



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JHAVON GOODE,

Defendant-below/
Appellant,

vs.

STATE OF DELAWARE,

Plaintiff-below/
Appellee.

No.: 276, 2015

Court Below:
Superior Court of the
State of Delaware,
in and for Sussex County,
Delaware

C.A. No.: 14-04-0681 thru
0682, 14-04-0685

APPELLANT'S REPLY BRIEF ON APPEAL

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ARGUMENT

I. RAYE BOONE WAS UNAVAILABLE FOR CROSS EXAMINATION AS A RESULT OF THE STATE'S NON-DISCLOSURE.

As stated in its Answering Brief, the victim's eyewitness identification of Goode did not involve state action. However, the State omits any argument that the identification procedure contained any safeguards to ensure it was not impermissibly suggestive. The State concedes that Goode's conviction was based on the victim's identification of Goode as arranged by Boone.

Here, the individual responsible for conducting the identification, Raye Boone, the victim's cousin, was only disclosed just prior to trial and not available for cross-examination. In its Answering Brief, the State argues that even if impermissibly suggestive circumstances produced an eyewitness identification which is very substantially likely to lead to misidentification, due process offers no protection against the admissibility of that evidence at trial unless "improper state action" produced the identification. This rationale is inconsistent with this Court's explanation of the rationale and operation of the due process safeguards.

If this Court were to accept the State's position, any identification (no matter how likely to lead to misidentification) would be allowed as long as no state action existed. The State primarily argues that any weakness in misidentification could be cured through cross-examination.

However, cross examination of the individual responsible for conducting the photo identification was not available in this case. As stated above, the individual conducting the identification procedure was not disclosed to the defense until just prior to trial. Therefore, the chief protection against a misidentification as articulated in the State's Answering Brief was not available to Goode.

Goode's counsel was not able to attack the identification procedures involved to demonstrate that they were impermissibly suggestive because the State never disclosed the identification of the witness, Raye Boone. Therefore the State's chief argument that Goode's counsel could simply cross examine the witness to prove misidentification did not exist. Goode's counsel did not have the opportunity to cross examine Boone on what she told the victim prior to showing the picture, where she obtained the picture, the manner she showed the victim the picture; all factors which would assist a jury to determine whether the photo identification was impermissibly suggestive and likely to lead to misidentification.

Goode's counsel ability to cross examine the victim was only one side of the coin. The victim was not in the best position to answer questions about the procedures involved in the photo identification. In contrast, if a police officer conducted the photo identification, Goode's counsel would have been given the opportunity to cross examine the officer on how he conducted the photographic identification. Defense would have questioned the officer on how the police

officer showed the photo, the difference between the photo on the electronic device and the photo not admitted into evidence, reinforcement issues, suggestive identification procedures, and weapon focus issues, all the key information which may illuminate make a photo identification impermissible suggestive.

The State seeks to have it both ways. They argue that any issues with the misidentification can be properly vetted through cross examination. Yet, the State failed to disclose the key witness who conducted the eyewitness identification. Defendant cannot cross examine a witness who is never disclosed until a pre-trial hearing. Identification is central to the State's case. The State had Raye Boone's email address and other identifying information which they were obligated to disclose pursuant to *Brady* and Rule 16. As identification was material to the defendant's defense and cross examination of Boone was essential to the defendant, the State violated both Rule 16 and *Brady* by not providing this vital information.

II. GOODE'S TRIAL SHOULD HAVE BEEN CONTINUED TO ALLOW FOR THE DNA AND FINGER PRINT TEST RESULTS.

Here, the lower court denied Goode's request for a continuance despite pending DNA and fingerprint testing. Certainly, if testing demonstrated that the gun did not contain Goode's DNA or fingerprints then the jury probably would have found him not guilty. The State's evidence at trial relied on almost exclusively on the identification of Goode. No additional direct evidence was offered to support Goode's guilt. Only one additional witness testified that Goode was present at the scene at the time of the crime. That witness did not testify that he saw the shooting or saw Goode with a weapon of any kind. This witness also left the scene at the actual time of the shooting. Any DNA or fingerprint testing results not consistent with Goode's identity would have provided reasonable doubt that Goode did not commit the crime. The lower court's denial of a continuance deprived the jury of critical evidence. Balancing the importance of the evidence versus the relatively minor inconvenience of delay was an abuse of discretion counter to the interests of justice.

CONCLUSION

For the reasons and upon the authorities cited here and its Opening Brief, Appellant Goode submits that his convictions and sentences be reversed.

/s/ André M. Beauregard

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