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

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DELAWARE SUPREME COURT CASES
July 1, 2012 THROUGH SEPTEMBER 30, 2012

STATE V. HOLDEN/LUSBY, (7/10/12): SUBSTANTIAL DEFERENCE TO
MAGISTRATE'S FINDING OF PROBABLE CAUSE



P got tips from 2 “proven and reliable” C.I.’s that D1 was selling various drugs, lived at a particular address and drove a white Chrysler 300 (the latter 2 facts were verified). P watched D1 & D2’s house. They saw a man, W, wait in the driveway until D1 returned and walked in the house with him. Ten minutes later W left and P followed him. Subsequently, they stopped W and seized 6 oxycodone pills. W lied about where he had come from. P submitted an APC and got a warrant to search D1 & D2’s house. In a common area of the house, P found marijuana, a marijuana grinder and a scale. In the couple’s bedroom, P found empty prescription bottles for oxycodone, cocaine residue, and a 59.47 grams of cocaine. The judge granted a motion to suppress because the affidavit did not establish probable cause. The State appealed.

The Court stated that a “finding of probable cause only requires the proponent to show a probability, and not a *prima facie* showing, that criminal activity occurred.” Thus, “judges reviewing a magistrate’s decision to issue a search warrant must show substantial deference by affirming its issuance so long as some evidence in the record supports the finding of probable cause, even if the absence of other information from the affidavit might suggest that a reviewing judge could draw a negative inference about probable cause based on the facts not discussed.” Here, it did not matter that: (1) the affidavit did not mention a high level of foot traffic, as one of the informants predicted, and (2) that P could not establish whether W got his drugs at D’s house. The magistrate could conclude probable cause existed because 2 C.I.’s stated that D1 sold drugs from the house, including oxycodone, and P found evidence tending to corroborate these tips.

REVERSED AND REMANDED

MURRAY V. STATE, (7/10/2012): ILLEGAL SEARCH AND SEIZURE OF
PROBATIONER

D was a passenger in a car pulled over by the Governor’s Task Force for speeding. P had a hunch, but no reasonable suspicion of criminal activity. Not knowing whether anyone in the car was on probation, a probation officer, (“PO”), rather than a

police officer, ran ID's through DELJIS. The PO learned that D and the other passenger were on probation. That other passenger had a capias but the driver was neither on probation nor wanted. The PO removed D from the car and patted him down. No contraband was found. PO asked D if the bag on the floor that had been between his legs belonged to him. At first he denied it. Upon questioning, the driver claimed it was her bag and "consented" to a search. D then admitted it was his bag and that it had drugs in it. D was arrested, the driver was not given a ticket and the other passenger with the capias was not arrested. At a suppression hearing, the PO claimed that he was permitted to search a probationer at any time for any reason. D's motion to suppress was denied.

On appeal, the Court concluded that once P ended the investigation for the speeding, they had no authority to continue to detain the car. There was no reasonable suspicion that anyone in the car possessed contraband. Further, Probation and Parole Procedure 7.19 dictates that PO's must have a reasonable suspicion of illegal activity to seize or search a probationer. Here, the PO admitted that when he searched D, there was no reasonable suspicion that D was involved in illegal activity or that he was armed and dangerous. Thus, D's 4th Amendment rights were violated when the PO had him step out of the car then searched him and his bag. D's statement that the bag contained drugs did not preclude a finding of a constitutional violation because D was illegally detained when he made the admission. REVERSED

DISSENT: The continued investigation was a de minimis intrusion and the driver's consent to search the car cleansed the taint of the unlawful detention.

WILLIAMS V. STATE, (7/16/12): ESCAPE AFTER CONVICTION

D was charged with Robbery 2nd and was sentenced to 5 years at Level V, suspended after 4 years for 1 year at Level IV. The 4-year term of incarceration was designated as mandatory pursuant to 11 Del. C. §4202(k). Later, the court removed the mandatory designation for the 4 years, and ordered that the remaining part of the original 5 year sentence be served at Level IV. The §4202(k) designation was removed because the statute could not apply to D's particular sentence. Later, D left a Level IV facility on a pass and did not return. He was found guilty of Escape after Conviction. D moved for another sentence correction on the initial robbery charge, arguing that his modified sentence order was illegal because it increased his time at Level IV. The State responded that if the corrected sentence had been imposed at the outset, D would have been released seventeen days after his escape. D was later sentenced to 2 years at Level V for violating his Level IV probation for the Robbery 2nd charge.

On appeal, the Court held that the lower court did not err in modifying D's sentence which had the effect of increasing his Level IV time. Further, even if D could show that he should have been released prior to his escape; an illegal sentence does not justify an escape. A writ of habeas corpus is always available to determine the lawfulness of his incarceration. Also, D cannot defend an Escape after Conviction charge merely on the grounds that he should not have been on probation in the first place. AFFIRMED

RIDLEY V. STATE, (7/20/12): RIGHT TO BE HEARD AT VOP HEARING

D was sentenced on a VOP. On appeal, D argued: that the judge erred when it prevented him from speaking at the VOP hearing; and that his probation officer was biased and imposed unreasonable conditions upon him. The State conceded that the judge erred in preventing D from personally addressing the court at the hearing. It acknowledged that the matter must be remanded for a “supplemental” hearing but also contended that its evidence was sufficient to sustain the VOP finding.

The Court noted that a probationer is entitled to some minimal due process protections, including the opportunity to be heard in person and to present evidence in defense of the VOP charge. Thus, fundamental fairness required an entirely new hearing for consideration of all of the evidence presented in a fair and impartial manner.
REMANDED

WASHINGTON V. STATE, (7/25/12): INCONSISTENT VERDICTS



V was on the ground with a gunshot wound in his back. He told P that D was 1 of 3 or 4 black males that approached him. V saw D with a silver handgun while D was struggling to get V’s money. V tried to run away, but was shot in the back. A month later, P stopped a suspicious car. P arrested a Co’d as he was in possession of a silver .25 caliber gun. P then found a 9 mm gun on the ground next to the car. D was found hiding near the car. The .25 was determined to have been used in the earlier robbery/shooting. D’s DNA was found on the 9 mm.

D was indicted on two sets of charges, which were ultimately consolidated for trial. The jury found D guilty of Robbery 1st, Conspiracy 2nd, and Resisting Arrest. D was found not guilty of CCDW. The jury could not reach a verdict on PFDCF (from first event). On appeal, D argued that the robbery conviction should be reversed because it is inconsistent with the hung jury on the PFDCF. That is because the robbery charge was based on evidence that the gun used in the robbery was the same gun that was found a month later during the car stop. However, the Court found the two offenses- Robbery 1st and PFDCF - do not share a common element. The robbery requires only that D displayed what appeared to be a handgun. The PFDCF requires that D actually possessed a handgun. Therefore, the two verdicts are not legally inconsistent. Also, there was sufficient evidence to support the guilty verdict on the robbery. AFFIRMED

ARCURI V. STATE, (7/26/12): DRUG DETECTION K-9/AFFIDAVIT OF PROBABLE CAUSE FOR SEARCH WARRANT



A CI told P that D had more than 5 pounds of marijuana in his hotel room and his van. The P called in a drug detection dog, which had a positive reaction for the presence of drugs when he walked past D's hotel room and van. Based on this information, the P got a search warrant. Marijuana was found in the hotel room and the van. At a hearing, D argued the P's affidavit did not include sufficient information to support a finding of probable cause. It did not include any facts to explain how the CI was "past proven reliable," and did not provide any evidence that the dog is a properly trained, reliable, drug detection dog. The judge noted the affidavit was not as specific as it could have been. But an affidavit of probable cause does not have to be perfect. D was convicted of PWITD.

On appeal, the Court held the affidavit provided more than enough information to justify a finding of probable cause. First, the CI had prior dealings with police, and had met with the officer to confirm, by photo id, that D was the claimed drug dealer. Second, the information was very specific and the officer was able to confirm it. Third, the officer's affidavit indicated he called a specific officer and asked him to bring his dog to help with an investigation. It was inferable that the officer contacted another narcotics officer, who worked with a dog trained in narcotics, to help him confirm the tip. Lastly, the dog's alert for drugs at the van and the specified hotel room confirmed the tip and provided independent support for the probable cause determination. **AFFIRMED**

MOTT V. STATE, (8/1/2012): RESTITUTION/RES JUDICATA



D entered into a construction contract to build V a house. As D received payments under the contract, he diverted the funds away from subcontractors. Thus, 2 subcontractors filed liens against V's house. One also filed a lien against D. V then cross claimed against D, alleging that he failed to pay the subcontractors. D did not file a counterclaim against V at this time for an alleged \$20,000 debt V owed him for doing some work at his own expense. At the civil trial, the court found the subcontractor's work

to be satisfactory. At the subsequent criminal case, D was convicted of fraud and ordered to pay about \$68,000 in restitution to V. D argued that V's alleged debt was relevant as an "off set" to the restitution. The judge found otherwise.

On appeal, the Court found that D should have filed a counterclaim against V in the civil case for the debt in order for it to be considered in the restitution hearing. Generally, under Super.Ct.R. 13 (a), if an issue arises from the same transaction as the opposing party's claim and it could have been litigated in a previous proceeding and no compulsory counterclaim triggered a final resolution of dispute, then the claim may not be relitigated. Here, D's issue was not an exception to this rule. Under *res judicata*, a final judgment may be raised as a bar to a second suit in a different court regarding the same matter between the same parties. This applies to actions that could have been raised in an earlier proceeding. Because D failed to raise the counter claim at the prior civil suit, the \$20,000 could not be considered for restitution in this case. AFFIRMED

POWELL V. STATE, (8/9/2012): CHANGE OF VENUE/LIO INSTRUCTION/DEBERRY INSTRUCTION/GREAT WEIGHT OF JURY 'S DEATH RECOMMENDATION/RECKLESS KILLING/PROPORTIONALITY OF DEATH SENTENCE



D and 2 Co'd's planned to rob a drug dealer. The plan went awry and D fired his gun at the dealer as he fled the scene. The 3 defendants fled the scene and were followed by P. D threatened that if Co'd1 stopped the car, D would shoot at P. Despite D's threats, Co-d1 stopped abruptly, opened the driver's side door and fled. Almost simultaneously, the police car stopped and stuck the driver's-side door of car driven by Co-d1. A bullet was fired from the back of the car into the police car and fatally wounded V1. The same bullet grazed V2's neck as he got out and pursued Co-d1. Co-d2, who had been in the back seat with D, remained at the scene and claimed that D shot the gun. D fled but was later arrested with the gun used in the shootings. D's hands had gunshot residue on them. The DNA of all 3 defendants was found on the gun. P failed to conduct gunshot residue tests on Co-d2 or his clothes. At trial, D was found guilty of Murder 1st- for recklessly causing V1's death while fleeing the attempted robbery. However, he was acquitted of causing the death of a law enforcement officer. D was sentenced to death. Co-d1 was charged with Resisting Arrest and Failure to Stop at a Police Signal. And, Co-d2 was not charged with anything.

D made 6 arguments on appeal:

CHANGE OF VENUE: D argued that the judge erred in denying his request for a change of venue out of Sussex County. The Court looked to whether the judge erred by refusing to “presume” prejudice from the evidence D submitted in his venue transfer motion. D must establish that the publicity is so “highly inflammatory or sensationalized,” as to justify that presumption. The only “highly inflammatory” language was a handful of anonymous internet comments from persons who may or may not be Sussex Countians or even Delawareans. Thus, the judge did not abuse its discretion in denying D’s motion.

LESSER INCLUDED INSTRUCTION: D argued that the judge erred when he denied his request for a lesser-included-offense instruction of criminal negligence for the murder charges. The judge is legally required to give a “lesser-included” instruction if there exists a rational basis in the record to acquit D of the charged offense and convict him of an alternative LIO. D argued that the gun went off accidentally while resting on his lap, as a result of the car accident. However, while Co-d2 testified that everything happened at once, he later said that the shot went off after the accident. Thus, the judge properly found that there was no rational basis in the evidence to give a LIO instruction.

MISSING EVIDENCE INSTRUCTION: D argued that the judge should have given a *Deberry* instruction because P failed to collect Co-d2’s shirt to test it for gunshot residue. However, P only have a duty to collect and preserve specific evidence if they had a reason, at that time, to believe the evidence might be exculpatory. Due to the limited evidentiary value of gunshot residue and because samples from D’s and Co-D2’s hands were collected, there was little reason to collect and test the shirt. Even if there was a duty, D still would not have been entitled to a *Deberry* instruction because D did not show negligence, bad faith or substantial prejudice.

RECKLESS KILLING: D argued that imposing a death sentence for a reckless killing violates the 8th Amendment. The Court responded that a death sentence is proper where it is shown that D displayed “reckless indifference to human life.” Whether or not D specifically intended to kill V1, the evidence established that D evinced “reckless indifference” to the unjustified risk of death, by firing his weapon at police to avoid apprehension.

GREAT WEIGHT TO JURY’S RECOMMENDATION: D argued that the judge’s decision to afford “great weight” to the jury’s 7-5 death recommendation contravenes the statutory mandate that the trial judge, not the jury, has the ultimate authority to impose a death sentence. The Court concluded that it was the judge’s prerogative, under the statute, to give the jury’s recommendation “great weight.”

STATUTORY REVIEW OF DEATH SENTENCE: D argued that D’s sentence was disproportionate to those within the universe of cases to be considered under 11 Del. C. §4209(g). Even though the only other 7-5 cases involving a death sentence were much more brutal than the present case, the Court found this sentence to be proportionate. It

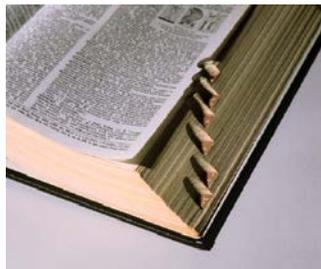
focused on the fact that D was the first person to be sentenced under the current statutory scheme for Murder 1st of an on-duty police officer. Thus, the Court's scrutiny required a broader legal context in assessing the proportionality of D's death sentence. The Court noted that the General Assembly has embraced the policy that violent crimes committed against on-duty police officers are more serious offenses. In assessing the heinousness of D's crime, the Court found that the judge correctly noted that "a policeman seemed destined to become a victim of D's crimes." Because D intentionally set in motion lethal forces, which had the likely consequences of causing death to innocent victims, and he did so without concern for those consequences, imposing the death penalty for a reprehensible reckless killing was not disproportionate. AFFIRMED

DIDOMENICIS V. STATE (8/13/2012): IMPROPER PROSECUTORIAL COMMENTS

D was charged with DUI. During his opening statement, the prosecutor admonished the jury about the dangers of drunk driving and the need to protect everyone on the road. He also pointed out that people who are arrested for DUI may have been arrested seven times before. D was convicted and on appeal argued that the prosecutor's improper statements amounted to misconduct that deprived him of a fair trial. Objections to the statements were not raised at trial so the Court reviewed them for plain error.

The State conceded that the comments were improper but argued that it was not plain error. The Court noted that the State may not focus on the larger concerns and interests of the community. It then concluded that due to the substantial evidence against D this was not a close case, the comments were not central to the case because they were not directed at D's credibility and the judge mitigated the harm with jury instructions. Therefore, the Court held that the improper comments did not deprive D of a fair trial. AFFIRMED

BROWN V. STATE, (8/13/2012): SUPPLEMENTING JURY INSTRUCTIONS/ REPRIMAND OF COUNSEL/ READING DICTIONARY DEFINITION



D was convicted of several drug-related charges. On appeal he raised three arguments: the judge (1) unfairly supplemented the definition of "delivery" to include not only the term "selling" but also the term "giving;" (2) abused his discretion by admonishing defense counsel in front of the jury; and (3) erroneously prohibited defense counsel from reading a dictionary definition during closing argument.

In support of his claim regarding the supplemented jury instruction, D argued that the judge's instruction improperly focused on D's testimony that he gave drugs to friends

and that the instruction was unfair because the judge did not change the instruction until after D testified. The Court held that the judge's instruction was an accurate statement of law that did not mislead the jury. The fact that the change coincided with D's testimony did not constitute error.

D's second claim was that the judge erred when he interrupted his closing to say he was dangerously "close to asking the jury to put themselves in D's position." The Court concluded that the interruption was not justified because counsel only asked a rhetorical question requiring common sense. Additionally, the admonition should not have been made in the jury's presence. Nonetheless, these errors were harmless because of overwhelming evidence against D.

Finally, the Court held that counsel is not permitted to read a dictionary definition of a term not defined in the code to a jury in closing argument without leave of the court. Otherwise, it would create the risk that the jury would accept a potentially incorrect definition. Because defense counsel should have proposed the definition before closing arguments, the Court concluded that the judge properly prohibited him from reading the definition. AFFIRMED

HUTT V. STATE, (8/15/12): "PARTY AUTONOMY"/LIO JURY INSTRUCTION



P1 was conducting surveillance when he saw D conduct what he believed to be multiple hand-to-hand transactions. P1 called P2 to detain D. When P2 confronted D, D admitted he had a "little bit of weed." D was taken into custody and a plastic bag with several small bags of marijuana and another plastic bag with a similar set of small empty bags were found. D was charged with PWITD, Possession of Marijuana Within 1000' of a School and Possession of Drug Paraphernalia. At trial, P opined that D possessed the marijuana for sale. D testified that he possessed the drugs but did not intend to sell them. He was convicted of all counts.

On appeal, D claimed, for the first time, that reversal was required because the judge failed to *sua sponte* issue a LIO instruction of simple possession. The Court noted that Delaware has adopted the "party autonomy" approach for jury instructions on LIO's. However, D argued that that approach does not foreclose a claim of plain error when there is no conceivable trial strategy for failing to make the request for the instruction. The Court concluded that defense counsel had an opportunity to review the instructions and was aware of the facts supporting the LIO. To the extent counsel's oversight deprived him of a fair trial, that claim should be addressed as an ineffective assistance of

counsel claim. Additionally, D failed to show that failure to issue the instruction affected the outcome of his trial. AFFIRMED

CURCY V. STATE, (8/16/12): HEARSAY/D.R.E. 801 (d)(2)(B)



D took weights from V's shed. V saw D, checked the shed and saw that the weights were missing. V then noticed that they were in D's minivan. When V confronted D, D apologized and asked for a price. V was not interested in selling the weights and called P. D was interviewed by P. In the interview, P recounted what the V said during her interview. P then asked D, "Does that all sound true?" To this, D responded, "Yes, sir." While V did not testify at trial, the State was permitted to introduce a summary of V's statement.

On appeal, D argued that the judge erred by admitting V's statement. However, the Court ruled that the jury was not required to rely on V's truthfulness but could rely on D's admission, as proof that the described summary accurately captures the night's events. Under D.R.E. 801 (d)(2)(B), a statement is not hearsay if the party against whom it is being offered "has manifested his adoption or belief in its truth." Here, D adopted the summary of events so the statement was admissible. AFFIRMED

MONCEAUX V. STATE, (8/22/12): SEX OFFENDER UNLAWFUL SEXUAL CONDUCT AGAINST A CHILD

D was a registered sex offender when he engaged in multiple sex offenses against a 15-year-old girl. Along with other offenses D was charged with 3 counts of Sex Offender Unlawful Sexual Conduct Against a Child, (SOUSC). D filed a motion to sever and the State filed an amended indictment that excluded the charges for Unlawful Sexual Contact. D filed a motion to dismiss the indictment arguing that 777A (SOUSC) is unconstitutional on its face and violates his due process rights. An amended indictment was filed eliminating all reference to D's sex offender status. Thus, there was a two-part trial where the judge found D guilty of SOUSC and the jury separately convicted D of the remaining counts.

On appeal, D argued that 777A is unconstitutional as it lowers the State's burden and diminishes D's presumption of innocence. It allows the evidence of D's sex offender status as evidence of D's character or prior bad to be used to show propensity for criminal conduct. The Court approved of the bifurcation in this case and held that bifurcation is required for all future trials under 777A. However, the issue in this case was moot. AFFIRMED

JENKINS V. STATE, (8/23/12):RAPE SHIELD LAWS/REPLAYING AUDIO TAPES DURING JURY DELIBERATIONS

V believed D to be her grandfather. As part of a pattern of abuse stretching back to V's childhood, D forced V to perform oral sex. D ejaculated in V's mouth and on her clothes. D also caused injury to V's lip. It was discovered that D's DNA was consistent with the sperm found on V and that D was not V's grandfather. D was convicted of Rape 2nd. D moved to have evidence that V was bisexual and a prostitute entered into evidence. D also sought to have evidence of a conversation the 2 had about V's sexual proclivities to show consensual nature of the sexual relationship. The court denied the motion without an *in camera* hearing under 3508.

On appeal, the Court stated that admissibility of V's prior sexual acts must be determined in light of the facts and circumstances at hand and the purposes of the rape shield law. Under 3509, evidence of V's sexual conduct is not admissible to establish consent. It can be used to attack credibility so long as it complies with the procedure in 3508. Here, the trial court did not error in denying a hearing under 3508 because D's claims in an affidavit did not provide detail. Additionally, contrary to D's claim, allowing a jury to replay a prior recorded statement of V's interview in the jury room rather than the courtroom was not error. It is presumed the jury followed the judge's proper instruction. AFFIRMED

ROSE V. STATE, (8/23/12): MAINTAINING A DWELLING



The first floor entrance of a residence led to D's apartment, stairs to Apt. B and a water access panel within a common vestibule in the house. Apt. B was unoccupied. P searched D's residence and found cocaine behind the siding on back of house and behind the water access panel in the common vestibule. In the apartment, P found a scale and empty smaller sized plastic bags in the kitchen. They found a cutting agent, hand held radios, binoculars and a monitor linked to 2 exterior cameras. D was acquitted of Trafficking and PWITD but convicted of Maintaining a Dwelling and Possession of Drug Paraphernalia. The judge found him guilty of an ammunition charge.

On appeal, D argued that there was insufficient evidence to support his Maintaining conviction. The Court stated that it must consider whether there is evidence of affirmative activity by D to use the dwelling to facilitate the possession, delivery or use of drugs. It concluded that based on the paraphernalia found in the residence and the testimony that it is used for purposes of selling drugs that there was strong evidence that D maintained the apartment for keeping cocaine. Additionally, possession is not an

element of Maintaining because they punish different behaviors – “possession” versus “use of dwelling for possession”. Finally, while the maintaining count referenced trafficking and PWITD, it did not limit the State to proving its case based solely on those offenses as predicates as they are not elements of maintaining. AFFIRMED

WRIGHT V. STATE, (9/4/2012): WAIVER OF RIGHT TO COUNSEL

D was charged with multiple weapons offenses and Resisting Arrest. On the day of trial, he informed his court-appointed counsel that he no longer wanted his representation. D signed the Waiver of Counsel form and the judge engaged in an extensive colloquy with him. After representing himself, D was convicted.

On appeal, D argued that the pre-waiver colloquy was legally inadequate and therefore he did not knowingly and voluntarily waive his right to counsel. The Court held that D’s claim of a constitutional violation lacked merit. During the colloquy, D’s answers were responsive and confirmed that he understood the judge’s questioning, and he displayed a sophisticated knowledge of the judicial process. Additionally, the judge made a knowing and voluntary waiver determination on the record. The Court found the record to demonstrate that D had made an informed and voluntary choice to proceed *pro se*. AFFIRMED

MCDUGAL V. STATE, (9/5/2012): RIGHT OF CONFRONTATION/REASONABLE SUSPICION/MJAQ

P saw D make a drug sale. Later, D was convicted on several drug and firearm offenses. On appeal he raised five arguments: a) his trial counsel provided ineffective assistance, b) his constitutional right to confront his accusers was violated when W’s were not called to testify, c) his constitutional right to confront his accusers was violated by the admission of a M.E.’s report into evidence without the M.E.’s live testimony, d) his arrest was invalid because P did not have a reasonable articulable suspicion to detain him, and e) there was insufficient evidence presented at trial to support his convictions.

The Court declined to address D’s allegations of ineffective assistance of counsel because they were not ripe for decision on direct appeal. Next, the Court found that the 6th Amendment right of confrontation is not implicated if a W is not adverse to the D. Here, the 2 W’s at issue were not adverse to D nor gave any statements against him. Thus, there was no error with respect to this claim. The Court also found that there was no violation of D’s right to confrontation when the M.E.’s report was entered into evidence without M.E.’s live testimony. Here the report was admitted solely to establish the identity and weight of drugs which were not issues in dispute.

As to D’s claim that P lacked reasonable articulable suspicion to detain him, the Court held that it lacked merit. It found that the testimony of the officer who observed D before, during, and after a drug transaction established reasonable suspicion. Finally, the Court viewed the evidence in the light most favorable to the State and found guilty verdicts were either fully supported by the evidence presented at trial, or were proper given that D had stipulated to his guilt. AFFIRMED

KOSTYSHYN V. STATE, (9/5/12): RIGHT TO COUNSEL/ COMPETENCY/
COMMENT ON THE EVIDENCE



V took out his trash and D, who owned land next to V, threatened him with a pickax. After V called P, D was arrested and charged with Aggravated Menacing, Possession of a Deadly Weapon During the Commission of a Felony and Terroristic Threatening. D's first appointed attorney was allowed to withdraw based on 3 separate instances including 1 where D called him an idiot in open court. After difficulty finding an attorney willing to represent D, the court appointed one who, 3 weeks later, moved to withdraw based on abusive and threatening behavior. After a hearing, counsel was allowed to withdraw and D proceeded *pro se* at a 6-day trial. At the end of trial, the jury asked whether the intent element of Terroristic Threatening was "to stab" or to cause "fear." The judge responded that the intent was to place V "in fear of imminent physical injury. D was convicted of all offenses.

On appeal, D argued that the judge erred in finding that he forfeited his right to counsel, failing to order a competency hearing and providing a misleading jury instruction. The Court determined, based on a standard in the 3rd Circuit that D did forfeit his right to counsel because his behavior was "sufficiently egregious" and his inability to work with multiple attorneys. With respect to competency, there is no clear criteria providing guidance whether D presents "indicia of incompetence." One factor not considered is whether D has social skills to interact with his attorneys. Rather, the focus is on whether D is able to understand the proceedings. The record reveals that D understood the proceedings. Finally, in context, the instruction given in response to the jury's question was a "written amplification of a phrase already contained in the instructions and no jury would have thought this judge intended to resolve a factual issue." AFFIRMED

BRADLEY V. STATE, (9/6/2012): AFFIDAVIT OF PROBABLE CAUSE FOR
SEARCH WARRANT/SCOPE OF SEARCH

In 2008, P applied for and were denied a warrant to search D's pediatric practice for child pornography upon receiving complaints that D performed lengthy or unnecessary vaginal examines on female patients. In 2009, a similar complaint was received. Based on the prior complaints, the 2009 complaint and additional investigation, P successfully obtained a warrant to search D's main office building and a "white" outbuilding for both electronic and paper medical files of 8 of D's patients. Prior to the search, D was taken into custody. When the warrant was executed, P noticed there was a main office building and 3 outbuildings. So, they contacted the DAG for direction.

However, before she arrived, P unilaterally concluded that the warrant authorized the search of all buildings on the property and began to search. P recovered a thumbdrive from one outbuilding that had a checkerboard design. P then opened a file and found a digital image indicative of child pornography. They obtained a new search warrant and continued a search and found a significant amount of child pornography on the thumbdrive. At a stipulated trial, the State introduced the video evidence of D committing sexual assaults against children. D was found guilty of 14 counts of Rape 1st, 5 counts of Assault 2nd degree and 5 counts of Sexual Exploitation of a Child.

On appeal, the Court found that probable cause supported the search warrant. The affidavit of probable cause must set forth, within its four corners, facts adequate for a judicial officer to draw reasonable inferences that an offense has been committed and that the seizable property will be found in a particular place. The Court found it was logical to conclude that the “checkerboard” building was the “white” outbuilding referred to in the warrant as it could be used to store records and to conduct medical examines, it was close to the main office and a finding that this was the building that D was seen taking a child.

The Court also held that the search did not exceed the scope of the warrant. The affidavit established a link between the patient files and the allegations of inappropriate examines. The records would be able to help police determine if the vaginal examines were part of an appropriate course of treatment as opposed to improper sexual contact. Though the affidavit did not state that D kept the medical files in electronic form, the Court believed it to be completely logical that medical files could be contained in that format. Thus, the Court found it reasonable for P to seize and search the thumb drive found in a computer in the checkerboard building. AFFIRMED

DRUMMAND V. STATE, (9/6/2012): D’s PRIOR TESTIMONY OBTAINED AS RESULT OF A VIOLATION OF THE RIGHT TO COUNSEL; ESTABLISHING PREJUDICE OF W’s UNRESPONSIVE STATEMENTS

D’s wife, V, lived in an apartment with their children. D was unable to live there because he is a convicted felon and he was banned from the apartment complex. V’s neighbor saw D in V’s apartment while V was out. When V came home, she found that her computer was gone so she reported it stolen. The neighbor overheard D confess to V that he stole and sold the computer. The individual to whom D sold the computer returned it. D told P he was on the property and stole the computer. D was charged with Burglary 2nd, Theft, Theft by False Pretenses and Criminal Trespass 3rd. After a first trial, the Court remanded because the judge erroneously allowed D to represent himself. On remand, the judge allowed the State, over D’s objection, to present D’s testimony from the 1st trial. Additionally, V made several statements at the second trial which were objectionable. However, D’s counsel failed to object. D was acquitted of burglary but convicted of the remaining charges.

On this appeal, D argued that admission of his testimony from the first trial was error because it had been given while he was erroneously permitted represent himself (a constitutional error). The Court found admission of D’s prior testimony to be harmless

error at worst as there was overwhelming evidence of D's guilt. While the admission violated D's rights, it was not structural error.

The Court then examined the issue of the judge failing to grant a mistrial *sua sponte* in response to testimony given by V to which D did not object. To constitute clear error, it must affect D's substantial rights, which generally means it must affect the outcome of the trial. D has the burden to establish prejudice from the error. To determine prejudice with respect to the "unresponsive" testimony V provided to which D did object, the court must examine four factors: (1) nature and frequency of the conduct or comments; (2) likelihood of resulting prejudice; (3) closeness of the case; and (4) sufficiency of the judge's efforts to mitigate any prejudice. Here, D was unable to show prejudice in admitting the testimony into evidence as the totality of the evidence against D was overwhelming. AFFIRMED

JOHNSON V. STATE, (9/7/12): INTRODUCING PRISON PHONE CALLS



D was convicted of murder and robbery. When P talked to D's girlfriend, she told them that D asked her to provide him with an alibi defense. D and his Co'D were arrested and D "spontaneously stated that police 'scared the truth' out of his alibi witness." P believed D would continue to try to pressure his girlfriend so they subpoenaed his prison phone calls. The calls contained incriminating statements and were introduced at trial by the State.

On appeal, D argued that his 4th, 5th and 6th Amendment rights were violated by the introduction of the calls. The Court concluded that there was no 4th violation because during each call a recorded message states that the call is being monitored and recorded. D's 5th and 6th Amendment claims failed because his argument that P must get permission from D's lawyer before recording the call was not supported by any law. Finally, there was no issue regarding a subpoena being issued for an indefinite period because it would end at time of trial. AFFIRMED

SMALL V. STATE, (9/11/2012): P's COMMENT ON D's RIGHT TO REMAIN SILENT/ MITIGATING CIRCUMSTANCES ARE NOT EXCUSES

D was convicted on two counts of Murder 1st along with other offenses and was later sentenced to death. During the penalty phase, the court permitted the State to elicit testimony from its expert regarding D's refusal to discuss the crime during his psychological evaluation that was not conducted for purposes of a defense at trial. On appeal, D argued that this violated his 5th Amendment right to remain silent. The Court concluded that, although the prosecutor's elicitation of D's refusal to discuss the crime

may have been improper, it was harmless under the circumstances given that his confession to police had been admitted at trial. Also, the prosecutor simply presented to the jury the information upon which its expert based his evaluation.

During the State's closing and rebuttal at penalty phase, the prosecutor repeatedly referred to D's mitigating circumstances as excuses or efforts to shift the blame. The Court concluded that this distorted the purpose of the penalty phase because it distracted the jury from its proper role and duty to weigh the aggravating and mitigating circumstances. Because the prosecutorial misconduct jeopardized the fairness and integrity of the penalty hearing, the Court found this to be plain error and reversed the imposition of D's death sentence and remanded for a new penalty hearing. **REVERSED (DEATH SENTENCE) AND REMANDED**

MICHAEL HUDSON, (9/18/12): UNRESPONSIVE/INADMISSIBLE COMMENT BY WITNESS AT TRIAL



D shot and killed his teenage son after his son allegedly threatened him with a baseball bat. D's son was missing for almost 2 months. D denied knowing anything about it. After finding V's corpse, P arrested D. At trial, the prosecutor asked W what W said to P about an incident that happened between him and D while V was missing. W recounted his statements and added that P replied, "Well, you are probably lucky to be alive." D objected and asked for a mistrial. The judge instructed the jury to disregard the comment. D requested and received a further instruction underscoring the first one. D was found guilty of all charges including homicide.

On appeal, D argued that the judge erred in not granting a mistrial. The Court noted that there was only one comment made and while D may have been prejudiced, there was significant evidence of D's guilt. Finally, the Court concluded that the prompt and more extensive instructions cured any error. **AFFIRMED**