneys in cases cited by D. Despite D's insistence on presenting no mitigating evidence, counsel diligently investigated potential mitigators. They "considered and explored different avenues of action" but they were "stymied at every turn." They retained a psychiatrist and a psychologist, multiple psycho-forensic evaluators, and a pastoral counselor. They interviewed D's family and gathered school, DFS and other records. To the extent there were records not obtained, "that was due more to the records' not being available and less to trial counsel's having been derelict. . . ." And, with those records, the original defense experts "largely stand by their pretrial opinions."

Additionally, "[a]lthough D instructed his trial counsel to pursue an 'all or nothing actual innocence' defense and present no mitigating evidence, counsel nonetheless retained two experts who questioned [D]'s truthfulness about possible mitigating factors. Trial counsel also strived to 'tease' out an EED defense for [D], and explored potential defenses based on mental illness and drug addiction. But, the original defense experts did not detect any brain damage to which [D] now points as 'missed' evidence in mitigation. Finally, the head trauma claims on which [D]'s new experts based their diagnosis were 'largely uncorroborated.'" AFFIRMED.

BROWN V. STATE, 10/31/11: CONSENSUAL STOP



At 1:00 a.m. police saw D standing at the corner of 5th and Madison Streets. As they approached, D turned the corner. They then alerted officers who were in a marked police car. The second set of officers saw D, pulled up beside him, and asked if they could talk to him. D responded "yeah, sure." Police exited the car and asked D his name. D gave the name "Amere Watson." Police believed D to be Brown and not Watson. So, an officer ran both names through DELJIS and reviewed the photographs associated with them. D had active warrants so police arrested him. They found drugs and money on him and he was charged accordingly. At a suppression hearing, D testified that police called out "Hold it" then D stopped and gave a false name. The court rejected D's testimony and concluded that D was not in custody while he waited for police to run the names through DELJIS. D was later convicted after a stipulated trial.

On appeal, the Court concluded that the encounter remained consensual while police ran the names because: it occurred in a public place; D consented to talk to police; D was not removed from the area prior to his arrest; and there was no physical touching or display of weapons. While D was not told that he was free to leave, there is no evidence that police told D that he had to wait during the DELJIS check. AFFIRMED.

RODRIGUEZ V STATE, 11/8/11: EXPERT WITNESS QUALIFICAITONS/ TIRE AND BOOT PRINT IDENTIFICATION



Firefighters responded to a series of 3 fires each on 2 separate days about 10 days apart. All fires were set deliberately. Investigators found and took photos of bicycle tire tracks and shoe prints that led from a road to the area where one of the fires on the first day had originated. Bicycle tire tracks were between 2 of the structures set on fire on the second day. Investigators made two castings of the tracks. They then found a bike in the area that belonged to D. The tires on the bike matched the tracks that had been found. D was arrested and charged with various arson and related offenses.

At trial, the State presented W as an expert in tire and boot track analysis. W worked in the Latent Print Section at SBI and acknowledged that his training was mostly in fingerprint analysis which is different from that involved in comparison of tire tracks and boot prints. Over 30 years ago he had taken a correspondence course in “Scientific Crime Detection” which covered shoe prints. About 20 years ago, he attended a 3-week FBI course on “Latent Fingerprint Contemporary Approaches,” of which a portion discussed footwear and tire impressions. He also read the first and second editions of a book about footwear impressions. Over D’s objection, the judge accepted him as an expert in tire tracks and shoe prints. D was acquitted by the judge on charges related to fires where there was no evidence linking D to the scene. However, the jury found D guilty of various offenses for the remaining fires.

On appeal, D argued that the judge erred in finding W to be an expert on tire track and footprint analysis. This analysis is part of a “separate and distinct forensic science discipline” than fingerprint ID. However, the Court found W’s training and “knowledge of the variables that could affect impressions” as well as the fact that he had previously testified as an expert in the field qualified him as an expert on the subject. Further, his experience and unchallenged qualifications as a fingerprint analyst were relevant as “tire tracks, shoeprints, and fingerprints are all form of impression evidence” consisting of

“experience based comparisons of impressions” and “identifying and comparing particular characteristics.” Also relevant to the Court was that D cross examined W on his training and qualifications. Thus, there was no abuse of discretion. AFFIRMED.

LEMONS V. STATE, 11/17/11: CONSPIRACY/CIRCUMSTANTIAL EVIDENCE



V was shot and killed by a single bullet to the neck. There had been a previous encounter between V and a group of people which included D. There were conflicting accounts as to what happened during that encounter. However, W's all stated that V had given either a “bump” or a “look” to Co-d or another individual was with D and Co-d. Some W's stated that Co-d complained to D about the slight and that D encouraged Co-d to retaliate. One W stated he saw Co-d brandish a handgun and put it in his pocket; another testified that Co-d gave gun to D. There was testimony that the two men pursued V. Ultimately, there was much conflicting testimony as to whether D or Co-d shot V. D was charged with Murder 1st, Conspiracy to commit Murder 1st and PFDCF. Co-d pled to Manslaughter. The jury acquitted D of Murder 1st and the weapons offense but convicted him of the Conspiracy charge. D moved for a judgment of acquittal which the trial court denied.

On appeal, D argued (1) that the evidence was insufficient to support an agreement between him and Co-d to retaliate against V; and (2) even if the evidence supported an agreement to retaliate, it did not establish that they agreed to kill V. The Court noted that “[e]vidence that is insufficient to support a conviction warrants reversal, but the mere fact that the evidence is in conflict does not.” The conspiracy charge rested on circumstantial evidence. However, the Court noted that “conspiracy is a crime long recognized as dependant on circumstantial evidence” and reasoned that the jury could choose which W to believe or base their decision on any combination of the testimonies. The Court further rejected D's claim that the conspiracy was based on his mere presence, finding that it was not “a *passive* happenstance” but the result of “*active* participation.” Even if a rational juror could not be sure who the shooter was, the juror could infer that the shooter intended to kill V and that homicide was the objective of the agreement. AFFIRMED.

WATSON V. STATE, 11/30/11:ESCAPE/ RESISTING ARREST/ “CUSTODY”

V, a DOC officer, transported D from SCI to Vaughn Correctional for medical treatment. Along the way, D slipped his hand out of a handcuff and hit V on the side of the head then tried to grab V's weapon. V pulled van over and sprayed D with pepper

spray. Eventually, V was able to get out of the Van. When D got out of the van, there was further struggle. V threw D down an embankment to get him away from his gun. D was arrested by police and charged with Escape Second Degree and Resisting Arrest with force or violence. At the end of the State's case, D moved for judgment of acquittal on both charges. The motion was denied.

On appeal, D argued that he was in V's custody the entire time so he did not escape. However, the Court concluded that D was in custody while he was in the van then got out of the van and ended up a distance away from V and the van, thus there was sufficient evidence for a jury to conclude there was an escape. A jury could also rationally conclude there was a subsequent resisting arrest after D was out of the van (i.e. out of custody) and V tried to take him back into custody. AFFIRMED.

FULLMAN V. STATE, 12/1/11: D.R.E. 403/ DISPLAY OF D's SCARS & TATTOOS



One evening, V1 was walking home when he saw a burgundy-colored, four-door car with tinted windows and a broken right headlight parked in his development. Three men walked toward V1, D pulled out what appeared to be an “uzi” and demanded V1's stuff. D obtained a cell phone, cigar, lighter and Excedrin. About 45 minutes later, V2 was likewise confronted. He saw the same car as V1 then two men from the car walk toward him. D pulled out a machine gun and demanded V2's stuff. D obtained the wallet but no money. Another 15 minutes later, V3 was similarly confronted with an “uzi-mac10.” D got a candle lighter from V3 but returned it to him. The men said they thought he was someone else.

Later, police apprehended D and others in a car matching the above description. Found in the car were some of the belongings stolen during the robberies. D went to trial on robbery and related offenses.

At trial, only V1 was able to identify D. But D brought out discrepancies in V1's statement about D's tattoo's and scars. So State requested and, over D's objection, was permitted to display D's tattoo and scar.

On appeal, D argued the display was unduly prejudicial. However, the Court noted that the judge performed a Rule 403 weighing of the probative value of the proffered evidence against the potential for unfair prejudice. Since D's “identification—both as a perpetrator of the robbery and the lone individual brandishing a gun—remained a key issue in this case, the evidence of [D]'s physical appearance was highly probative.”

Therefore, the judge “did not exceed the bounds of reason, or so ignore recognized rules of law or practice to produce injustice in having [D] display his facial scar and tattoos.” The Court found no abuse of discretion. AFFIRMED.

COOPER V. STATE, 12/5/11: FIRST TIME C.I./SPEEDY TRIAL/FLOWERS MOTION



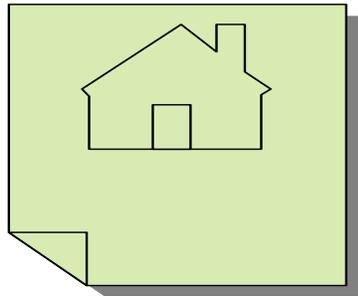
In 2008, police investigated D through the use of 2 controlled drug buys. After a search warrant was executed police found only cash on his person. After 2 years, police heard from other officers that D was involved in heroin sales and drove a Grand Marquis with a blue ragtop and chrome wheels. It was about this time that police arrested C.I. on unrelated charges. The C.I. was not past proven reliable and wanted to ‘work off’ his charges. He provided police with a clear description of D and claimed that he communicated with D to purchase drugs. Police had him communicate with D in the police car. D arrived at a designated time and location with children in the back seat. Police arrested d and found drugs and money on him. In a suppression motion, D argued he was under arrest at the time the police approached his vehicle and removed him at gunpoint; and the subsequent search of his person was invalid because the police did not possess probable cause to support this seizure. D also filed a *Flowers* motion arguing that his identity was essential to the litigation of his suppression motion.

After a suppression hearing, the State declined to disclose the C.I.’s identity. The judge ordered a “*Flowers*” hearing, but months later, the State had failed to secure the C.I.’s presence. Recognizing the case would have to be dismissed if the State did not produce the C.I. the judge reversed her decision on the *Flowers* issue and instead grant D a *Franks* hearing since he was refuting the facts in the warrant. This switch relieved the State of its burden to find the C.I. and placed it on D. The judge denied subsequent filings by D that were made in response to the judge’s “switch.” D could not obtain C.I.’s presence. Over a year after D was incarcerated, the court ordered the State to reveal the C.I.’s identity and it did.

On appeal, the Court concluded that the judge properly denied D’s Motion to Suppress. While the C.I. was not past, proven reliable, his information was corroborated by the officer’s viewing of his texts to D in arranging a sale and that D arrived just as the C.I. said he would. As to his speedy trial claim, the Court recognized that the length of delay between D’s arrest and trial was over a year and triggered a review of the *Barker* test. The Court concluded that D was the one who engaged in aggressive motion practice

and delayed trial. Also, the State made efforts to locate the C.I. and cannot be held accountable for delay resulting from their search for the C.I. The Court found that D's assertion of his speedy-trial claims was undercut by his motions prolonging trial. D suffered no prejudice because he has never denied that he had an independent means of locating C.I. Finally, the trial court was correct in denying D's *Flowers* motion because the C.I.'s information went solely to probable cause and not to an issue in litigation. Thus, disclosure was not required. AFFIRMED.

ANDREWS V STATE, 12/12/11: RESIDENCE/SEX OFFENDER REGISTRATION



D is a tier 1 sex offender and required to register the address of his residence with SBI within three days of changing his residence. The address he registered was that of his parents with whom he lived. One day, D went to his estranged wife's house with a police officer, pursuant to a no contact order, to remove some belongings he kept there. The officer believed D should have registered the wife's address as his residence. Because this address was not registered, D was interrogated by a detective. D admitted that he "goes back and forth" between his parents' house and his wife's house. He also acknowledged that he had stayed at his wife's house for more than 3 consecutive days. D was charged with and subsequently convicted of failing to register his wife's residence.

On appeal, D argued that the trial court erred when it instructed the jury that the definition of "residence" included both a permanent and temporary place of abode. The trial court adopted this definition from 11 *Del.C.* §1112(b), a statute unrelated to the charge at issue in this case. That statute specifically limits the definition to the purpose of *that* statute. Because the term was not defined generally in the code or specifically was to this charge, the trial court should have provided the jury with the commonly accepted meaning of the term "residence." Dictionary definitions of "residence" include an element of permanence. The Court found no evidence that D had been living in his estranged wife's house on more than a temporary basis. The State misconstrued the requirement that one has 3 business days to register as requiring that one register if he stays in one place for 3 days. A person only must register if he changes his permanent address. REVERSED.

NORCROSS V STATE, 12/21/11: RULE 61/FAILURE TO PRESENT MITIGATION EVIDENCE/INADMISSIBLE OPINION TESTIMONY/ D's UNDULY PREJUDICIAL COMMENTS RELAYED TO THE JURY/ JURY INSTRUCTION IN PENALTY PHASE/ DEATH STATUTE CONSTITUTIONAL

D and his Co-d were each convicted of murder and sentenced to death after breaking into V's house and killing V in front of his wife and child during a robbery. D's conviction and sentence were upheld on direct appeal. Subsequently, D filed a motion for post conviction relief which was denied. D appealed that denial. On appeal, D argued: (1) counsel's failure to produce certain mitigating evidence during the penalty phase was ineffective assistance; (2) that the prosecution tainted the penalty phase with improper questioning and prejudicial comparisons; (3) that the jury instructions given at sentencing were improper; and (4) that the death sentence is unconstitutional because neither the judge nor the jury found that the aggravators outweighed the mitigators beyond reasonable doubt. The Court found all of these claims lacked merit.

D argued that counsel were ineffective because they failed to present the following mitigation: (1) testimony from 4 lay witnesses; (2) D's school records; (3) his Co-d's criminal record; and (4) testimony from psych experts. Focusing on the prejudice prong of *Strickland*, the Court found the omitted evidence would have been cumulative, irrelevant, or detrimental to his case. Additionally, the aggravators were overwhelming. D argued that if the evidence could have swayed even one juror it could create prejudice. The Court rejected this argument, noting that while this argument may have been relied on by the Third Circuit, it fails to account for Delaware's death sentence where, unlike other states, a unanimous jury is not required. Thus, the weight of 1 juror's position in Delaware is not comparable to 1 in Maryland for example.

Next, the Court analyzed D's claim of improper questioning by the State, based on 5 solicited comments. The arguments as to the first 3 were procedurally barred. The final 2 comments lacked merit: the opinion testimony of W1 that "anyone can change his ways but a man without a conscience is potentially dangerous;" and the testimony of W2 about D's comment while watching NYPD Blue that "the first time you kill someone its hard but the second time it gets easier." W1 was a Sergeant in the Marines who had supervised D and was in a position to give an opinion on D. Also, D had ample opportunity to rebut the opinion. Finally, D was fully able to nullify any impact at trial of the comment relayed by W2.

D's argument that the elimination of the phrase "conscience of the community" from the jury instructions was improper was rejected. The Court concluded that nothing mandates this specific language and that the language did not undermine the ability of the jury to perform its duty. Lastly, D's claim that Delaware's sentencing scheme is unconstitutional was rejected as procedurally barred. The argument had already been rejected on direct appeal and there was no reason in the interest of justice to override this procedural bar. **AFFIRMED.**

**WILLIAMS V STATE, 12/29/11: WAIVER EVEN WHEN T.C. RAISES ISSUE
*SUA SPONTE***



V was in her apartment doing crack when D knocked on her door. The 2 had a brief exchange then D left. D returned minutes later, V opened the door then D grabbed her by the throat, forced her to the ground and raped her. V escaped and was treated for sexual assault. DNA analysis supported her claim that D raped her. At trial, V began to cry during her testimony after being asked by the prosecutor about the incident. On cross examination, defense counsel asked V whether she remembered a meeting with the prosecutor and a social worker where she was told it would be okay to cry, to which V responded she had. On re-direct, the prosecutor asked, “Are you crying because I told you should cry?” V said she was crying because that was how she felt. After additional re-cross and re-direct on the issue, the judge excused the jury and held a *sua sponte* sidebar discussing the exchange. He eventually decided not to issue a curative instruction. D was convicted of Unlawful Sexual Conduct 1st.

On appeal, D claimed that the prosecutor engaged in misconduct by prodding or coaching V to cry in front of the jury. Even though the judge had raised the issue *sua sponte* at trial and there was a lengthy discussion about the issue, the Court concluded that D had waived the issue. Not only had D not raised the claim, when the issue was raised he failed to request a mistrial or pursue a curative instruction. Even under a plain error standard, D’s argument fails. The Court found that D’s allegation of misconduct directly contradicted earlier statements he made that he did not believe V was coached to cry, and that there is no evidence in the record that the prosecution’s preparation was improper. Accordingly, there was no plain error. AFFIRMED.