



IN THE SUPREME COURT
OF THE STATE OF DELAWARE

CATHERINE D. WAPLES : No. 201, 2017
: (Case ID No. 1608002838)
Defendant Below, :
Appellant, :
v. : ON APPEAL FROM CONVICTION
: AND SENTENCE
THE STATE OF DELAWARE :
Plaintiff Below, :
Appellee. :

APPELLANT'S REPLY TO STATE'S ANSWERING BRIEF

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Trial Court: Superior Court of Delaware,
In and For Sussex County

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STATEMENT OF NATURE OF PROCEEDINGS

Catherine Waples was convicted on two counts of Drug Dealing Plus an Aggravator in March 2017. (Op. Br. Tab B.) On March 3, 2017, she filed a Motion for Judgment of Acquittal, or In the Alternative, *Flowers* Hearing and New Trial. (Op. Br. Tab A.) After this motion was denied, she filed the present appeal. In response to her Opening Brief, the State filed an Answering Brief. This is Ms. Waples' Reply to the Answering Brief.

SUMMARY OF THE ARGUMENTS

1. The State argues that it did not commit a discovery violation when it failed to respond twice to requests for information about its use of a confidential informant (“CI”), but in so doing it confuses the question of whether information is “material to the preparation of the defendant’s defense” under Delaware discovery rules with that of whether a CI “may be able to give testimony which would materially aid the defense.” Super. Ct. Crim. R. 16(a)(1)(C); D.R.E. 509(c). The former does not necessarily require the latter. There are any number of scenarios imaginable in which the disclosure of a CI’s involvement would help in the preparation of a defense, even where the State alleges a CI was not present or otherwise involved in a way that would require disclosure of the CI’s identity under *Flowers*. State v. Flowers, 316 A.2d 564 (Del. Super. 1973).
2. Ms. Waples did preserve her federal and state constitutional arguments, and this Court may address constitutional violations when the interests of justice so require, even if they were not raised at trial.

STATEMENT OF FACTS

Catherine L. Waples was arrested on September 24, 2016 and charged with two counts of Drug Dealing Plus an Aggravating Factor and two counts of Conspiracy in the Second Degree. She was acquitted of the two Conspiracy charges upon her motion for judgment of acquittal after the State's case in chief.

Jerome M. Capone, Esq. initially represented Ms. Waples. During his representation of her he filed a Rule 16 Discovery Request. (A-28). In that written Request Mr. Capone specifically asked for "A statement as to the involvement of any confidential informant(s), if applicable."

Undersigned Counsel was appointed by the Office of Conflict Counsel ("OCC") to take over Ms. Waples' representation on October 12, 2016.

Undersigned Counsel also filed a Rule 16 Discovery Request on behalf of Ms. Waples on October 24, 2016. (A-32). In that written Request Undersigned Counsel also specifically asked for "A statement as to the involvement of any confidential informant(s), if applicable."

The State never divulged that it had used a CI in this case. The State never mentioned the use of a CI in any of the discovery material it provided, nor in any conversations with Ms. Waples' attorneys. None of the police reports in this case mentioned the use of a CI. Undersigned Counsel was given no notification, either written or verbal, that a CI was involved in this case in any manner.

Ms. Waples' trial began on February 27, 2017 in the Superior Court of Delaware in Sussex County. At trial, Detective Sean Callaway of the Delaware State Police testified that Ms. Waples had sold him crack cocaine on June 22, 2016 and on June 23, 2016. On cross examination, Detective Callaway was asked how he came to know Ms. Waples. (A-7/L7 through A-10/L16). The State objected on grounds of relevance and averred that this is something that should have been brought up in a *Flowers* motion prior to trial. (A-7/L12 through A-9/L16). The State argued that defense should have raised the issue of a CI pre-trial by way of a *Flowers* motion – this despite the State never having once divulged the use of a CI in any discovery material or in any pre-trial conversations with Ms. Waples' attorneys, preventing them from being able to conduct any investigation into whether such a motion was necessary. Defense advised the Court that there had been no mention of a CI having been used in this case. (A-7/L22 through A-12/L13). The Court ultimately sustained the State's objection.

The jury returned a verdict of Guilty on March 1, 2017. A presentence investigation was ordered and a Sentence Hearing was scheduled for April 28, 2017.

Defense filed a Motion for Judgment of Acquittal, or In the Alternative, *Flowers* Hearing and New Trial on March 3, 2017. The trial judge denied this Motion on April 28, 2017 at the Sentencing Hearing.

ARGUMENT

The State's Answering Brief misrepresented the question on appeal; the State did commit a discovery violation and the trial judge therefore abused his discretion during trial and in denying Defendant's Motion for Judgment of Acquittal, or in the Alternative, *Flowers* Hearing and New Trial.

Question Presented

Whether the State commits a discovery violation when it completely ignores—twice—discovery requests for “A statement as to the involvement of any confidential informant(s), if applicable,” and what the appropriate remedy should be. This question was preserved in the trial court during (1) cross examination testimony (A-7/L4 through A-12/L19), (2) a chambers conference (A-13/L9 through A-17/L9), and (3) Ms. Waples' post-trial Motion for Judgment of Acquittal, or In the Alternative, *Flowers* Hearing and New Trial (A-23).

Standard and Scope of Review

This Court reviews “[a] trial judge’s application of the Superior Court Rules relating to discovery for an abuse of discretion.” Oliver v. State, 60 A.3d 1093, 1095 (Del. 2013). An abuse of discretion occurs when “[s]ubstantial rights of the accused are prejudicially affected.” *Id.* at 1097.

Merits of the Argument

The State argues that there was no discovery violation in this case, and thus, that the trial judge did not abuse his discretion in failing to order the State to

disclose the identity of its CI during trial or in denying Ms. Waples Motion for Judgment of Acquittal, or In the Alternative, *Flowers* Hearing and New Trial. In so arguing, however, the State fails to actually establish that there was no discovery violation when the State unilaterally decided to ignore not one, but two requests for information about the involvement of a CI (not necessarily the identity of a CI). Moreover, it failed to show why the appropriate sanction should not have been either a compelled disclosure of the CI's identity when its involvement was revealed for the first time mid-trial or a new trial after a *Flowers* hearing.

As the State noted in its brief, Superior Court Criminal Rule 16(a)(1) states that “[u]pon request of the defendant the state shall permit the defendant to inspect and copy or photograph books, papers [and] documents ... which are within the possession, custody or control of the state, and which are *material to the preparation of the defendant’s defense* or are intended for use by the state as evidence in chief at the trial.” Super. Ct. Cr. R. 16(a)(1)(C) (*emphasis added*). A violation of this rule allows for several remedies at the Court’s discretion after it weighs “all relevant factors, such as the reason for the State’s delay and the extent of prejudice to the defendant.” Taylor v. State, 982 A.2d 279, 283 (Del. 2008) (citing Super. Ct. Crim. R. 16(a)(1)(C) and quoting Snowden v. State, 677 A.2d 33, 39 (Del. 1996)).

The State goes on to argue that the identity of the CI in this case was

immaterial under Delaware Rule of Evidence 509(c), which involves the disclosure of the identity of a CI when the identity “would materially aid the defense.” D.R.E. 509(c). The State provides no excuse or explanation for its failure to respond to the discovery requests in the first place. It also conflates the “material” and “materially” standards under Superior Court Criminal Rule 16 and Delaware Rule of Evidence 509(c), despite the fact that one refers to the ability of a defendant to prepare a defense while the other refers to the defense itself.

First, the disclosure of a CI’s involvement may be material to the *preparation* of a defense even if that CI’s identity or testimony itself would not materially *aid* the defense. Information is discoverable if it would aid in the preparation of a defense. The fact that a CI introduced the undercover detective to Ms. Waples would have materially aided the preparation of the defense here, as this information would have allowed Ms. Waples to investigate whether she had an alternative defense argument available or if other people may have been involved—even if the CI’s testimony itself would not aid the defense. While it is true that she initially planned to show that she was out of state at the time of the transactions and only realized during trial that her recollection was off by about a week, she certainly would have conducted follow-up inquiry and investigation had she been made aware that a CI was involved in any way with identifying her to an undercover police officer.

Second, the State's argument about the materiality of the error hinges on what the outcome of a pre-trial *Flowers* hearing would have been if Ms. Waples had been given the opportunity to request one. In turn, this argument relies on an assessment about which facts were found credible by the jury. The State makes the assumption that, because the jury found Ms. Waples guilty of the charges of Drug Dealing plus an Aggravator, the jury must have found every assertion made by Detective Calloway (the undercover officer who purchased the drugs in question) to be credible, and every assertion by George White (Ms. Waples' codefendant) to be incredible. This suspect reasoning fails. The State may not, post-trial, make arguments based on assumptions about which facts the jury accepted. The jury could easily have believed Detective Calloway's assertion that the "young, thin, black female" present at the transactions was Ms. Waples and at the same time believed George White's assertion that in addition to a "dark-skinned, slim" woman (whom he identified as Gloria Hoodie), a third party was present. Tab A/L12-13; and, A-20/L12. This would not have changed the verdict, but these facts would change the outcome of a *Flowers* motion.

The State's Answering brief fails to rebuff the fact that the discovery violation in this case did severely prejudice Ms. Waples and impede her ability to conduct an appropriate pre-trial investigation into the CI's involvement. It conflates the standard of materiality required for discovery of general information

and documentation with the different one required for the revelation of a CI's identity. In essence, the State now attempts to argue that its blatant discovery violation was not that bad because the identity of the CI would never have been disclosed in any event, ignoring that it had an obligation to disclose its use of the CI and that such disclosure would have materially aided in the preparation of a defense.

Conclusion

The State committed blatant discovery violations that significantly prejudiced Ms. Waples' defense preparation when it failed to respond to two separate requests by two separate defense attorneys for information about its use of any CI. As a result, the trial judge abused his discretion in not ordering the State to disclose the identity of the CI when its use was only revealed mid-trial and in not granting Ms. Waples' Motion for Judgment of Acquittal or, in the Alternate, *Flowers* Hearing and New Trial. Ms. Waples is therefore entitled to a Reversal of her conviction and an entry of Judgment of Acquittal or, at the very least, a reversal of her conviction and remand for new trial.

ARGUMENT

II. This Court may address constitutional violations when the interests of justice so require, even if they were not explicitly raised at trial. Moreover, by raising the issue of the State's discovery violation at trial, Ms. Waples did in fact preserve her constitutional arguments for appeal.

Question Presented

Whether this Court can or should address the federal and Delaware state constitutional violations committed by the State against Ms. Waples.

Standard and Scope of Review

This Court reviews “[a] trial judge’s application of the Superior Court Rules relating to discovery for an abuse of discretion.” Oliver v. State, 60 A.3d 1093, 1095 (Del. 2013). An abuse of discretion occurs when “[s]ubstantial rights of the accused are prejudicially affected.” *Id.* at 1097.

Merits of the Argument

The State’s Answering Brief argues that this Court should not address Ms. Waples’ arguments that her constitutional rights were violated as a result of the State’s discovery violations because they were not explicitly raised at trial. This argument is nonsensical; the very standard for whether or not the trial judge abused his discretion is one of whether “[s]ubstantial rights of the accused are prejudicially affected.” *Id.* at 1097. These “substantial rights” include the due process rights given to Ms. Waples under both the Delaware and U.S.

Constitutions. U.S. Const. amend. XIV; Del. Const. art. I, § 7. The preserved issue of the State's discovery violations and trial judge's abuse of discretion in responding to those violations inherently includes the issue of trampled-upon constitutional rights.

Even if Ms. Waples did not properly preserve the issue of the State's constitutional violations against her, this Court may still and should address them. Supreme Court Rule 8 states that "when the interests of justice so require, the Court may consider and determine any question not [fairly presented to the trial court]." Here, the interests of justice plainly do so require:

- Ms. Waples had a right to have the State respond properly to all of her discovery requests.
- The State elected to simply ignore two separate discovery requests.
- Mid-way through trial, the State's star witness shockingly revealed that he had come to know and recognize Ms. Waples through a CI.
- The State offensively claimed that Ms. Waples should have made a *Flowers* motion, knowing full well that she could only have done so if she had reason to believe the State used a CI.
- Ms. Waples was deprived of the opportunity to investigate the State's use of a CI and to discover information that might aid her defense.
- Ms. Waples was convicted, but the jury did not specify each fact that

they believed or disbelieved as alleged by the witnesses. The State now argues without any support that the jury could not possibly have believed the co-defendant's claim that a third person was present at the time of the transactions simply because the jury plainly trusted the detective's identification of the "thin, black female" who was present as Ms. Waples.

- The testimony of record supports that a CI may have not only introduced Ms. Waples to the detective in this case, but may also have been present at the time of at least one of the underlying transactions, drastically changing the impact on Ms. Waples rights and potential defenses.

The record plainly shows that Ms. Waples' due process rights were egregiously violated by the State's total disregard for her discovery requests, and a failure to address them now would irreparably harm her and encourage the State to continue ignoring discovery requests whenever it makes assumptions about how the information would be used or what result might happen if it is used to make a *Flowers* motion.

Conclusion

This Court should and must consider the impact of the State's violations of Ms. Waples' rights when it considers her appeal, both because this issue was

inherently preserved when she preserved her discovery requests and because it is necessary to serve the interests of justice.

Respectfully Submitted,

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Tab A

CALLAWAY - CROSS

1 Q. And the only photograph you saw of her was on
2 DELJIS; is that correct?

3 A. Yes.

4 Q. What is DELJIS?

5 A. The Delaware Law Enforcement Justice
6 Information System.

7 Q. And you would agree that that photograph was a
8 photograph of a young, thin, black female, correct?

9 A. Correct.

10 Q. And isn't it true that the female that you
11 personally met on June 22nd and on June 23rd was a
12 young, thin, black female?

13 A. Correct.

14 Q. Isn't it true that without seeing more than a
15 single photograph on DELJIS and only meeting her once
16 before within the month before or weeks before for only
17 30 seconds, isn't it true you could be mistaken about
18 the person's identity who did that drug transaction
19 with you on the 22nd and on the 23rd?

20 A. I am not mistaken.

21 Q. Have you ever been mistaken about the identity
22 of a person?

23 A. I have not.

DAVID WASHINGTON
Official Court Reporter

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	:	
Plaintiff Below,	:	
Appellee.	:	

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT
AND TYPE-VOLUME LIMITATION**

1. This reply brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2010.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 3,716 words, which were counted by Microsoft Word 2010.

Dated: 12/13/17

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