



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYWAAN JOHNSON, :
 :
 :
 Defendant-Below, :
 Appellant, : **No. 164, 2015**
 :
 :
 v. :
 :
 :
 STATE OF DELAWARE, : **Case below No. 1007020056**
 :
 :
 Plaintiff-Below, :
 Appellee, :

APPELLANT’S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS ii

ARGUMENT

I. THE STATE’S ANSWERING BRIEF CONTAINS MULTIPLE FACTUAL
AND LEGAL INACCURACIES IN RELATION TO MR. JOHNSON’S
CLAIMS RAISED IN THE OPENING BRIEF 1

CONCLUSION 16

CERTIFICATION OF SERVICE

TABLE OF CITATIONS

Federal Cases

| | |
|------------------------------------------------------------------------------------------|-----------------|
| <i>Albrecht v. Horn</i> , 485 F.3d 103 (3d Cir. 2007) | 13 |
| <i>Brady v. Maryland</i> , 373 U.S. 83 (1963) | 1,2,11,12,13,14 |
| <i>Fahy v. Horn</i> , 516 F.3d 169 (3d Cir. 2008) | 13 |
| <i>Moore v. Sec’y Pennsylvania Dept. Of Corr.</i> , 457 Fed.Appx. 170 (3d Cir. 2014)...3 | |
| <i>Strickland v. Washington</i> , 466 U.S. 668 (1984) | 9 |

State Cases

| | |
|----------------------------------------------------------|----|
| <i>Hall v. State</i> , 788 A.2d 118 (Del. 2001) | 1 |
| <i>Hughes v. State</i> , 437 A.2d 559 (Del. 1981) | 8 |
| <i>Hunter v. State</i> , 815 A.2d 730 (Del. 2002) | 8 |
| <i>Jackson v. State</i> , 770 A.2d 506 (Del. 2001) | 12 |
| <i>Roth v. State</i> 788 A.2d 101 (Del. 2001) | 7 |
| <i>Swan v. State</i> , 28 A.3d 362 (Del. 2011) | 1 |
| <i>State v. Wright</i> , 67 A.3d 319 (Del. 2013) | 12 |
| <i>Wright v. State</i> , 405 A.2d 685 (Del. 1979) | 13 |

Statutes

| | |
|--------------------------------|------|
| 11 <i>Del. C.</i> § 3507 | 6,14 |
| 11 <i>Del. C.</i> § 4220 | 2,3 |

Rules

| | |
|-----------------------------------|-------|
| Del. Super. Ct. Crim. R. 61 | 10,12 |
|-----------------------------------|-------|

United States Constitution

| | |
|-----------------------|---|
| U.S. CONST. V | 1 |
| U.S. CONST. VI | 1 |
| U.S. CONST. XIV | 1 |

Delaware Constitution

| | |
|-------------------------------|---|
| DEL. CONST. ART. I, § 4 | 1 |
| DEL. CONST. ART. I, § 7 | 1 |

I. THE STATE’S ANSWERING BRIEF CONTAINS MULTIPLE FACTUAL AND LEGAL INACCURACIES IN RELATION TO MR. JOHNSON’S CLAIMS RAISED IN THE OPENING BRIEF.

A. The standard of review for constitutional claims is *de novo*.

In response to Mr. Johnson’s claims of ineffective assistance of counsel raised in the Opening Brief,¹ the State erroneously claims that this Court should review under an abuse of discretion standard. Answer pg. 9,14,20,26,29.² The State’s assertion ignores controlling case law in which this Court has held that ineffective assistance of counsel claims and claims of a constitutional violation are reviewed *de novo*.³ Opening pg. 6,13. As Mr. Johnson alleged in the Opening Brief, ineffectiveness caused by Trial Counsel’s actions and a *Brady*⁴ violation have violated his Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution and Article I §§ 4 and 7 of the Delaware Constitution. Therefore, the denial of these claims must be reviewed *de novo*. Opening pg. 8,13,18,22,25. Mr. Johnson has also alleged that the cumulative effect of the multiple ineffective assistance of counsel claims and the *Brady* claim violated due process which also requires a *de novo* review of this claim. Opening pg. 28. Thus, as Mr. Johnson has

¹ Hereinafter cited as “Opening pg._.”

² The State’s Answering Brief is cited to as “Answer pg. _”

³ See *Swan v. State*, 28 A.3d 362, 391 (Del. 2011) (This Court reviews ineffective assistance of counsel claims *de novo*); *Hall v. State*, 788 A.2d 118, 123 (Del. 2001) (Claims of a constitutional violation are reviewed *de novo*).

⁴ *Brady v. Maryland*, 373 U.S. 83 (1963).

alleged ineffective assistance counsel claims and a *Brady* violation, the State's contention is incorrect and *de novo* review is the appropriate standard of review.

B. The State's argument does not address Trial Counsel's failure to introduce evidence of Gregory Napier's future benefit with the State.

In response to Mr. Johnson's argument that Trial Counsel was ineffective for failing to adequately cross examine Gregory Napier concerning the possible future benefit he will receive from the State,⁵ the State contends that "[t]he jury knew everything about Napier's agreement that Johnson now claims cross-examination should have revealed." Answer pg. 12. The State's assertion is without merit as the jury was never informed of the future benefit of a five year prison reduction that Mr. Napier could receive under the substantial assistance agreement.⁶ Opening pg. 10. At trial, the State only mentioned Mr. Napier's cooperation with police in very broad terms and emphasized that Mr. Napier had not received any benefit from the agreement.⁷ Opening pg. 9. The prosecutor's questioning and the response given by Mr. Napier, gave the impression that Mr. Napier could not receive any additional

⁵ Opening pg. 8.

⁶ A82-83. The agreement outlines that in exchange for Mr. Napier's cooperation, a *nolle prosequi* would be entered on the remaining Delaware charges in relation to this case. The letter also noted that Mr. Napier would cooperate with Delaware law enforcement officers in the prosecution of three unsolved homicides. It further noted that upon Mr. Napier's future cooperation and testimony, the State will file a motion under 11 *Del. C.* § 4220, recommending a reduction of level V time to five years for Mr. Napier's assistance.

⁷ The prosecutor asked Mr. Napier, "As you sit here today, have you received a lighter sentence?" to which Mr. Napier answered, "No." A113.

benefits from the State. As this impression was incorrect,⁸ the failure of either party to admit the substantial assistance agreement into evidence resulted in the jury not knowing that Mr. Napier could receive a future sentence reduction from the State for his continued cooperation.

Additionally, the State fails to cite to the record in support of its argument that “the jury also knew Napier offered information about other cases in exchange for a possible future sentence that was even lighter.” Answer pg. 12. The State’s argument is not supported by the record as the trial prosecutor deliberately worded his questioning to address only the benefits Mr. Napier’s had already received.

Q. Okay. Now Mr. Napier, did you also offer information with respect to other pending investigations.?

A. Yes.

Q. Did you do that because you wanted to get a lighter sentence?

A. The other things?

Q. Yes, sir.

A. Yes.

Q. As you sit here today, have you received a lighter sentence?

A. No.

A113. It is clear from the context of the trial transcript that the prosecutor’s intent was to give the appearance that while Mr. Napier cooperated with law enforcement on other cases for a lighter sentence, Mr. Napier did not, and would not receive one.

⁸ The State had yet to file, and still could have filed, a motion under 11 *Del. C.* § 4220 for a recommended sentence reduction for Mr. Napier’s cooperation.

Furthermore, the State has never indicated whether Mr. Napier ever received a sentence reduction due to his cooperation or whether the State ultimately decided not to file a motion for a sentence reduction. As the State does not address this crucial argument and does not cite to the record to support its assertions, its argument is meritless.

The State also erroneously contends that the Third Circuit case of *Moore*⁹ is distinguished from Mr. Johnson's as "the witness' reduced charges and prison exposure were not introduced [in Moore's trial]; Napier's were." Answer pg. 13. This assertion is unpersuasive as the introduction of Mr. Napier's plea deal with the State only touched upon what Mr. Napier had already received at the time of the trial. A113. Trial Counsel's failure to introduce evidence of Mr. Napier's future benefit under the substantial assistance agreement was necessary for the jury to properly weigh Mr. Napier's testimony and was akin to the ineffectiveness by Moore's counsel for failing to fully impeach a witness concerning his plea deal with the State.¹⁰ As such *Moore* is applicable.

Lastly, in arguing that additional impeachment testimony concerning Mr. Napier's plea bargain would not have changed the outcome of the case, the State cites

⁹ *Moore v. Sec'y Pennsylvania Dept. Of Corr.*, 457 Fed.Appx. 170 (3d Cir. 2014).

¹⁰ *Id.* at 182.

witness testimony¹¹ and trial evidence¹² as corroborating evidence of Mr. Napier's testimony. Answer pg. 13. The State's reliance on this evidence is misplaced as Mr. Johnson's own testimony placed him at the scene of the drug buy. A125. The cell phone evidence was consistent with Mr. Johnson's testimony that he was in the area. *Id.* Additionally, the ballistic evidence¹³ does not contradict Mr. Johnson's testimony as it was uncontroverted that it was Mr. Sierra who shot and killed the victim.¹⁴ Furthermore, the existence of Mr. Napier's handprint does not disprove any of Mr. Johnson's testimony. As such, the additional impeachment evidence against Mr. Napier would have affected the outcome of the trial as it would have made Mr. Napier less believable in the eyes of the jury. Thus, this argument is meritless.

Additionally, the State's reliance on Mr. Plunkett's testimony to support Mr. Napier's testimony is misplaced as Mr. Plunkett was only able to identify Mr. Napier and Mr. Sierra in a photo line up, but not Mr. Johnson. A106-107. Mr. Plunkett described the man he could not recognize as a bald headed man wearing a short sleeved shirt and buttoned down Hawaiian shirt.¹⁵ This description did match Mr.

¹¹ The State asserts that Mr. Plunkett's and other eyewitness testimony were consistent with Mr. Napier's testimony.

¹² Mr. Napier's handprint, Mr. Johnson's cell phone records, and ballistic evidence.

¹³ No firearms were ever recovered.

¹⁴ A111, A116.

¹⁵ A104-105.

Johnson's description of the fourth individual he saw at the buy.¹⁶ The only witness to identify Mr. Johnson as one of the robbers was Mr. Napier himself.¹⁷ As such, contrary to the State's position, the evidence in this case corroborated Mr. Johnson's testimony as much as it did Mr. Napier's. Thus, as the case came down to the credibility of Mr. Napier and Mr. Johnson, Trial Counsel's failure to adequately cross examine Mr. Napier concerning the future benefit of the substantial assistance agreement with the State prejudiced Mr. Johnson and affected the outcome of the trial.

For the reasons stated, Mr. Johnson's conviction should be reversed and remanded for a new trial.

C. The State fails to address Detective Gifford's repeated mentioning of Mr. Napier's family as a coercive tactic which rendered Mr. Napier's statement involuntary and therefore inadmissible.

In response to Mr. Johnson's argument that Trial Counsel was ineffective for failing to object to the admission of Mr. Napier's police interview under 11 Del. C. §3507,¹⁸ the State erroneously argues that the statement was not coerced as the officer's questioning of Mr. Napier was proper because "the officer never threatened

¹⁶ A123-124. Mr. Johnson described the fourth man as having peanut butter color skin, bald head, goatee, shirt with flowers on it, light blue shorts, and a pair of sneakers.

¹⁷ A111.

¹⁸ Opening pg. 13.

to take Napier’s children away.” Answer pg. 17. The State does not specifically address Mr. Johnson’s argument that the use of Mr. Napier’s family was not in the form of one overt threat like in *Roth*,¹⁹ but consistent throughout the interview during every instance Mr. Napier did not provide Detective Gifford with a response that the Detective sought.²⁰ Opening pg. 16. Contrary to the State’s assertion, Detective Gifford’s repeated mentioning of Mr. Napier being separated from his family was not used to suggest that cooperation with the police would be favorable as the Detective himself interjected his own kids into the conversation in order to undermine Mr. Napier’s will.²¹ The mentioning of both Mr. Napier’s and the Detective’s own family was clearly coercive police conduct that was designed to overpower Mr. Napier’s will.²² As the record clearly indicates that the Detective’s questioning was designed to overpower Mr. Napier’s will, the State’s responsive argument is meritless.

Furthermore, the State incorrectly asserts that even if Mr. Napier’s statement was excluded, “Napier’s testimony was corroborated by physical and testimonial evidence other than this statement.” Answer pg. 18-19. As argued in section B *supra*, the physical and other testimonial evidence in the case was not inconsistent

¹⁹ *Roth v. State* 788 A.2d 101,107 (Del. 2001).

²⁰ A28,44,50,58.

²¹ Det. Gifford told Mr. Napier, “...I got 2 kids, 2 kids that are very young. You know what they tell me about little girls, and I know this because I got little girls. Little girls need their fathers, and you know why? Because they won’t take it....” A47.

²² *Roth*, 788 A.2d at 108.

with Mr. Johnson's testimony and Mr. Napier was the only witness to identify Mr. Johnson as one of the gunman. A111. As such, the State is incorrect.

For the reasons stated, Mr. Johnson's conviction should be reversed and remanded for a new trial.

D. The Detective's testimony concerning Mr. Johnson's invocation of his right to counsel prejudiced Mr. Johnson and the record does not support Trial Counsel's asserted strategy.

In response to Mr. Johnson's argument that Trial Counsel was ineffective for failing to request a mistrial,²³ the State erroneously argues that "Johnson's conclusory assertion that the statements relayed to the jury that Johnson invoked his constitutional right to an attorney does not disturb Superior Court's factual findings to the contrary." Answer pg. 23. The State is incorrect as Mr. Johnson's argument is not a conclusory assertion but the application of the *Hughes v. State*²⁴ and *Hunter v. State*²⁵ factors to the Detective's testimony. Opening pg. 19-21. The State does not specifically address Mr. Johnson's argument that the improper comment by the Detective struck at the core of the case as the credibility of Mr. Johnson and Mr. Napier was the determining factor in the case.²⁶ Without any curative instruction, the

²³ Opening pg. 18.

²⁴ 437 A.2d 559, 571 (Del. 1981).

²⁵ 815 A.2d 730, 737-38 (Del. 2002).

²⁶ The State contends that Mr. Johnson disregarded all other evidence against him. Answer pg. 14. However, as noted in Section B *Supra*, the majority of the evidence admitted against Mr. Johnson was rendered moot by Mr. Johnson's own admission of his involvement in

jury was free to use the fact that Mr. Johnson did not want to talk to the Detective due to exercising his constitutional right to an attorney. When compared to Mr. Napier, who gave multiple statements to the police and viewed photo lineups, it created an improper perception that Mr. Johnson was hiding something. Opening pg. 20-21. As this case came down to the credibility of Mr. Napier and Mr. Johnson, the improper remarks struck at the core of the case and as the State failed to specifically address this argument, its contention is meritless.

In relation to Mr. Johnson's argument that Trial Counsel's strategy should be afforded no *Strickland*²⁷ deference for failing to object and request a mistrial concerning the Detective's improper comment on Mr. Johnson's constitutional right to counsel, the State misstates the record when it contends that "Johnson asserts trial counsel's strategy merits no deference because the second objection at closing shows they believe the comment was improper. (Op. Br. at 21). Johnson's speculation is contrary to the record of trial counsel's clear affidavits and statements at trial, and fails to show trial counsel was unreasonable." Answer pg. 24. The State is incorrect as Trial Counsel did not formally object but requested a sidebar to discuss the first improper comment during the Detective's testimony. A122. As Mr. Johnson has

the drug buy.

²⁷ *Strickland v. Washington*, 466 U.S. 668 (1984).

argued, Trial Counsel should be afforded no deference for failing to object and request a mistrial for the first statement because an objection was made during the State's closing argument to the same statement. Opening pg. 21. Trial Counsel's objection at closing argument, which stopped the proceeding and allowed the jury to dwell on the issue, was clearly contrary to Trial Counsel's purported strategy of not objecting in order to not draw more attention to the issue. *Id.* The State's misunderstanding of the record is fatal to its argument and as such is meritless.

E. The record does not support the State's assertion that Trial Counsel investigated Jamal to an extent as to render effective representation.

In response to Mr. Johnson's argument that Trial Counsel was ineffective for failing to investigate Jamal,²⁸ the State erroneously argues that "Johnson provides no record support for his theory that trial counsel did not investigate" as Trial Counsel indicated that they had in fact used an investigator to locate Jamal. Answer pg. 27. The State is incorrect as Mr. Johnson has argued that there is nothing in Rule 61 Counsel's file to indicate that any investigation into Jamal was conducted including investigative reports or correspondence concerning the issue.²⁹ Opening pg. 22. As such, the State's argument that "it is uncontroverted that trial counsel did investigate

²⁸ Mr. Napier's friend and according to Mr. Johnson, the fourth man at the scene of the drug buy who had a gun along with Mr. Napier and Mr. Sierra. Opening pg. 22.

²⁹ Rule 61 Counsel's file includes both Trial Counsels' files.

Jamal's existence" is not compelling. Answer pg. 28.

Additionally, the State fails to specifically address Mr. Johnson's argument that Mr. Plunkett³⁰ and Mr. Johnson³¹ both described the same unknown individual at the drug buy, presumably Jamal. Opening pg. 24. The State attempts to minimize this point by arguing that these descriptions do not match the description of Jamal which Mr. Napier provided to the police. Answer pg. 28. This argument is unpersuasive as it is more likely than not that Mr. Napier gave a false description of Jamal to police in order to protect him and separate his involvement in the crime.³² As Mr. Plunkett's description of the unknown suspect matched Mr. Johnson's description of Jamal, an investigation into the identity of Jamal was crucial to presenting a strong defense theory that it was Jamal, Mr. Sierra, and Mr. Napier who were in on the robbery and not Mr. Johnson.

For the reasons stated, Mr. Johnson's conviction should be reversed and remanded for a new trial.

F. The record was insufficient for the Superior Court to rule on the *Brady* violation.

In response to Mr. Johnson's argument that the State committed a *Brady*

³⁰ Mr. Plunkett described the unknown individual as a bald headed man wearing a short sleeved shirt and buttoned down Hawaiian shirt. A104-5.

³¹ Mr. Johnson described the fourth man as having peanut butter color skin, bald head, goatee, shirt with flowers on it, light blue shorts, and a pair of sneakers. A123-124.

³² Mr. Napier did not provide police with Jamal's last name or address.

violation for failing to disclose information relating to the identity of Jamal,³³ the State erroneously argues that “Johnson fails to establish a colorable *Brady* violation that meets Rule 61(i)(5)’s³⁴ narrow exception.” Answer pg. 30. The State does not specifically address Mr. Johnson’s argument that the Superior Court did not have an adequate record to rule on this claim as 1) Detective Gifford did not submit an affidavit indicating that all *Brady* information was provided to the prosecutors and 2) neither of the State’s trial prosecutors provided details as to what actions were performed to satisfy *Brady*. Opening pg. 26-27. Without these crucial pieces of evidence, the only evidence in the record before the Superior Court was the Detective’s word that he did not discover any *Brady* related information during his search for Jamal. As the State failed to address this argument as well as the fact that a colorable claim of a *Brady* violation falls under the exceptions to the procedural bars under Rule 61(i)(5),³⁵ its contentions are meritless.

For the reasons stated, Mr. Johnson’s conviction should be reversed and remanded for a new trial.

³³ Mr. Napier’s friend and according to Mr. Johnson, the fourth man at the scene of the drug buy who had a gun. Opening pg. 22.

³⁴ Del. Super. Ct. Crim. R. 61

³⁵ *State v. Wright*, 67 A.3d 319, 324 (Del. 2013); see also *Jackson v. State*, 770 A.2d 506, 515-516 (Del. 2001).

G. The State ignores the cumulative error from the underlying constitutional errors in this case.

In response to Mr. Johnson’s claim of cumulative due process error,³⁶ the State unpersuasively argues that “[e]ach of Johnson’s four ineffective assistance claims and his *Brady* claim fail separately; therefore, there is no cumulative error.” Answer pg. 32. The State’s argument should be ignored as it has argued³⁷ that Mr. Johnson suffered prejudice warranting reversal as Trial Counsel’s ineffectiveness and the State’s *Brady* violation resulted in Trial Counsel failing to fully protect Mr. Johnson’s constitutional rights at trial and not allowing the jury to hear crucial impeachment and exculpatory evidence concerning the fourth man at the drug buy, Jamal. Opening pg. 29-30. The cumulative effect of the above described errors “operated to deprive the defendant of a fair trial.”³⁸ As such, the State’s argument is not persuasive and upon *de novo* review, this Court should reverse and remand Mr. Johnson’s case for a new trial.

H. As the factual record was incomplete, an evidentiary hearing was necessary in the Superior Court.

Lastly, the State’s argument that an evidentiary hearing was not required in

³⁶ Opening pg. 28.

³⁷ In the Opening Brief and throughout this Reply.

³⁸ *Wright v. State*, 405 A.2d 685, 690 (Del. 1979); *see also Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007); *Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir. 2008).

relation to Mr. Johnson's claims raised in the opening brief is not persuasive. Answer 34. In relation to Claim II, ineffectiveness for failing to object to the admission of Gregory Napier's 3507 statement,³⁹ the State erroneously argues that an evidentiary hearing was not needed as the statement was played for the jury and Mr. Napier testified at trial. Answer pg. 34. As argued in the Opening Brief, an evidentiary hearing was needed for the Superior Court to properly weigh the credibility of both Mr. Napier and Detective Gifford concerning the events of the police interview, which would have included what, if anything, was said to Mr. Napier before the interview was taped. Opening pg. 32. As the State has failed to address this point, its argument is not persuasive and an evidentiary hearing should have been ordered.

In response to Mr. Johnson's claim of the need for an evidentiary hearing in relation to the State's *Brady* violation, the State does not specifically address Mr. Johnson's argument that an evidentiary hearing was required to determine what information Detective Gifford discovered concerning Jamal that should have been disclosed pursuant to *Brady*. Opening pg. 33. Furthermore, the State failed to address Mr. Johnson's argument that an evidentiary hearing was required to determine the magnitude of the *Brady* violation and the appropriate remedies for such a violation. Opening pg. 33-34. The State's failure to address these two critical

³⁹ Opening pg. 13.

arguments renders its contentions meritless.

For the foregoing reasons, Mr. Johnson's conviction must be reversed and remanded for a new trial or remanded to the Superior Court for an evidentiary hearing.

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Johnson respectfully requests that this Court reverse and remand Mr. Johnson's conviction and grant all appropriate relief.

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