



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

REGINALD WATERS, )  
)  
Defendant Below- )  
Appellant, ) No. 491, 2019  
) ON APPEAL FROM  
) THE SUPERIOR COURT OF THE  
v. ) STATE OF DELAWARE  
) ID No. 1602019886A/B  
STATE OF DELAWARE, )  
)  
Plaintiff Below- )  
Appellee. )

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

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**APPELLANT'S REPLY BRIEF**

**COLLINS & ASSOCIATES**

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**ARGUMENT IN REPLY TO STATE’S ANSWERING BRIEF**

**CLAIM I: THE TRIAL JUDGE’S DENIAL OF A DEFENSE CONTINUANCE REQUEST TO ENABLE REVIEW OF ALL MR. WATERS’ PRISON CALLS COMPROMISED HIS RIGHT TO A FAIR TRIAL.**

The State essentially argues that the continuance request was waived because defense counsel did not ask for all the prison phone calls initially.<sup>1</sup> The State asserts that defense counsel was aware there were additional phone calls and failed to request them, opting instead for a “continuance on the eve of trial.”<sup>2</sup> Those assertions do not reflect the reality of what occurred.

The State proposes protective orders in cases like these. The defense often agrees, as it did here, to be better prepared for trial. The protective order comes at a cost. The cost is that defense counsel cannot discuss any protected materials with the defendant. In this case, the State had Mr. Waters’ prison calls for months but held them back until April 25, 2018, when it provided the audio for 13 calls. Initially, counsel presumed that any calls with *Brady* material would have been provided and did not seek further calls. But defense counsel was not permitted to speak with Mr. Waters regarding prison phone calls due to the protective order.

The embargo as to prison calls finally lifted on May 9, 2018 – the day before jury selection. That same day, defense counsel visited Mr. Waters to discuss the

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<sup>1</sup> Ans. Br. at 18.

<sup>2</sup> Ans. Br. at 20-21.

calls. Based on that discussion, the same day, counsel sought an office conference to seek a continuance. Based on finally being able to discuss the phone calls with Mr. Waters, defense counsel argued it was no longer feasible to delegate review of the calls to the Department of Justice. There were many calls with witnesses beyond just the calls involving Rapha Moore that the State selected. As such, there was no dilatory behavior or delay in requesting a continuance. It happened the same day counsel was finally allowed to discuss the evidence with the defendant.

The State did provide three additional phone call recordings, and none after that. The State selectively chose a total of 16 phone calls and provided them on a protected basis two weeks before trial then a few more after trial started. The defense continuance request was made on the earliest possible date it could have been and was entirely reasonable.

The State has cited to *Secrest v. State* for a rubric to assess continuance requests, and as far as it goes it is an accurate statement of the law.<sup>3</sup> It is noteworthy, however, that *Secrest* involved a mid-trial continuance request with an empaneled jury, after the State failed to disclose an expert opinion it presented in the rebuttal case.<sup>4</sup> In Mr. Waters' case, the jury had not yet been selected. The inconvenience to the judge and the parties was outweighed by Mr. Waters' due

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<sup>3</sup> Ans. Br. at 21-22; *Secrest v. State*, 679 A.2d 58 (Del. 1996).

<sup>4</sup> *Secrest* at 63.

process rights. Specifically, he had the right to obtain the prison calls to use in cross-examination of the State's witnesses for impeachment.

The factors articulated by this Court in *Secrest*<sup>5</sup> militate in favor of a trial continuance:

(a) Counsel was as diligent as possible in preparing for the testimony, given that he was not allowed to discuss the existence of or the State's planned use of Mr. Waters' prison calls until the day before jury selection. When the State insists on protective orders as a condition of disclosing evidence to counsel, and requires nondisclosure to the defendant, the State should expect that continuance requests are a natural consequence.

(b) The continuance would have satisfied the need for the defense to be prepared. The Court posited that because Mr. Waters would continue to make phone calls, the defense would never be ready for trial.<sup>6</sup> Defense counsel explained that new phone calls would only be incremental as compared to the large batch of phone calls that prompted the continuance request.<sup>7</sup>

(c) The continuance would not have inconvenienced a jury, but it would have inconvenienced the Court and the State. However, Mr. Waters only got one trial, and in that trial his due process rights should have been protected. That

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<sup>5</sup> *Secrest* at 66.

<sup>6</sup> A365.

<sup>7</sup> *Id.*

protection includes the right to have the State timely disclose the phone calls it obtained from the Department of Corrections to the defense, so the defense could make use of the calls in cross-examining witnesses. More to the point, the State's argument it had been inconvenienced by the continuance request is significantly undermined by the fact that it had the calls for months but did not turn them over to defense counsel.

A trial judge has wide latitude in acting on continuance requests but denying a request because of the defendant's prior behavior was error in these circumstances. This continuance request was not occasioned by anything the defendant did. There were no issues or continuance requests from the time the undersigned attorney entered the case in January 2018 to May 9, 2018. The judge's focus on Mr. Waters' difficulties with prior counsel and a concern he would keep creating evidence by talking on the phone were not sufficient bases upon which to base a denial of a reasonable continuance request.

**CLAIM II: THE TRIAL JUDGE ERRED IN DENYING THE DEFENSE MID-TRIAL MOTION TO EXCLUDE MR. WATERS' PRISON PHONE CALLS.**

The State complains that the motion to exclude the prison calls for lack of foundation was “untimely” and “circumvented established Superior Court procedural rules.”<sup>8</sup> The State alleges no exceptional circumstances existed for hearing the motion and the judge should not have considered it.<sup>9</sup>

Again, the State is complaining about a situation of its own making. The State alleges that the motion to exclude was untimely, but it only provided the AG subpoenas used to obtain the calls on May 7, 2018 – three days before jury selection.<sup>10</sup> These subpoenas were issued on June 26, 2017 and October 2, 2017.<sup>11</sup> The State did not provide them until May 7, 2018. That timing does not leave much room for pretrial litigation. Moreover, when the subpoenas did arrive, they contained a signed certification from a Delaware attorney that

the information sought is relevant and material to the above-captioned law enforcement inquiry. This request is specific and has been limited in scope to the extent reasonably practicable in light of the facts and circumstances of the above-captioned law enforcement matter and de-identified information cannot reasonably be used.<sup>12</sup>

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<sup>8</sup> Ans. Br. at 25.

<sup>9</sup> Ans. Br. at 26.

<sup>10</sup> AR1.

<sup>11</sup> A1275-1276.

<sup>12</sup> A1275, A1276.



Given the late disclosure of the subpoenas and the certification of the Deputy Attorney General, no good faith basis existed to file a motion to suppress or exclude prior to trial. As such, the State's waiver argument fails. The first time to seek to exclude the calls because the basis for obtaining them was unreasonable came when the detective surprisingly testified that the only reason the State sought the calls was that witness Rapha Moore was being difficult.<sup>13</sup>

Even after the detective was given further opportunity to lay a foundation, the detective could not point to one fact about Mr. Waters – he just reiterated that Moore was uncooperative. In doing so, the detective confirmed that the State was simply fishing when it decided to obtain the calls. Even the judge stated that she had not heard any fact giving rise to concern that Mr. Waters was tampering with witnesses.<sup>14</sup>

The State asserts that the prosecutor's last minute argument that Mr. Waters had previously been convicted of witness tampering rendered the subpoenas reasonable under the law.<sup>15</sup> The State neglected to mention that the conviction was for written communications, not phone calls, which the trial judge held, "I think

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<sup>13</sup> A589.

<sup>14</sup> A593.

<sup>15</sup> Ans. Br. at 29.

it's relevant to note. It takes it out completely.”<sup>16</sup> Moreover, the subpoenas do not mention that the prior conviction was part of the legal basis for obtaining the calls.

The State has not cited to one case where the reasonableness of the subpoena is based on difficulties with a separate witness. In each case cited in the Opening Brief, this Court held that a person had reported the defendant's attempted witness tampering to police.<sup>17</sup> Because the subpoena in Mr. Waters' case was based on pure speculation of a reason why Rapha Moore was being recalcitrant, the judge erred in denying the motion to exclude the prison calls at trial.

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<sup>16</sup> A594.

<sup>17</sup> *See*, Op. Br. at 47-48.

**CLAIM III: THE TRIAL JUDGE ERRED IN DENYING THE DEFENSE MOTION FOR A NEW TRIAL.**

The Opening Brief asserts that the judge applied an erroneous legal standard – light most favorable to the State – in deciding Mr. Waters’ motion for a new trial.<sup>18</sup> It tracks the case citations that have been used in this case and others to reach the erroneous conclusion that on a motion for new trial the evidence must be viewed in a light most favorable to the State. The State does not address any of those cases but one, *State v. Johnson*.<sup>19</sup> The State merely points out that *Johnson* does not “flatly reject” a review in a light most favorable to the State.<sup>20</sup> But the case makes clear that motions for judgments of acquittal and motions for new trial are not subject to the same legal standard, which is the point. The other cases cited in the Opening Brief, which the State does not mention, demonstrate that the judge applied an incorrect legal standard to the motion.

As to the second misapplication of law, the Superior Court held that a new trial should not be granted unless the verdict is against the great weight of the evidence. The Opening Brief demonstrated why that holding is also incorrect.<sup>21</sup> The State has not even addressed this argument, and presumably concedes that the judge erroneously applied this more stringent standard.

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<sup>18</sup> Op. Br. at 51-52.

<sup>19</sup> 1999 WL 458627 at \*1 (Del. Super. Apr. 29, 1999).

<sup>20</sup> Ans. Br. at 33.

<sup>21</sup> Op. Br. at 52-53.

The Opening Brief argued that the presence of CSLI evidence at trial affected important fundamental decisions made by Mr. Waters, such as to seek a bench trial and to decline to testify.<sup>22</sup> Retroactively excising the CSLI evidence and then denying a new trial motion deprived Mr. Waters of the ability to knowingly and intelligently make those decisions. The State failed to address this argument as well in its Answering Brief. Mr. Waters should have been granted a new trial to make those fundamental decisions based on the anticipated evidence at the retrial. The State does not argue otherwise.

Instead, the State argues that even without the CSLI evidence, Mr. Waters was conclusively placed at the scene of the crime. It quotes from the judge's decision on the motion, which in turn relies solely upon the various statements and testimony of "Six" (Rapha Moore).<sup>23</sup> Moore is a witness who gave a statement implicating Mr. Waters only after many people at the scene accused Moore of the murder. Moore tried to retract his statement by way of an affidavit and then at trial. He is not a witness a finder of fact could rely on beyond a reasonable doubt for Mr. Waters' involvement in the crimes. Another witness, Cassie Brown, girlfriend of the decedent, spent 10-15 minutes with the shooter outside the apartment. She was then given two opportunities to pick Mr. Waters out of a photo array and did not

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<sup>22</sup> Op. Br. at 55-56.

<sup>23</sup> Ans. Br. at 36-37.

identify him. In fact, she identified him as someone she had met a couple weeks prior, but *not* as the person at the apartment that night. Her lack of identification was important, because she was right there and had close opportunity to observe Mr. Waters. And she was not distraught enough to not perceive things; she had the presence of mind to remove Mr. Thompson's drugs, money, and gun and hide them in the trunk of her car.

Shorn of the CSLI evidence, the State's case, presented by unreliable narrators, did not establish proof beyond a reasonable doubt. By applying an incorrect legal standard, the trial judge erred in denying Mr. Waters' motion for a new trial.

## **CONCLUSION**

For the foregoing reasons and those set forth in the Opening Brief, Appellant Reginald Waters respectfully requests that this Court reverse the judgment of the Superior Court.

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