



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL E. DEMBY,	*	No.: 667, 2013
	*	
Defendant-below/	*	Court Below:
Appellant,	*	Superior Court of the
	*	State of Delaware,
vs.	*	in and for Kent County,
	*	Delaware
	*	
STATE OF DELAWARE,	*	C.A. Nos.: 1206011513
	*	IK12070025W, IK12070026W
	*	IK12070028, IK12090255W
	*	
Plaintiff-below/	*	
Appellee.	*	

APPELLANT'S CORRECTED REPLY BRIEF ON APPEAL

André M. Beauregard
Delaware Bar ID No. 2427
BROWN, SHIELS & BEAUREGARD, LLC
502 S. State Street
Dover, DE 19901
(302) 734-4766
Attorney for Appellant

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ARGUMENT

I. THE LOWER COURT DID NOT PROVIDE A PROPER RECORD THAT A CONSPIRACY EXISTED.

In their Answering Brief, the State argues the lower court properly adduced at the hearing (and at trial) that (1) there was a conspiracy (2) Brooks, Demby, Ayers and Valorie Brooks were all members of the conspiracy and (3) the statements of the wiretap were made in furtherance of the conspiracy.

However, the State fails to cite the Court's basis for such a determination. The State cites Harris v. State for the proposition that the trial court does not abuse its discretion in its evidentiary ruling as long as the record supports a finding that a conspiracy existed. 695 A.2d 34 (Del. 1997)

Unlike in Harris, the State does not cite to the record that a conspiracy existed. Rather the State only points to Special Agent Dunn's conclusory interpretations of the wiretap conversations at issue. Due to the incomplete record supporting the finding below, this Court should follow the requirements held in U.S. v. Diaz, 670 F.3d 332, 348 (1st Cir. 2012).

Regardless, the evidence does not support that the lower court properly found that a conspiracy existed. The trial court offered no basis for its

determination that a conspiracy existed nor did it determine the scope of the conspiracy.

Rather than follow the objective criteria supported by evidence as directed in U.S. v. Diaz, the Court makes no determination as to whether each individual defendant was a member of the conspiracy. The two defendants were jointly tried in the case and therefore required an individual determination for each on whether they participated in the conspiracy. Further, the trial court failed to make a determination as to whether each individual declarant's out of court statement was made in furtherance of the conspiracy.

Finally, the trial court failed to cite any corroborating evidence that Demby was a member of a conspiracy outside the recordings. The State presented no evidence of actual drugs being exchanged for money. During both the May and June events, the State's surveillance saw no drugs being exchanged, containers or paraphernalia, and none were ever found by the police throughout the entire investigation. Without the recordings, the State presented scant evidence that any criminal activity occurred.

The State also incorrectly states that Demby “does not argue that the wiretap statements are testimonial.”¹ Demby’s *Opening Brief* argues that the 6th Amendment required cross-examination of the testimonial hearsay offered in the recordings and Special Agent Dunn’s interpretation of such². Demby argued that Defense counsel was unable to cross examine the actual declarants regarding the language in the recordings. Finally, Demby argued that the out of court statements were a principal factor in Demby’s conviction.

¹ *An. Brf.* at 13.

² *Op.Brf.* at 14-17

II. DEMBY’S CONVICTION OF AGGRAVATED POSSESSION AND DRUG DEALING VIOLATED BLOCKBURGER.

The State acknowledges that Demby should not have been sentenced on both set of drug charges. However, the State argues there is no Blockburger violation because Drug Dealing requires an element that Aggravated Possession does not.³

As stated in Demby’s Opening Brief, Aggravated Possession does not require any additional elements from Drug Dealing and therefore the conviction of such violated Demby’s rights against double jeopardy.

The Statute (16 Del. C. §4752) mandates that the defendant be guilty of only “a Class B felony”. The concept of the two offenses merging for the purpose of sentencing is not mentioned in the law.

Defendant Demby’s conviction for Aggravated Possession is a lesser included offense of his Drug Dealing offense. Therefore, it is impermissible to punish Demby for Drug Dealing when the Aggravated Possession offense is considered a lesser included offense.

³ *An.Brif.* at 18.

CONCLUSION

The trial court's errors below violated important constitutional rights of Demby resulting in his convictions. For the reasons stated above and his Opening Brief, the Appellant, Michael E. Demby requests that his convictions be reversed.

/s/ André M. Beauregard
ANDRÉ M. BEAUREGARD
Delaware Bar ID No. 2427
BROWN, SHIELS & BEAUREGARD, LLC
502 S. State Street
Dover, DE 19901
(302) 734-4766
Attorney for Appellant

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