EFiled: May 07 2015 10:00PM EDT
Filing ID 57206201
Case Number 317,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK SEWELL,	:	
	:	
Defendant-Below,	:	No. 453, 2014
Appellant,	:	
	:	COURT BELOW: In the Superior
v.	:	Court of the State of Delaware, In and
	:	for Sussex County, I.D. #1305008035
STATE OF DELAWARE	:	
	:	
Plaintiff-Below,	:	
Appellee.	:	

APPELLANT'S REPLY BRIEF

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DATED: May 7, 2015

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SUMMARY OF THE ARGUMENT

IV. THE DELAWARE HABITUAL OFFENDER STATUTE WAS NOT DESIGNED TO IMPOSE HABITUAL OFFENDER STATUS FOR PREVIOUS FELONY TRAFFIC OFFENSES.

V. THE FAILURE OF THE STATE TO TURN OVER ALL THE POLICE REPORTS IN DISCOVERY PRIOR TO TRIAL INTERFERED WITH THE PREPERATION OF THE DEFENSE STRATEGY.

VI. THE STATES FAILURE TO FILE THE HABITUAL OFFENDER MOTION PRIOR TO THE FINAL CASE REVIEW CAUSED PREJUDICE TO THE DEFENDANT.

ARGUMENT

I. THE DELAWARE HABITUAL OFFENDER STATUTE WAS NOT DESIGNED TO IMPOSE HABITUAL OFFENDER STATUS FOR PREVIOUS FELONY TRAFFIC OFFENSES.

a. Question Presented.

Is the Delaware Habitual offender statute, Title 11 Delaware Code, Section designed to impose Habitual Offender status on a defendant when, as in the case *sub judici*, the defendant previous felony convictions included 2 counts of Failure to Stop at the Command of a Police Officer and a Conspiracy 2nd degree as an adult. This issue was properly preserved in the Court below.

b. Scope and Standard of Review

When the question involved concerns questions on matters of law, "[t]he standard and scope of review is whether the court below erred in formulating or applying legal precepts."[1]

c. Merits of the Argument

[1] *See Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993). *See also Rohner v. Niemann*, 380 A.2d 549, 552 (Del. 1977).

The Delaware Habitual Offender Statute was not designed to impose Habitual Offender status on a defendant when, as in the case *sub judici*, the defendant previous felony convictions included 2 traffic counts of obedience to authorized persons directing traffic and a Conspiracy 2nd degree as an adult.

The State argues that the Modern Day manifestation of the Delaware Criminal Code which became effective April 1, 1973 [2] incorporated the Previous Habitual Offender sentencing provisions in Chapter 42 of Title 11 to all offenses found in the Delaware Code. The problem with that argument is that at that time, there were only felony offenses in Title 11 and Title 16 of the Delaware Code. The first Title 21 offense to get Felony provisions occurred in 1996, 21 Del. Code Section 4177(d)(8)[3]. Since that time, the Legislature has designated one Title 23 offence, Boating under the influence 23 Del Code Section 2305 (3)[4]as a felony offense and two additional Title 21 offenses 21 Del Code Section 4202 Duty of Driver to remain at the scene of an accident and 21 Del Code Section 4103 Obedience to authorized persons directing traffic. There is no provision in Title 21 that provides for Title 21 Felony convictions to be used as predicate convictions

[2] See 58 Del. Laws ch. 497, Chance v State 685 A2d 351, 355 (Del. 1996) (discussing history of passage of the Delaware Criminal Code)

[3] 21 Del Code Section 4177 (d)(8) ("No conviction for a violation of this section, for which a sentence is imposed pursuant to this paragraph or paragraph (d)(3) or (d)(4) of this section shall be considered a predicate felony for conviction or sentencing pursuant to Section 4214 of Title 11. ')

[4] 23 Del Code Section 2305 (3) and (4)(" No convictions for violations of this chapter for which a sentence is imposed pursuant to this paragraph shall be considered a predicate felony conviction for sentencing pursuant to Section 4214 of Title 11")

for Habitual Offender status and there is no explicit provision that covers Title 21 or Title 7 or Title 23 felonies in 11 Del. C. Section 4214. Further, the only listed violent felony charge that Sewell was convicted of was 11 Del. Code Section 611 Assault in the First degree so the minimum on four of the five charges were not required under Delaware law.

In addition, does it make sense when reviewing Delaware criminal law that two charges involving obedience to persons directing traffic and failure to remain at the scene of an accident involving injury and death when the Legislature exempted Felony Driving under the Influence or Boating under the Influence from habitual offender predicate conviction status.

II. THE FAILURE OF THE STATE TO TURN OVER ALL THE POLICE REPORTS IN DISCOVERY PRIOR TO TRIAL DID INTERFERE WITH THE PREPERATION OF THE DEFENSE STRATEGY.

a. Question Presented.

The State's failure to timely respond to the request for discovery under Rule 16 of the Court's rules prior to trial did interfere with the preparation of the defense strategy. This issue was properly preserved in the Court below.

b. Scope and Standard of Review.

When the question involved concerns questions on matters of law, "[t]he standard and scope of review is whether the court below erred in formulating or applying legal precepts."[5]

c. Merits of the Argument.

[5] *See Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993). *See also Rohner v. Niemann*, 380 A.2d 549, 552 (Del. 1977).

The State argues that late discovery did not prejudice Sewell: as follows:

A. The Federal Reports

The State cites that the Federal Reports at Ans. Br. at 14-15 that became the subject of a protective order before trial and the change of witness were not discovery violations. The problem with that practice by the State is that changing the federal witness just before trial with a different witness who had been represented at Sewell's counsel prior law firm by himself and his then associate on unrelated Superior Court charges in Kent County in 2012 could have caused serious ethical violations and could possibly lead to a Rule 61 violation claimed by Sewell in the case *sub judici.*

B. Detective Kelly's Notes

The Superior Court in Sussex County instituted an automatic discovery agreement in the early 90's where defense attorneys and prosecutors automatically turn over police reports notes and copies of all evidence in all cases except first degree murder cases. Sewell's counsel signed onto that agreement in 1993. The agreement gives greater access to information in the Attorney General's file than Superior Court Rule 16. When the State argues that it does not have to turn over witness statements

prior to trial by rule or case law,[6] it does by agreement. Just because Sewell's attorney was able to pause, read the notes and then ask questions B-100-101 doesn't mean that the flow of the preparation of the case and the defense was not impaired. Sewell's counsel spent significant time with Sewell in preparation of the defense. Sewell was not pleased that he did not have proper time to review the late discovery. Detective kelly's notes are at C-5 through C-10

C. Firearms Expert Discovery

The State has a responsibility to make available to defense counsel exhibits being prepared for trial pursuant to the discovery agreement and Rule 16. At no time prior to day 2 of trial did the State do this. At trial Sewell's counsel attempted to cross examine the expert to the best of his ability. The lack of preparation of the State to obtain these items at the last minute shows non-compliance with the discovery agreement as well as Rule 16. The letter to the trial Judge regarding this issue is at C-28-29

D. The Stetser Police Report

[6] Quirico v. State, 2004 WL 220328 at *4(Del. Jan 27, 2004)

The State argues that there is no requirement under case law that directs the State to provide police reports on a case.[7]Further, that there was no agreement in this case to provide police reports. An. Bf. 21. But there was under the Sussex County automatic discovery agreement and a request in Sewell's request for Discovery and Brady material C-11-C-19 a provision to provide all of the police reports, and a letter from the State indicated that "enclosed is a copy of the entire discovery that has been sent previously in the entire case in this case" C-20-21 The State would have you to believe that you have all of the reports when in actuality one was left out, Trooper Steser's report C-22-C-27 Until Trooper Stetser testified, Sewell's counsel was unaware that Trooper Stetser was operating an unmarked silver car with wigwag lights and a visor mounted light and not a marked State Police Vehicle and the nature of the stop was based on a co-owner had a suspended license.

Sewell's counsel asked for a moment and Detective Kelly located a copy of Trooper Stetser's report and gave it to him. Sewell's counsel quickly scanned the five page report, did the cross examination, and then asked for a sidebar. A-58-61, and followed up with a letter to the Presiding Judge C-28-29

[7] Lovett v State, 516 A.2d 455, 472(Del. 1986) quoting Moore v. Illinois, 408 U.S. 786, 795 (1972)

In aggregate, all of these issues did interfere with the advance preparation of the defense of the case. Dealing with several issues like this on the cuff denied the defendant the opportunity to review in advance, discuss and then determine how to proceed with each issue at trial. There was substantial prejudice to Sewell.

III THE STATES FAILURE TO FILE THE HABITUAL OFFENDER MOTION PRIOR TO THE FINAL CASE REVIEW CAUSED PREJUDICE TO THE DEFENDANT

a. Question Presented.

The State's failure to file the Habitual Offender motion prior to the defendants' final case review unfairly prejudice the defendant. The issue was properly preserved at sentencing.

b. Scope and Standard of Review.

When the question involved concerns questions on matters of law, "[t]he standard and scope of review is whether the court below erred in formulating or applying legal precepts."[8]

c. Merits of the Argument.

The defendant had two case reviews and a final case review on February 7, 2014. The pleas offered are at C-1-3. At that time the defendant was told the range of his potential liability for all the offenses. He chose to go to trial on the charges against him. It was not until May 8, 2014 after the completion of the trial that the motion for Habitual Offender was filed by the State and docketed in the Court. The range of penalties increased because of this filing. As a result of the filing, the

[8] *See Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993). *See also Rohner v. Niemann*, 380 A.2d 549, 552 (Del. 1977).

sentencing judge declared the defendant a habitual offender on five of the eight counts he was to be sentenced upon: Assault in the 1st degree, Possession of a Deadly Weapon during the commission of a Felony, Aggravated Menacing, Possession of a Firearm during the Commission of a Felony, and Possession of a Firearm by a Person Prohibited. As a result of that finding, the defendant was sentenced to over 80 years at Level 5 followed by probation.

The State in its initial case review offer and its final case review offers never indicated that it would be seeking habitual offender status for Sewell. C-1-3 Contrast this to a recent case review offer for another individual where the Habitual Offender status is clearly identified so counsel can have detailed discussions about potential penalties and proper notice under Delaware Law. C-4

The State argues that there is no requirement for the Attorney General to file a motion to have a defendant declared a habitual offender before trial, quoting 11 Del. C Section 4215(b) [9] . Fundamental fairness and due process requires that said notice take place prior to final case review, where the Superior Court now asks "how much time does the defendant face on these charges" at the time of the rejection of the final case review plea. The State should not be allowed to ask for more time than the maximum time they stated at final case review.

[9] 11 Del. C Section 4215 (b) ("If, at any time after conviction and before sentence, it shall appear to the Attorney General or to the Superior Court that, by reason of such conviction and prior convictions, a defendant should be subject to Section 4214 of this title, the Attorney General shall file a motion to have the defendant declared a habitual criminal under Section 4214 of this title.

CONCLUSION

WHEREFORE Defendant prays this Honorable Court enter judgment in favor of the Defendant and reverse the conviction below.

Respectfully submitted,

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DATED: May 7, 2015