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

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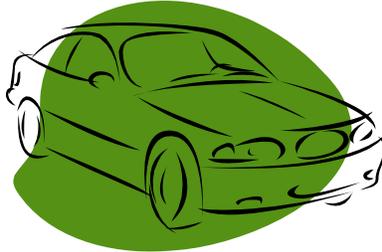
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**DELAWARE SUPREME COURT CASES  
APRIL 1, 2012 THROUGH JUNE 30, 2012**

**DENNIS V. STATE, (4/12/12): CARJACKING**



V started her car then went back to her house to get some items. When she returned, she saw D drive off in her car. At trial, the judge proposed a jury instruction that carjacking required a finding that: D took possession/control of V’s car; the taking was w/o V’s permission and D acted knowingly and unlawfully. At the State’s request, the court added that the taking was accomplished within V’s immediate presence. D requested that the court require the jury to find that the taking was “by coercion, duress or otherwise.” The judge denied that request. D was convicted of carjacking.

On appeal, the Court found that the clear language of the carjacking statute did not require coercion or duress as necessary elements. The use of the phrase, “or otherwise” revealed that coercion and duress may potentially be elements, they are not required elements. Contrary to D’s argument, reading the carjacking statute this way did not render it the same as Theft of a Motor Vehicle. For the theft, unlike carjacking, V does not need to be present during the taking. **AFFIRMED.**

**KIRKLEY V. STATE, (4/3/12): IMPROPER PROSECUTORIAL COMMENTS**

D was charged with Attempted Robbery 1<sup>ST</sup>. D’s defense was that there was no use of force and thus, he was guilty of Attempted Theft. In the State’s case, the prosecutor stated: “[t]he State of Delaware is bringing this charge because it is exactly what [D] did[;]” and “[t]his is more than a theft, which is why, exactly why, the State of Delaware is bringing forth attempted robbery in the first degree.” Defense counsel immediately objected. The judge found that the comments were not improper and that, even if they were improper, the pattern jury instruction that an attorney’s personal beliefs are not evidence would cure the problem.

On appeal, the Court found that the statements were improper vouching and that the jury instruction did not cure the prosecutorial misconduct. Using the *Hughes* 3-factor test, the Court concluded that the misconduct prejudicially affected D because: (1) this was a factually close case, (2) the statements concerned a central issue, and (3) the curative effort by the judge was not given immediately after the prosecutor’s statements.

Here, the Court focused on the fact that the prosecutor's comments were made in the closing rebuttal and the judge made no immediate curative statement to the jury. **REVERSED and REMANDED.**

**TAYLOR V. STATE, (4/17/12): W'S IMPROPER TESTIMONY/RIGHT TO COUNSEL**



V was found dead in the woods in NJ having been shot 3 times in the head. D, V and 2 Co'd's had been in a drug business together. One night, 2 co'd's entered a motel room the group was sharing to find V on the floor, shot three times in the head and D with a gun tucked in his waistband. D was charged with murder. At trial, Co-d 1 testified that he was afraid to cooperate with police for fear of possible repercussions. He claimed this fear was the result of having been assaulted a couple of times and insinuated that D had something to do with it. D moved for a mistrial. The judge denied that motion but issued a curative instruction. D moved to suppress testimony of a W with whom he shared a prison cell before being charged with V's murder. D had told W that he shot V 3 times in the head and that he had been visited by an attorney who would represent him in all matters going forward. The objection was overruled.

On appeal, the Court found that Co'd's insinuation that D had something to do with prior assaults did not give rise to a mistrial because a mistrial "is appropriate only where there is a manifest necessity or the ends of justice would otherwise be defeated" and the testimony at issue "was a single sentence in a trial that lasted 11 day." Also, the judge did not err in denying D's motion to suppress W's testimony. D had argued that police were not permitted to indirectly question him knowing that he was represented by counsel. The Court concluded that there was no constitutional violation. The Sixth Amendment was not implicated because adversarial proceedings had not yet begun. Additionally, Fifth Amendment rights had not attached either, since D had not been charged with V's murder. Nor was the Delaware Constitution implicated because "the record does not reflect the police were 'clearly made aware of [Taylor's] desire to deal with police only through his counsel during the investigation leading to the arrest.'" **AFFIRMED.**

**STANFORD V. STATE (5/1/12): REASONABLE SUSPICION TO CONDUCT A POLICE STOP; "STOP"**

D was standing on a street corner in what was considered a "high crime"/"high drug" area. Police drove toward him, but did not activate their lights. D looked around. Police stopped in front of D and when one officer opened his door, D dropped a cell phone and drink then ran. Police ordered D to stop; D continued to run. D then threw a

black object - later determined to be a handgun. Before trial, D moved to suppress the handgun because police did not have reasonable suspicion to justify the stop. The motion was denied. The judge further ruled that for constitutional purposes, the “stop” occurred after D had begun to run. After a bench trial, D was convicted with Possession of a Deadly Weapon by a Person Prohibited and Carrying a Concealed Deadly Weapon.

On appeal, the Supreme Court affirmed the conviction. D argued that the police did not have reasonable suspicion to stop him. The Court disagreed, holding that the police had reasonable suspicion to stop him because, upon seeing police, D abandoned his personal belongings and fled in a high crime area. D further argued that the “stop” occurred at the moment the officers parked their police car near him, at which point the police officers did not have reasonable suspicion to justify stopping him. The Court disagreed, holding that the stop did not occur when the police parked their car because police officers are permitted to walk up to and ask questions of a person on a public street, no emergency lights were activated by the police, and no other indications were given that Stanford that he was not free to walk away. Rather, the Court ruled that the “stop” occurred when the police ordered D to stop, because it was at that point when a reasonable person would believe her or she was not free to ignore the police. **AFFIRMED.**

#### **WATERS V. STATE, (5/9/2012): CONSIDERATION OF DISMISSED CHARGE AT VOP HEARING**

D entered a guilty plea in November of 2007 to Assault 2<sup>nd</sup> and Offensive Touching and he was sentenced to 7 years at Level 5 suspended for 2 years of probation. In November 2009, D entered a guilty plea to Rape 4<sup>th</sup> and was sentenced to 15 years at Level 5 suspended for 12 months at Level 3. Another two years elapsed and a contested VOP hearing was held. The court considered a Criminal Mischief charge that had been dismissed. That charge was based on damage to a vending machine at a Level IV facility where he had recently resided. The trial court continued D’s sentence but imposed restitution for the damage. D appealed on the grounds that the Criminal Mischief charge was irrelevant because it had been dismissed and that he should have been sent to Level 3 rather than Level 4 for his VOP.

On appeal, the Court noted that a judge has authority to revoke probation and impose a new sentence on the grounds that D was charged with new criminal conduct, even if that new charge is dismissed. Further, a judge has a right to impose monetary damages on D since 11 *Del.C.* § 4204 (c)(9) requires restitution to V when he experiences monetary loss due to the D’s criminal conduct. Thus, the judge appropriately considered criminal mischief.

The Court also noted that the judge must impose either the full or lesser sentence when D is violated. Here, D was sentenced within proper limits and there was no evidence that the judge acted vindictively or arbitrarily so D’s claim that he should have received Level 3 was without merit. **AFFIRMED.**

**ALLEN V. STATE, (5/10/12): CLEAN HANDS DOCTRINE/JUVENILE RESTITUTION**



D, a juvenile, and Co-d went to a vacant farmhouse owned by V. D lit a torch and failed to extinguish it. This led to a fire that caused significant damage to the farmhouse. D was adjudicated delinquent on 1 count reckless burning and one count of criminal trespass. V was told that the farmhouse was an imminent public safety hazard and had to be demolished. Demolition began without a demolition permit and continued until completion despite a stop work order. V was fined \$2,300 for working w/o a permit and violating a stop work order. At D's restitution hearing, V sought \$30,642 in costs from D, including \$21,000 for demolition and \$5,000 in reward money. The judge ordered \$24,508.25 in restitution and excluded from the stipulated amount employee expenses, attorney's fees and \$4,000 of the reward money.

On appeal, D argued that V's demolition costs should be excluded from restitution because V failed to get a permit, and therefore had "unclean hands." The Court held that "clean hands" doctrine allows a court of equity to refuse relief to a party whose inequitable conduct relates directly to the claim presented. Here, the doctrine had no application because V's conduct had nothing to do w/the farmhouse fire, and V's failure to obtain a permit had no bearing on the cost of demolition or the fact demolition was required b/c of D's conduct. D also argued the judge failed to consider D's inability as a juvenile to generate income and to pay restitution. The Court found the judge did not abuse its discretion because it recognized that D was young and it was a lot of money, V must not be required to pay for a juvenile's destructive conduct. And, the amount of restitution awarded was less than V's stipulated costs. **AFFIRMED.**

**RICHARDSON V. STATE, (5/14/12): 3507 & VOUCHING/ LIMITING INSTRUCTIONS**

D lived with his aunt from 2001-2005. During that time, many other relatives, including the aunt's two granddaughters, V1 & V2, also stayed at the house on and off. In 2009, v's made claims that D had sexually assaulted each of them. They gave videotaped statements to a CAC interviewer. At trial, v's testified in detail that when they were at the house and between the ages of 6 & 10, D sexually assaulted each of them. The State introduced their statements under §3507. The Interviewer testified as to her own

experience/qualifications, the interviewing techniques she used, the disclosure process by the child and her opinion as to truthfulness of children. In fact, she stated that it is very apparent when a child is telling the truth. D was found guilty by the jury on four of six charges, and was sentenced to 50 years in prison.

On appeal, D argued that the trial court abused its discretion when it allowed the interviewer to testify as she did. Under § 3507 out-of-court statements may be used as affirmative evidence if a “proper foundation” is laid: (1) establish the statement was voluntary, (2) W testifies about the content of the prior statement and its truthfulness; and (3) W is available for cross-examination. If (1) is satisfied, the interviewer’s testimony must be limited to authentication. Here, the Court found that the testimony went far beyond that and amounted to improper vouching -- testimony that directly or indirectly provided an opinion on the truthfulness of V’s. The admission of this testimony was clear and reversible error.

D also argued that the judge should have given a limiting instruction as D requested after V-1 testified that she was “nervous and embarrassed” about testifying in front of her family. The State wanted the jury to understand V-1 was embarrassed in order to explain her flat demeanor. But, such a statement also engenders empathy and appeals to the jury’s emotions. The Court, while disagreeing with the judge’s refusal to give a simple curative instruction, found no abuse of discretion. **REVERSED AND REMANDED.**

In *dicta*, the Court noted that § 3507 was enacted to address the problem of a “turncoat witness,” and was not intended to allow the parties to double the impact of the witness’s evidence – if a witness fully recalls the events and is not contradicting out of court statements, the prior statement simply supports the in-court testimony. Thus, it noted a potential issue regarding cumulative evidence.

**MURRAY V. STATE, (5/14/12): PROBATION OFFICER’S SEARCH OF D NOT KNOWN TO BE ON PROBATION**



Members of the Governor’s Task Force had a hunch that individuals in a car were involved in a drug transaction. So, they followed the car out of a high crime area in the city down I-95 and stopped the car for speeding. D was a front seat passenger in the car. Police obtained ID from the driver, D and the back seat passenger. The ID was given to a probation officer who learned that D and the backseat passenger were both on Probation. The backseat passenger had a capias. The probation officer had D get out of the car then patted him down. He asked him whether a bag on the front passenger floor belonged to

him. He said no. Upon questioning, the driver said it was her bag and said probation officer could search it. Prior to the search, D said it was his bag. A search revealed drugs. Officers admitted that when they stopped the car, there was no reasonable suspicion that D was involved in illegal activity, that he had any contraband or that there was any threat to officer safety. They claimed, however, the probation officer was permitted to search D and his bag simply because he was on probation. D's motion to suppress was denied.

On appeal, the Court held that questioning D constituted a baseless investigation after the conclusion of traffic stop. A stop may not extend beyond the scope of the objective justification for the stop, unless police have acquired reasonable suspicion of the subjective justification. Further, Delaware case law and regulations prohibit suspicionless probationer searches. Over dissent objection, the majority held that the driver's consent to the search of the bag was irrelevant, because it was given during an illegal detention and subsequent to an illegal pat-down and questioning of D. **REVERSED.**

#### **NEYHART V. STATE, (5/16/12): ROBBERY & "FORCE"**

D and co-d (Turner) were charged with Robbery 2nd and Conspiracy. D hit V's car with a pipe and co-d moved V's legs out of the way. V had limited use of his legs because he was paraplegic and when legs were moved, he slid out of truck and leaned against truck Co-d then fished for V's wallet out of his pants pocket. Co-d & D took \$80 in cash and then gave his wallet back.

D moved for a judgment of acquittal arguing that the State failed to show that D used force during a theft with the intent to "compel the owner of... property.. to deliver up the property." During deliberations, the jury asked whether "to deliver up the property" means V had to physically hand it up to D. The judge responded, "no." D was convicted of Robbery 2nd but acquitted of conspiracy.

On appeal, D argued that there was insufficient evidence that "the force that was used against V was intended to compel V to deliver up his wallet and further that his wallet was never delivered up in accordance with the statute." The Court noted that the statute does not require the property actually be delivered up by V. Rather; the statute requires that D use force for the purpose of compelling the owner of the property to deliver up the property. The evidence was sufficient to prove beyond reasonable doubt that D acted with the requisite intent. A reasonable juror could conclude that D intended to compel V to "deliver up" money when he smashed Vs truck and demanded money from V. **AFFIRMED.**

#### **TURNER V. STATE, (5/16/12): ROBBERY & "FORCE"/INCONSISTENT VERDICTS**

See Neyhart for underlying facts. V argued that her acquittal of conspiracy required an acquittal of the robbery charge. On appeal, the Court noted that D's robbery

conviction did not depend on her co-d being convicted of Conspiracy, one element of which is an agreement to commit a crime. Under the “rule of the jury lenity,” the Court may uphold a conviction that is inconsistent with another jury verdict if there is legally sufficient evidence to justify the conviction. D made the same unsuccessful argument as Neyhart regarding the element of “force” in robbery. **AFFIRMED.**

### **COBLE V. STATE (5/30/12): HABITUAL OFFENDER STATUS**



D pled guilty to Assault 2<sup>nd</sup>. The trial court determined that D qualified as a habitual offender under § 4214(a) and sentenced him to life in prison. On appeal, D argued: (1) the State failed to prove D committed the required number of felonies needed in order for him to be branded a habitual offender; (2) the certified records from North Carolina were insufficient to establish proof of a conviction in that state; (3) life in prison qualifies as cruel and unusual punishment in this case; and (4) the sentencing hearing was defective since the presentence report lacked information from 2000-2010, the prosecutor made prejudicial comments, and the judge acted with a close mind.

The Court concluded that the State properly relied on three prior felony convictions. The certified records from North Carolina were sufficient to establish his prior convictions even though they did not include a copy of the reverse side of the plea form which contained his signature. D acknowledged his convictions in open court and the documentation that was presented was accurate. The State was not required to offer any particular documentary evidence.

Additionally, the Court noted that Crosby v. State, explains how to determine whether a habitual offender sentence is disproportionate under the 8<sup>th</sup> Amendment. Proportionality review is reserved only for the “rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.” D’s extensive record of violent felonies and several VOPs, rendered a disproportionality analysis unnecessary.

Lastly, the prosecutor did not make prejudicial comments during sentencing. He recapped factual circumstances of D’s sexual attack on a 63 year old woman and D’s history of sexual assaults. There was nothing in the record to indicate that the judge acted close mindedly, nor that the judge did not take into consideration the fact that D had been out of jail from 2000 to 2010. **AFFIRMED.**

## **JACKSON V. STATE, (6/5/2012): FORFEITURE OF PROFIT OF DRUG SALES**

D pled guilty to two counts of delivery of cocaine. The State sought forfeiture of D's motorcycle as a profit traceable to D's illegal drug sales under 16 Del. C. 4784(a)(7). Following his arrest, D filed a petition seeking the return of the motorcycle that had been seized. The trial court held a hearing on D's petition. The State presented evidence that D had a history of dealing drugs for cash and that D had purchased the motorcycle with a large roll of cash. The trial court concluded that the State had met its burden of establishing probable cause that the motorcycle was subject to forfeiture pursuant to 16 Del. C. 4784(a)(7) as a profit of D's drug sales.

On appeal, D argued that the State could not obtain forfeiture without filing an *in rem* forfeiture application. The Court held that the State was not required to file such an application because a hearing on D's petition for return of the motorcycle was conducted under Rule 71.3(c). D also claimed the trial court erred in finding that the State had probable cause to seize the motorcycle, and that the State failed to prove a nexus between the motorcycle and illegal drug sales. D alleged he was self-employed making \$120,000 per year. However, he produced no evidence to support his claim and an income tax return had not been filed since 1996. D also falsely claimed to have purchased the motorcycle from a cousin and had purposefully hidden the motorcycle to avoid its seizure. Consequently, the Court found no error in the Superior Court's denial of D's petition for return of property. **AFFIRMED.**

## **THOMAS V. STATE, (06/11/12): VIOLATION OF PROBATION HEARING/RESTITUTION**



D pled guilty to possession of drug paraphernalia and was sentenced to one year at Level 5 suspended for one year at Level II probation. A \$480 fee was also imposed. No restitution was ordered. Ten months later, at a VOP hearing, D was alleged to have failed to see his P.O. or pay his fines. The trial court found D in violation and sentenced him to one year at Level 5 suspended after 120 days in prison. The court also imposed a civil judgment of \$12,311.41 (\$10,006.80 of this penalty was restitution). On appeal, D argued that he was never notified that the civil matter would be addressed at his VOP hearing and, as a result, he could not present any evidence in his favor. The Supreme Court remanded for further proceedings because the trial court had failed to provide any evidence in the record to justify the civil judgment. **REMANDED.**

**GRIFFIN V. STATE (6/18/12): RIGHT TO CARRY A CONCEALED DEADLY WEAPON IN ONE'S HOME**



D was in the basement of his house opening boxes with a steak knife. Police responded to a report of a domestic dispute in the home. Upon arrival, D's girlfriend told officers that D was in the basement, had been drinking, and might have a knife. Police ordered D upstairs; D complied. Police cuffed D and a scuffle ensued. No one claimed D used the knife as a weapon. Eventually D was taken to the hospital and the knife was discovered when D changed into a gown. At trial, conflicting testimony was introduced as to what D actually told police about the knife. Police stated that when asked, D told them a knife was in the basement. D stated that he, in fact, told police that the knife in his pants. D was convicted of, among other things, carrying a concealed deadly weapon ("CCDW").

On appeal, the Court adopted the following three-part test used in Wisconsin: (1) whether D's interest in carrying the concealed weapon outweighed the State's interest in public safety; (2) if it does, whether D "could have exercised the right in a reasonable, alternative manner that does not violate the statute"; and (3) whether D was carrying the concealed weapon for a lawful purpose. The Court found that D was in his own home using the knife for an everyday activity; D's interest in carrying the knife is strongest in his home; it would be unreasonable to restrict how one carries a legal weapon in his own home; and D did not use the knife as a weapon. However, because there was conflicting testimony as to whether D told police that the knife was in his pants a new trial was required. If he did not tell them, then his Constitutional right to bear arms no longer protected him. If, on the other hand, he did tell police, he was protected by the constitution. At the new trial, the jury was to be properly instructed. **REVERSED AND REMANDED.**