

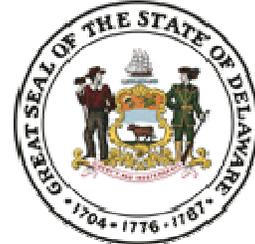
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**OFFICE OF THE PUBLIC DEFENDER**

LAWRENCE M. SULLIVAN, PUBLIC DEFENDER OF THE  
STATE OF DELAWARE



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

**Cases Summarized and Compiled by  
Nicole M. Walker, Esquire  
P. Ross A. Flockerzie, Law Clerk**

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## **IN THIS ISSUE:**

**Page**

<b>DABNEY v. STATE (January 14, 2009): RESENTENCING AFTER SUCCESSFUL APPEAL .....</b>	<b>1</b>
<b>HARRIS v. STATE: (January 23, 2009): PHYSICAL INJURY/ PWITD <b>**AFFIRMED IN PART, REVERSED IN PART, &amp; REMANDED**</b> 965 A.2d 691 .....</b>	<b>1</b>
<b>ALLEN v. STATE (Feb. 17, 2009): ACCOMPLICE LIABILITY/ KIDNAPPING INSTRUCTION/LOW INCOME AS MOTIVE/ D.R.E. 609-OTHER CRIMINAL CONDUCT<b>**REVERSED &amp; REMANDED**</b> 2009 WL 377164 .....</b>	<b>2</b>
<b>BROWN v. STATE (February 18, 2009): MAINTAINING A VEHICLE/ JURY INSTRUCTIONS <b>**REVERSED &amp; REMANDED**</b> 2009 WL 387076 .....</b>	<b>3</b>
<b>BINAIRD v. STATE (February 23, 2009): CONFRONTATION CLAUSE/ SUFFICIENCY OF THE EVIDENCE/PHYSICAL INJURY/ASSAULT 2009 WL 405284 .....</b>	<b>3, 4</b>
<b>NORMAN, JR. v. STATE (March 4, 2009): DRUG IDENTIFICATION/ BRADY MATERIAL 2009 WL 539909 .....</b>	<b>4</b>
<b>HARRIS v. STATE (March 10, 2009): SUFFICIENCY OF THE EVIDENCE/ CONSPIRACY 2009 WL 597092 .....</b>	<b>5</b>

**GREENE v. STATE (March 17, 2009): *MIRANDA*/ CONSPIRACY  
2009 WL 684107 ..... 5, 6**

**MICHAELS, et al. v. STATE (March 17, 2009): “TEARDROP TATTOO”/  
*D.R.E.* 403 & 404/ SPEEDY TRIAL/CUMULATIVE ERROR/DENYING  
PROSECUTOR’S REQUEST TO APPROACH DEFENDANT WITH  
HANDGUN IN EVIDENCE/ROBBERY  
2009 WL 684142 ..... 6, 7**

**BRODIE V. STATE (Jan. 26, 2009): SPEEDY TRIAL/DISCOVERY  
VIOLATION/RULE 16  
2009 WL 188855 ..... 7**

**STOW V. STATE (Jan. 20, 2009): PLEA WITHDRAWAL  
2009 WL 724133 ..... 8**

**STATE V. BRIDGERS (March 30, 2009): ROBBERY/AGGRAVATED  
MENACING/MULTIPLICITY  
2009 WL 824536 ..... 8, 9**

**REDDEN V. STATE (Jan. 14, 2009): FLIGHT DURING TRIAL ..... 9**

**DABNEY v. STATE (January 14, 2009): RESENTENCING AFTER SUCCESSFUL APPEAL**  
**2009 WL 189049**

D was convicted of rape and related offenses and sentenced to 16 years at Level 5 (10 for rape and 6 for the remaining charges). D's rape conviction was vacated on appeal. On remand, the trial court increased the sentence for the related charges from 6 years to 12 years. D appealed this increase arguing that the court resentenced him with a closed mind, provided no objective support and looked beyond the record.

In affirming, the Court found that the trial court did not have a closed mind because it listened to D and others. The Court also noted that while the sentence for the related offenses increased, D's overall sentence was four years less than when it included the rape conviction.

**HARRIS v. STATE: (January 23, 2009): PHYSICAL INJURY/ PWITD**  
**\*\*AFFIRMED IN PART, REVERSED IN PART, & REMANDED\*\***  
**965 A.2d 691**



D and police had an altercation when D fled from court. During the incident, D elbowed an officer in the forehead which left a red mark. The officer also got a scrape on his knee. No medical attention was required. D was convicted of PWITD, assault and related offenses. D appealed only the assault and PWITD convictions.

On appeal, D argued the officer did not receive a "physical injury;" thus, his assault conviction should be reversed. In reversing, the Court agreed that the officer did not sustain a "physical injury" because there was no "impairment of physical condition" and it did not "reduce the officer's ability to use the affected parts of his body." The Court rejected D's argument that circumstantial evidence was insufficient to establish the intent element of PWITD.

**ALLEN v. STATE (Feb. 17, 2009): ACCOMPLICE LIABILITY/ KIDNAPPING  
INSTRUCTION/LOW INCOME AS MOTIVE/ D.R.E. 609-OTHER CRIMINAL  
CONDUCT**

**\*\*REVERSED & REMANDED\*\***

**2009 WL 377164**



D was alleged to have participated in 3 separate robberies on 3 separate occasions with 2 Co-D's. It was alleged the 3 Co-D's cut holes in roofs of buildings to gain access to money. The 2 Co-D's pled guilty. D went to trial and was found guilty of robbery, burglary and aggravated menacing based solely on the theory of accomplice liability. D was found guilty of several offenses, including multiple robberies and one count of kidnapping. D made several arguments on appeal.

First, he argued that the trial court erred when it refused D's request for a § 274 instruction on accomplice liability. D argued that § 274 required the jury to consider that D may be less culpable than his Co-D's in that, unlike them, he did not use a gun. In reversing, the Court held that a § 274 instruction should be given in accomplice liability cases dealing with charges that are divided into degrees. The Court explained that even if D had the same *mens rea* as the principal, D may be less culpable due to the lack of aggravating circumstances with respect to his own conduct. The Court overruled previous decisions which prohibited the consideration of varying aggravating circumstances in determining the culpability of a principle and an accomplice. Two justices dissented and concluded that § 274 does not apply to aggravated menacing because that offense is not divided into degrees, which is a necessary predicate for §274.

The Court rejected D's second argument that the court improperly applied *D.R.E.* 609 in limiting D's cross of one Co-D regarding other criminal conduct engaged in with the other Co-D. Because D did not argue that the questions were allowed under *D.R.E.* 608(b) or 616, there was no abuse of discretion.

The Court agreed with D that the State drew an improper inference from the record by arguing D was living beyond his means as a stock boy and that is why he engaged in robberies.

Finally, the Court held that the trial court was required to give a *Weber* instruction regarding the kidnapping offense. D can only be guilty of kidnapping if the movement of the V was independent of and not incidental to the underlying crime.

**BROWN v. STATE (February 18, 2009): MAINTAINING A VEHICLE/ JURY INSTRUCTIONS**  
**\*\*REVERSED & REMANDED\*\***  
**2009 WL 387076**



D was a backseat passenger in a car that was pulled over on a motor vehicle violation. Police located marijuana in his pocket. He was later convicted of PWITD and maintaining a vehicle. D moved for judgment of acquittal on the maintaining offense because there was no evidence that D “kept” or “maintained” the car for the purpose of delivering drugs. D appealed denial of this motion. D also argued reversal was warranted because the given jury instructions improperly stated that a person is guilty of maintaining when he: “knowingly keeps, *uses*, or maintains...” instead of “keeps or maintains.”

In reversing, the Court stated that maintaining requires more than proving D used or possessed drugs while in the vehicle. Maintaining requires D to “exercise some control over the vehicle.” Reversal was independently warranted because the jury instruction for maintaining did not correctly state the law and did not allow the jury to perform its duty. The trial court erred when it deviated from the statutory language: “keep or maintain” and instructed the jury that D was guilty if he: “keeps, *uses*, or maintains.”

**BINAIRD v. STATE (February 23, 2009): CONFRONTATION CLAUSE/ SUFFICIENCY OF THE EVIDENCE/PHYSICAL INJURY/ASSAULT**  
**2009 WL 405284**



D charged at V with a knife. He stabbed him in the arm and in the back. He also bit V in the arm. D was charged with Assault Second Degree and other offenses. To establish an assault, the State was required to show V suffered “impairment of physical condition or substantial pain.” V did not use those exact words in describing his pain. D repeatedly asked V whether the pain he felt as a result of certain injuries was “substantial.” The judge sustained an objection by the State and found that V’s answers were responsive and described the pain in his own words.

On appeal, D argued his right to confrontation was violated. He claimed that based on the indictment, only the injury to the back could support the assault. However, the Court concluded that the testimony was that the injury to the arm could also have been from a knife. The Court also ruled that the trial judge has latitude in controlling cross based on four factors: (1) how crucial it is; (2) its relevance to bias; (3) its danger of unfair prejudice; and (4) whether evidence of bias is cumulative. Ultimately, there was sufficient evidence to support the assault second conviction. V was not required to “parrot” the exact statutory language of an offense to satisfy that statute.

**NORMAN, JR. v. STATE (March 4, 2009): DRUG IDENTIFICATION/ *BRADY* MATERIAL  
2009 WL 539909**



D sold marijuana to V who was not satisfied with the drug’s quality. To get his money back, V followed D in his car and approached him when he stopped. D shot and killed V. D was charged with murder, weapons, drug and other offenses. The State failed to obtain an expert report stating whether seized substances were marijuana. At trial, officers testified that it was their opinion that the substance was marijuana. D was convicted of murder second, PFDCF, PWITD, and related offenses.

On appeal, D argued the officers were not qualified to give an opinion regarding whether the substance was marijuana. In affirming, the Court agreed that they should not have so opined. The Court explained the judge’s reliance on *Wright v. State* was incorrect. While *Wright* allows a lay W with sufficient experience and familiarity with the drug to provide an opinion as to the identity of the substance at issue, it does not allow anyone who happens to be familiar with drugs to give a lay opinion. Here, police erroneously testified as experts without being qualified. This error was only harmless because there were 2 W’s at the scene and one properly qualified expert did testify.

D also argued there was a *Brady* violation because the State withheld the fact that D’s window was rolled down and that V was standing upright when the shooting occurred. D alleged this information came from an undisclosed statement. The Court found no merit. It was not clear that there was undisclosed material that existed or that, if it did, it was favorable to D.

**HARRIS v. STATE (March 10, 2009): SUFFICIENCY OF THE EVIDENCE/  
CONSPIRACY  
2009 WL 597092**



D, a male juvenile, and 2 other boys went to a store where they saw V. After V walked down the street, he was attacked with a hard object to the head and was then kicked in the face by a boy wearing roller skates. The boys fled. D denied being involved in the conspiracy and denied serving as a lookout. D was adjudicated delinquent of conspiracy second and attempted robbery first. On appeal, D argued there was insufficient evidence to prove he was guilty of conspiracy second. D also argued that because the judge could not find beyond a reasonable doubt that D was even the one who struck V, the State failed to prove every element of the attempted robbery.

In affirming, the Court, under a plain error standard, found that the record supported the judge's conclusion that the evidence was sufficient for the conspiracy charge. D heard one Co-D say he was going to go get money and D was the first boy V saw when he stood up after the attack. Since the judge found that one of the 3 boys struck V, they were co-conspirators and were responsible for striking V.

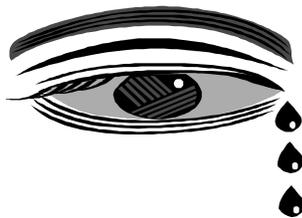
**GREENE v. STATE (March 17, 2009): MIRANDA/ CONSPIRACY  
2009 WL 684107**



D reported that his son, a Boscov's employee, was stealing T.V.'s from the store. An investigation led to a belief that D was selling the stolen T.V.'s. Police obtained an arrest warrant for D but did not tell D. Instead, they asked D to go down to the station voluntarily and D agreed. D was not handcuffed and sat in the front seat of the cruiser. D was questioned at the station without being *Mirandized* and made incriminating statements. These statements were admitted at trial. A shop owner who said he purchased stolen televisions from D also testified.

On appeal, D argued the admission of the incriminating statements constituted reversible error because they violated *Miranda*. D also argued there was insufficient evidence to prove a conspiracy. In affirming, the Court stated that admitting the statements was harmless because the shop owner's testimony was sufficient to convict D. The Court also explained that, while mere knowledge of criminal activity is insufficient to establish a conspiracy, D actually sold the televisions; thus, he actively participated.

**MICHAELS, et al. v. STATE (March 17, 2009): "TEARDROP TATTOO"/ D.R.E. 403 & 404/ SPEEDY TRIAL/CUMULATIVE ERROR/DENYING PROSECUTOR'S REQUEST TO APPROACH DEFENDANT WITH HANDGUN IN EVIDENCE/ROBBERY  
2009 WL 684142**



D2 was incarcerated for 328 days before he and D1 went to trial for robbery, kidnapping, and burglary charges. D3 pled. At trial, an officer testified that D1 had a teardrop tattoo on his face. All three D's moved for a mistrial, explaining to the judge that the tattoo commonly represents that the "person either has gang affiliations, has been in prison, or has participated in a murder." They argued that the testimony was not relevant under *D.R.E.* 403 in that identity was not an issue and none of the V's mentioned it. Also, it was impermissible character evidence in violation of *D.R.E.* 404 because it linked D1 to gang activity. The judge gave a curative instruction but only after a weekend recess. Additionally, when the prosecutor cross examined D1, she sought permission to stand closer to him. She had a gun in her hand that was in safety mode. The judge denied her request after a CO stood up and told the bailiff that he was concerned. The bailiff then walked over to the judge and passed along the message.

On appeal, the Court found that the judge did not abuse his discretion when he denied the motion for a mistrial with respect to the "teardrop tattoo." The D's failed to explain how the delay in issuing the curative instruction, by itself, was unfairly prejudicial. The Court also found that the judge did not abuse his discretion when he asked the prosecutor, who was holding the gun, to "ask your questions from where you are standing" because no prejudice was shown, the Co-D's failed to ask for a curative instruction and the D's cited no basis to support a claim that the judge was required to give one *sua sponte*. Also, the judge noted there was no reaction by the jury and he had the bailiff recount what occurred.

The Court also rejected D2's speedy-trial claim because the delay was not unreasonable in this case as he had not been incarcerated for more than one year. While "no one deserves to be commended for that delay, we are unable to conclude that the delay was one of constitutional dimension." The Court also rejected D2's argument that there was insufficient evidence to convict him of robbery because there was no evidence

to show that the stolen cell phone, in which he was found in possession, was taken with force. The Co-D's used force to enter V's house. Later, V's phone was missing from her purse. D2 conceded that he stole it. The Court concluded that a reasonable jury could find there was sufficient evidence to convict on robbery.

Finally, the Court rejected D2's cumulative error argument that was based on: the teardrop tattoo; the prosecutor not permitted to approach D1; the State's mention in its opening that another Co-D had pled guilty; testimony by D1 indicating that D2 was in jail; and the State's use of a hypothetical in its closing to explain accomplice liability. Once again, D2 failed to show prejudice. The judge gave a curative instruction in response to the State's comment in its opening statement; multiple CO's were in the courtroom making it obvious Co-D's were in custody; as already ruled, there was no prejudice with respect to the prosecutor's cross examination; and D2 asked the court to tell the State to move on after it provided a hypothetical, and it did.

**BRODIE V. STATE (Jan. 26, 2009): SPEEDY TRIAL/DISCOVERY VIOLATION/RULE 16  
2009 WL 188855**

D was convicted of kidnapping, robbery and related offenses. He was indicted in May, 2005 but was not arrested until January, 2007. D asked for discovery in February, 2007. Two weeks later the State responded that it requested scientific tests and that when the results were received they would be turned over. In June, 2007, the State turned over an M.E.'s report dated March, 2005 linking D to DNA found at the crime scene. The discovery was provided 2 weeks before trial and 3 days before D's attorney was to be on vacation. D filed a motion *in limine* to preclude admission of the DNA evidence because it was untimely under Rule 16. The judge granted a continuance and later admitted the evidence at trial.

On appeal, D argued that the discovery violation prejudiced him in that it led to the continuance that contributed to a violation of his right to a speedy trial. The Court rejected this argument after applying the four *Barker* factors: 1) length of delay; 2) reason for delay; 3) assertion of speedy trial right; and 4) prejudice to D. Because the 2 ½ year delay was over 1 year, it was presumptively unreasonable. Thus, inspection of the remaining factors was triggered: 2) The reason for the delay was largely attributable to D because he was a fugitive for 20 of the 28 month delay; 3) He never asserted his speedy trial rights, he only objected to the continuance. Thus, he did not waive the issue but this factor did weigh against him; and 4) He was not prejudiced by the delay but benefited from it because his counsel was given additional time to prepare for trial. Thus, his speedy trial right was not violated.

**STOW V. STATE (Jan. 20, 2009): PLEA WITHDRAWAL**  
**2009 WL 724133**



D pled guilty to continuous sexual abuse of a child. At the plea hearing, D was asked if he wished to plead guilty. De replied, “No, I did not commit that crime – I guess I have to say yeah. Yes, I did.” D then conferred with counsel and said he wanted to plead guilty. He had the benefit of two attorneys. The judge twice questioned him to determine whether he understood the gravity of his plea. The plea was entered.

Later, D moved to withdraw the plea claiming that it was not entered into knowingly, intelligently and voluntarily. The motion was denied. Rule 32 allows for withdrawal for a “fair and just reason” which is defined by the *Scarborough* factors: 1) procedural defect; 2) knowing and voluntary consent; 3) present basis of legal innocence; 4)adequate legal counsel through the proceedings; and 5) prejudice to the State or undue inconvenience to the court.

On appeal, the Court affirmed the judge’s denial of D’s motion. The Court explained that D was assisted by 2 attorneys and twice explained to the judge that he understood the consequences of pleading guilty. D’s assertion that he is innocent and was coerced was not sufficient to warrant withdrawal of a guilty plea. D also argued the trial court should have had a hearing before making its decision. However, he cited no authority for this claim.

**STATE V. BRIDGERS (March 30, 2009): ROBBERY/AGGRAVATED**  
**MENACING/MULTIPLICITY**  
**2009 WL 824536**



Three Co-D’s robbed a bank. D1 used a gun to take money from tellers, D2 used a gun to prevent customers and other bystanders in the lobby from moving, and D3 was the getaway driver. D3 pled and D1 and D2 went to trial. The State charged the Co-D’s with one robbery count for each person inside the bank at the time money was taken from the bank. Nothing was taken from anyone other than the bank. Co-D’s were found guilty of each count. On a motion for judgment of acquittal, the trial court reduced the charges

with respect to the bystanders to aggravated menacing. One count of robbery for each teller remained, however.

The State appealed and argued the bystanders were robbery victims because force was used against them to “prevent or overcome resistance” to the taking. D cross-appealed and argued there was only one robbery because there was only 1 theft that could merge into 1 of the several aggravated menacings to make 1 robbery and several aggravated menacings. While the Court heard argument *en banc*, it issued a summary order upholding the lower court’s decision. Thus, bystanders who have nothing taken from them are not victims of robbery. On the other hand, neither the trial court nor the Supreme Court issued a decision with respect to whether there was a robbery for each employee who was ordered to turn over money or whether there was only 1 robbery (of the bank). Thus, that issue can still be litigated.

**REDDEN V. STATE (Jan. 14, 2009): FLIGHT DURING TRIAL**

D went to trial with his Co-D on burglary, theft, weapons and related charges. On the fifth day, D failed to appear. Counsel and the trial judge agreed that D had fled. D’s counsel requested a mistrial. The trial judge denied that request, instructed the jury that it could not infer guilt from D’s absence and the trial continued. On appeal, the Court ruled that the judge’s instruction, which had not been objected to, was sufficient. Thus, it affirmed D’s convictions.