EFiled: Sep 16 2016 05:53PM EDT
Filing ID 59574568
Case Number 654,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTOINE L. MILLER,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	No. 654, 2015
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

APPELLANT'S REPLY BRIEF

/s/ James J. Haley, Jr.
James J. Haley, Jr., Esquire
I.D. No. 2997
FERRARA & HALEY
1716 Wawaset Street
Wilmington, DE 19806-2131
(302) 656-7247
Attorney for Antoine L. Miller
Defendant Below-Appellant

Dated: September 16, 2016

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page**

I. STATEMENT OF ADDITIONAL FACTS

In reply to facts described to by the State, Miller clarifies the record below.

Jannell Lloyd

Jannell Lloyd testified:

> "Q. Now, did your brother, Rock, ever bring drugs directly to your house?
>
> A. Yes.
>
> Q. Was this Heroin?
>
> A. Yes.
>
> Q. And how often did that happen?
>
> A. It wasn't always him, he did it maybe three, four times.
>
> Q. Would he come by himself or with someone else?
>
> A. He came with others.
>
> Q. Who else did he come with, do you know?
>
> A. B and Flock.
>
> . . .
>
> Q. Now, when Flock and Rock would come, what would they do when they got there?

A. Flock only came once, but when he came they were sitting at the table, he was just sitting there.

Q. Did they bring Heroin the time they came together?

A. Yes." (A 411)

The persons who actually handled the heroin were "Andrew Lloyd and Lil B." No one else touched the heroin:

"Q. Did Mr. Miller come, Mr. Lloyd's brother come to your house one or two times?

A. Two.

Q. With Heroin?

A. Yes.

Q. And do you recall how that visit was preceded, with a phone call, anything else that day?

A. Just a phone call.

Q. From?

A. Andrew.

Q. What did he say?

A. Open the door, he's on his way.

Q. And that happened both times or the one time?

A. Both.

Q. And then he came in and sat down at your house, is that right?

A. Yes.

Q. He brought stuff with him?

A. Yes.

Q. And who handed you that stuff?

A. Andrew and Lil B.

Q. That's it?

A. Yes." (A 417-18)

Jarrell Brown

Jarrell Brown testified that he never dealt with Antoine Miller, only Andrew Lloyd.

"Q. Do you recall telling him anything about distribution of heroin with relation to Antoine Miller?

A. I told Officer Lloyd that I didn't necessarily know Antoine Miller on the streets. But I told him also that one time Rock said that he was going to defer the business to him but he never did so.

Q. So Rock meaning --

A. Rock said basically he said he was going to stop. He was going to fall back for a little while. And he said I was going to be dealing with Flock, but that never happened.

Q. So when was this conversation? When do you think it took place?

A. Probably like February, February or March, like around that area.

Q. February or March of 2014?

A. '14.

Q. And this was a conversation that the defendant had with you?

A. Yes.

Q. And he specifically told you that you would be dealing with Flock?

A. Yes, if he decided to fall back, like I said; he never did, though." (A 382-83)

Yasmeena Brown

Ms. Yasmeena Brown testified that she did not see Antoine Miller doing anything with heroin:

"Q. Did you see them do anything with the heroin?

A. Mm-mm.

Q. MR. HALEY: Is that yes or no, Your Honor?

A. THE WITNESS: No." (A 532)

She never saw Andrew Lloyd receive any money from Antoine Miller. She did see Lloyd receive money once, when he was with co-defendant Brian Miller:

> "Q. Did you ever see Rock -- let me rephrase. Did you ever see anyone give Rock money?
>
> A. Yeah, one time.
>
> Q. Can you describe that time, where this occurred?
>
> A. We was at the car wash -- you say round what time?
>
> Q. Do you remember when this occurred?
>
> A. Mm-mm.
>
> Q. Was it back in 2013? 2014?
>
> A. '14.
>
> Q. It was at the car wash. Do you remember which one?
>
> A. Right off the Philadelphia Pike where everybody go. Can't think of the name.
>
> Q. Do you remember who gave money to Rock on that occasion?
>
> A. The boy in the green right here (indicating).
>
> Q. Brian Miller?
>
> A. Um-hmm.

Q. Do you know what nickname he goes by?

A. It say Beezer.

Q. Do you know how much money he gave Rock?

A. No.

Q. What did Rock do with the money?

A. Put it in the car. We left.

Q. Who was driving?

A. He was driving.

Q. Was it just the two of you?

A. Um-hmm." (A 533)

Maroon Dodge Caravan

Investigators observed Miller in a white Town & Country van—never in a maroon Dodge Caravan. (A 427-28)

October 30, 2014

Wilmington police officer Thomas Lynch testified that he observed a person throw a handgun out of the third-floor rear window of 810 West Ninth Street (A548), but video evidence submitted by defense investigator Mark Webber showed that Lynch could not have seen what he said he saw

from his position, a few houses down from 810 West Ninth Street. (A 576-80)

The jury acquitted Miller of the gun charges.

ARGUMENT I -- The Superior Court erred as a matter of law in denying Miller's Flowers Motion and his Motion to Suppress.

The State does not dispute that the affidavit of probable cause, upon which the search warrant for 810 West Ninth Street issued, contained information that was proven false at the Motion hearing of September 8, 2015. Specifically, paragraph 85 of the affidavit indicated:

> "(85) During the course of the investigation in September, 2014 a past proven and reliable CI that advised while he/she was on his way to the predetermined meet location, he/she observed a maroon Dodge Caravan stationary in the 2600 block of North Market Street, Wilmington, Delaware and in front of the flower shop. The CI advised he/she observed Andrew LLOYD exit the front passenger seat of the van."

Sergeant Leary of the Wilmington Police Department testified that the drug transaction described in paragraph 85, at the "predetermined meet location," in "September 2014," was an illegal drug transaction charged in the Indictment. (A223) The only September drug transactions charged in the Indictment occurred on September 10 and September 17, 2014. The "maroon Dodge Caravan" from which defendant Andrew Lloyd allegedly emerged during the indicted drug transaction in September 2014 was identified as the same maroon Dodge Caravan observed by Detectives Leary and Lloyd in October 2014.

Per paragraph 88 of the affidavit, the same confidential informant purportedly advised that the 2006 maroon Dodge Caravan had been recently sold to the "Andrew Lloyd drug trafficking organization by the same source of supply [from Philadelphia]."

In fact, as was indisputably proven at the motion hearing, the 2006 maroon Dodge Caravan was impounded by the City of Philadelphia on August 21, 2014, and was sold by the City of Philadelphia to Felicia Pagan at auction on September 23, 2014. Assuming no suspension of the law of physics, the 2006 Maroon Dodge Caravan could not have been on a City of Philadelphia impound lot from August 21, 2014 through September 23, 2014 and also in the 2600 block of North Market Street in Wilmington on September 10 or September 17, 2014. Furthermore, the confidential informant supposedly advised that the 2006 maroon Dodge Caravan had been sold to the "Andrew Lloyd Drug Trafficking Organization" by the "source of supply," but the State has never referred to the "City of Philadelphia" as the entity supplying the "Andrew Lloyd drug trafficking organization" with heroin.

Also, from paragraph 88 of the affidavit, the falsity of the allegations from the CI was apparent to law enforcement since Detective Dewey Stout

Caravan had been in the possession of the Philadelphia Parking Authority. (A234) Said information was not included to the Magistrate in paragraph 88 because it would have undermined the allegations of the CI regarding the sale of the vehicle by "the source of supply."

Furthermore, during the motion hearing no facts were developed to support paragraphs 82 and 83 of the probable cause affidavit. No transportation, or distribution, of drugs with the 2006 maroon Dodge Caravan was testified to by any witness.

Likewise, the information in paragraph 84 of the affidavit was uncorroborated, and given the falsity of the information supplied by the CI in paragraphs 85 and 88, it cannot be accepted without corroboration.

Regarding paragraph 86 of the affidavit, the only van observed in use by Andrew Lloyd to deliver heroin was a white Town & Country. No deliveries were observed involving the 2006 maroon Dodge Caravan.

Regarding paragraph 87, the CI incorrectly advised that Felicia Pagan and Andrew Lloyd's girlfriend previously resided together in Claymont, Delaware, when, in fact, Felicia Pagan had lived in Edgemoor perhaps 10 years earlier.

Finally, paragraph 89 reports an alleged wiretap revelation that Antoine Miller could be the target of threatened violence, but said threat added nothing to probable cause to search 810 West Ninth Street, only raising a duty to protect Miller.

A. The Court had no basis to deny Miller's Flowers Motion.

Given the falsity of the information supplied to the Magistrate in the probable cause affidavit, the question remained whether the alleged CI had supplied the false information to affiant Leary, or whether Leary had, on his own, supplied false information to the Magistrate.

Said question could only have been answered by an *in camera* examination of the CI pursuant to Flowers. The Superior Court, for example, would have questioned the confidential informant whether, in fact, he had seen the 2006 maroon Dodge Caravan in the 2600 block of North Market Street on September 10 or September 17, 2014.

The examining judge would have further asked whether the CI had told Sergeant Leary that the 2006 maroon Dodge Caravan had been sold to the Andrew Lloyd Drug Trafficking Organization by the "source of supply." If CI swore to those claims, then the credibility of all of the other uncorroborated statements by the CI in the probable cause affidavit would

have been doubtful, infecting CI—based allegations throughout the affidavit, not just in paragraphs 80 through 88. If the CI testified *in camera* that he did not make the comments attributed to him by Sergeant Leary, then Sergeant Leary's credibility would have been called into question, likewise affecting the credibility of Leary's averments throughout the probable cause affidavit.

Whether the credibility of the CI, or Sergeant Leary, or both, was worthless, was a fact that Miller was entitled to know before a decision on his pending suppression motion, and was also a fact which should have been known by any Court sitting in a Franks setting. For the Superior Court to close its eyes to those credibility questions, and their implications, was an abuse of discretion, and a violation of Flowers.

B. Even without an *in camera* examination of the CI pursuant to Flowers, the Superior Court had no rational basis to deny Miller's Motion to Suppress.

Although an *in camera* examination of the CI would have put to rest the question of who had no credibility—the CI, Sergeant Leary, or both—the Superior Court still erred by denying Miller's Motion to Suppress on the record before it. From the Motion hearing, it was evident that false

information had been supplied to the Magistrate and that the actual record was that:

1) the 2006 maroon Dodge Caravan was not in the 2600 block of North Market Street, and was not observed in any indicted transaction in September 2014;

2) The Philadelphia "source of supply" never sold the 2006 maroon Dodge Caravan to Felicia Pagan;

3) The Delaware State Police knew that the Philadelphia Parking Authority was the party in possession of the 2006 maroon Dodge Caravan prior to Pagan's purchase of same, but withheld said information from the affidavit;

4) Law enforcement never observed any controlled drug transaction conducted from the 2006 maroon Dodge Caravan;

5) No drug activity was ever observed at 810 West Ninth Street;

6) Either the CI, or Leary, or both, were not credible.

Given that record, no warrant could have been issued on "facts" supplied by the CI or Leary.

Finally, even accepting the affidavit at face value, no criminal activity

at 810 West Ninth Street appears to justify a search of same. Given that the police had no probable cause to believe that Felicia Pagan and Antoine Miller were involved in criminal activity (See Sergeant Leary's preliminary hearing testimony at A 30-31; A 37), no probable cause existed to obtain warrants to arrest Miller and Pagan as of October 28, 2014, and likewise no probable cause existed to search their home for drugs.

ARGUMENT II – The Superior Court racketeering instruction failed to properly define an Association-in-Fact Enterprise under the racketeering statute, as required by Boyle v. United States, 556 U.S. 938 (2009)

As argued by the State, in Boyle v. United States, 556 U.S. 938 (2009), the United States Supreme Court identified the minimal structural features that an "association-in-fact enterprise" must have under the federal racketeering statute (which statute Delaware's racketeering statute tracks). Specifically, the Boyle Court explained:

> "Structure." "We agree with petitioner that an association-in-fact enterprise must have a structure. In the sense relevant here, the term "structure" means "[t]he way in which parts are arranged or put together to form a whole" and "[t]he interrelation or arrangement of parts in a complex entity." American Heritage Dictionary 1718 (4th ed. 2000); see also Random House Dictionary of the English Language 1410 (1967) (defining structure to mean, among other things, "the pattern of relationships, as of status or friendship, existing among the members of a group or society").
>
> From the terms of Rico, it is apparent that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose. As we succinctly put in the *Turkette*, an association-in-fact enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." (Citation omitted) Boyle at 945-6

The Superior Court's racketeering instruction failed to include language that the prohibited association-in-fact enterprise must have the third structural feature of "longevity sufficient to permit those associates to pursue the enterprise's purpose."

Instead, the given instruction indicated that the enterprise element could be satisfied by proof of only two structural features:

> "Under the law, an enterprise includes a group of people associated in fact for a common purpose." (A 657)

Eliminating the third structural feature of "longevity" from the enterprise element resulted in the jury receiving an incorrect statement of the substance of the law, violating Miller v. State, 224 A.2d 592 (Del. 1966), and further violating Miller's right to a fair trial under the Delaware and the United States Constitutions.

ARGUMENT III – The State's presentation of five co-defendants for the purpose of putting their racketeering guilty pleas into evidence in order to prove the racketeering and "conspiracy to commit racketeering" charges against appellants was improper, and violated Miller's right to a fair trial.

The Superior Court ruled that the racketeering pleas of co-defendants were substantive proof of the racketeering charges against the appellants.

Specifically, Superior Court instructed counsel as follows:

> "MR. HALEY; Your Honor, I'm not sure the relevance of the testimony to begin with. What's the proffer and relevancy of him taking a plea to racketeering? That's about all I heard. And it kind of bolsters the racketeering case against my defendant by saying other folks pled to racketeering. I'm not sure what else we got out of this besides that fact, Your Honor.
>
> THE COURT: It sounds like cross-examination will be very brief.
>
> MR. HALEY: Well, there's a lot of racketeering defendants before the court. Kind of bolsters the idea of racketeering because the guy has pled to it. There's got to be more evidence than that, I would submit, Your Honor, to a racket than just some folks pled to it.
>
> THE COURT: The fact that there's probably a need for more evidence than that does not mean that having people come in and say I was part of a racketeering operation with the defendant is inadmissible. Having somebody say, I pled guilty to racketeering with this

person over here, it doesn't prove the racketeering by itself.

MR. HALEY: True.

THE COURT: But it is a piece of that picture." (A 286)

Later, the Superior Court, in ruling on Miller's renewed objection to the State's practice, said:

"MR. HALEY: Comes down to issues in the plea agreement bolster the racketeering case. If the State's evidence is nothing but a plea agreement, pled to racketeering and nothing other offered, that, to me it's just bolstering the racketeering charge with no other relevant evidence coming in, prejudicial to my client, to do nothing more than that.

THE COURT: I think precisely that's what the State's trying to do, bolster its case by introducing prejudicial evidence, that's the whole point of the trial. We've been through this several times now and I'm not inclined to recapitulate or perhaps rerecapitulate the court's rulings on this. I've said it enough times now that I'm going to summarize it one last time and then from now on, I'm not sure what kind of a hard time I'm going to give you, Mr. Haley, about this, but to the extent that somebody came in and said I pled guilty to doing racketeering with Lloyd, that has some probative value in terms of whether the two of them were doing racketeering together. The guy took a felony and probably a prison sentence as result of that admission. If you want to cross-examine him about it to suggest, as you have, that he had ulterior motives, that's fine, but meanwhile, his plea is I admit to the court that I did racketeering with this fellow and I'm getting ready to go to prison for that, so you can try and

> undermine that as well as you can and that's fine, but the State gets to make this evidence go in front of jury.
>
> Mr. Haley: Yes, Your Honor.
> THE COURT: Does that sum up the State's position?
>
> MR. DENNEY: Yes.
>
> THE COURT: This is the last time I plan on reiterating the court's thinking.
>
> MR. HALEY: I didn't' want to waive my objection.
>
> MR. VEITH: Join." (A 505)

Thus, the Superior Court allowed co-defendant plea agreements to be used to prove that racketeering had occurred and that Lloyd and Miller were also guilty of it.

As conceded by the State, but minimized as "harmless," said practice violated Allen v. State, 878 A.2d 447 (Del. 2005).

Given the paucity of the evidence against Miller, and the inaccurate racketeering instruction, said error cannot be said to have been harmless.

The State also argues that "By presenting the jury with live witnesses to inform the court that they conspired with Lloyd and Miller and participated in the racketeering, the State provided Miller the opportunity to ask the witnesses about their relationship with him and to explain their line of participation with him in criminal activities," but said justification for

violating Allen is empty. Miller did not need the State for the "opportunity" to ask witnesses questions. Said opportunity was already guaranteed to him under the United States and Delaware Constitutions: i.e., the defense case, when he could have called those witnesses. The State's use of co-defendant plea agreements to prove the guilt of a defendant on trial is forbidden, even though that defendant can obviously question any witness the State has improperly put forward.

CONCLUSION

For all of the foregoing reasons, this matter should be reversed and remanded for a new trial, with any evidence from the October 30, 2014 search suppressed.

/s/ James J. Haley, Jr.
James J. Haley, Jr., Esquire
FERRARA & HALEY
Bar I.D. #2997
1716 Wawaset Street
Wilmington, DE 19806-2131
Attorney for Defendant-Below,
Appellant.

Dated: September 16, 2016