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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE WHITE, Defendant Below – Appellant, v. THE STATE OF DELAWARE, Plaintiff Below – Appellee.	)	Supreme Court No. 467, 2019 On appeal from Superior Court ID No. 1006004227

APPELLANT'S REPLY BRIEF

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ARGUMENT I

THE SUPERIOR COURT COMMITTED PLAIN ERROR BY FAILING TO MERGE THE TWO COUNTS OF CONSPIRACY TO COMMIT MURDER WITH RACKETEERING OR CONSPIRACY TO COMMIT RACKETEERING.[1]

1. Merits

Appellate Review of White's Claim is not Barred.

The interests of justice require review of this claim because it involves novel issues of law and to avoid the double jeopardy implications of the plain error. The plain error exception includes questions of first impression.[2] In *Bullock v. State*, the Court addressed the reason for exceptions relating to questions of first impression:

> "An additional consideration exists when the legal issue presented for the first time on appeal is one of first

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[1] *The State mistakenly couched the conspiracy charge (Counts 4) as conspiracy to commit attempted murder in the title of its argument. In fact, the plain language of the charge relates to conspiracy to commit murder first degree, with the overt act in furtherance of the conspiracy being the attempted murder allegation. Count 23 alleges a conspiracy to commit murder or attempted murder.*

[2] *McBride v. State, 477 A.2d 174, 184 (Del. 1984)("However, as the question of the effect of the 1977 amendment is one of first impression, we will waive Rule 8 in the interests of justice to provide guidance to the trial courts and future litigants . . ."); Lewis v. State, 757 A. 2d 709, 712 (Del. 2000)("We have decided to address the merits of Lewis' argument because it presents important questions relating to the Sixth Amendment right to counsel, attorney ethics, judicial responsibility, and fundamental fairness in the administration of justice throughout a criminal proceeding."); Monroe v. State, 652 A.2d 560, 564 (Del. 1995)(reversing judgment of conviction based on finding of plain error, noting that we have not previously addressed the question before the Court in this case."); Culver v. Bennett, 588 A.2d 1094, 1098 (Del. 1991)(noting that this case presents questions of first impression); Shelton v. State, 744 A. 2d 465, 497 n. 142 (Del. 2000) ("Because the right to allocution is arguably a 'substantial right' of a capital defendant, and the law of allocution is ambiguous in Delaware, we waive the waiver rule and consider the merits of Shelton's argument."): Norman v. State, 976 A.2d 843, 869 (Del. 2009) (Death penalty reversed based upon issues of first impression involving lack of criminal responsibility for conduct outside of Delaware not fairly presented below.).*

> impression. Our plain error review has been sensitive to the desirability of addressing such issues in order to provide guidance to future litigants and to the related consideration of relieving the appellant from forfeiture arising in part from the lack of clarity in the law, assuming that all elements of the plain error standard are satisfied."[3]

This claim fits the plain error exception because it involves an important question of first impression; namely, whether a stand-alone conspiracy charge identical to a charged predicate act in a racketeering charge is a lesser included offense of the racketeering charge. While the Court in *Stroik v. State* provided that a substantive conviction and a conspiracy conviction under Delaware RICO do not merge, the issue was not the same as presented here.[4] The *Stroik* Court reasoned that a violation of 11 Del Code §1503(a) does not require an agreement and can be achieved through the acts of one person. This case is factually and legally distinguishable from *Stroik* because this racketeering charge included predicate acts (6 & 20) which required agreement and had to be achieved by the acts of more than one person. Moreover, the first paragraph of the criminal racketeering charge (Count 1) included an allegation of "conspiring to commit the murder of another . . ." In short, unlike *Stroik*, the racketeering charge here is distinguishable because it required agreement and could not have been committed by one person as alleged.

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[3] *775 A.2d 1043, 1057 (Del. 2001) (citations omitted).*

[4] *Stroik v. State*, 671 A.2d 1335 (Del. 1996), abrogated on other grounds, *Lloyd v. State*, 152 A.3d 1266 (2016).

Review serves many interests of justice. First and foremost, it provides this Court with an opportunity to establish protection for Delaware citizens where none currently exists. As it stands, Delaware citizens are not protected against the double jeopardy implications of convictions for racketeering and other stand- alone conspiracy charges which share identical elements.

Another factor in this analysis is whether an issue is outcome-determinative with "significant implications for future cases."[5] This case meets that test. A favorable ruling will result in the merger of conspiracy convictions which will result in a dramatic reduction of White's sentence. It will have "significant implications for future cases" by avoiding the prospect of duplicative convictions in racketeering cases.

Next, addressing this issue will provide guidance to the courts and litigants, and relieve appellants from forfeiture arising from the lack of clarity in the law.

The State's complaint that this claim is waived because the Defendant "deprived the State of an opportunity to litigate the claim" is specious. The facts relating to this specific claim have been developed. This is a legal question. The State has a fair opportunity to address the legal question and is at no disadvantage by addressing it now.

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[5] *Scion Breckinridge Managing Member, LLC v ASB Allegiance Real Estate Fund, 68 A.3d 665, 679 (Del. 2013) ("Because the issue of whether knowing silence is sufficient for reformation is outcome-determinative and because our law is contradictory, we will consider this issue on the merits"), citing Sandt v. Del. Solid Waste Authority, 640 A.2d 1030, 1034 (Del. 1994).*

This important issue of first impression is worthy of appellate review. There is no prejudice to the State by the fact that it was not raised below. This case involves plain error which jeopardized the fairness and integrity of the criminal proceedings below.

The Charges Merge

There is no dispute that conspiracy first degree is a stand-alone offense. However, the allegations in the conspiracy charges (counts four and twenty three) contain identical elements found in the corresponding predicate acts of the racketeering charge. Moreover, the statutory definition of racketeering subsumes conspiracy to engage in a felony, including a class A felony.[6]

Query: If the jury concluded that the State failed to prove racketeering predicate act 6 beyond a reasonable doubt, would a conviction for the identical allegation contained in the conspiracy offense (count twenty three) stand? The same question applies to predicate act 20 of the racketeering offense and the corresponding conspiracy offense (count four). The allegation contained in the predicate act, and the corresponding conspiracy charge, are identical.

The State acknowledges that the conspiracy allegations contained in Count four and twenty three are the same as the corresponding predicate acts in the racketeering offense (predicate acts 6 and 20).[7] Therefore, the conspiracy

[6] 15 Del. C. §1502(9)(b).
[7] An. Brf. at p.19.

counts were lesser included offenses of the racketeering offense to the extent it was based upon predicate acts 6 and/or 20.

The State focuses instead on the differences between the elements of the conspiracy counts, and the conspiracy to commit racketeering count. It argues that conspiracy first degree requires action advancing an underlying Class A felony, which the Conspiracy to Commit Racketeering does not. It rests its argument on the fact that the conspiracy counts required agreement to commit a Class A felony, whereas the Conspiracy to Commit Racketeering doesn't specify the commission of a Class A felony.

The State's analysis is incorrect. It disregards the fact that predicate acts 6 and 20 were incorporated by reference in the Conspiracy to Commit Racketeering charge. Predicate acts 6 and 20 allege a conspiracy to commit a Class A felony. Its argument also disregards the broad definition of racketeering, which includes any conspiracy to commit any felony.[8]

However, since the conspiracy to commit racketeering charge merged with the racketeering count, the issue is academic.

Since the stand-alone conspiracy allegations are included offenses of the racketeering charge (predicate acts 6 and 20), the conspiracy counts must merge with the racketeering conviction.

[8] 15 Del. C. §1502(9)(b).

ARGUMENT II

THE SUPERIOR COURT COMMITTED PLAIN ERROR WHEN IT SENTENCED WHITE ON SEPARATE COUNTS OF CONSPIRACY.

1. Merits

Defendant's argument is that separate conspiracy offenses are subsumed under the continuing conspiracy envisioned under the conspiracy to commit racketeering charge.

By definition, racketeering includes conspiring to engage in any activity constituting any felony.[9] The gist of the racketeering charge in this case is that there was a continuing conspiracy to commit racketeering which encompasses the specific predicate acts mirrored in the separate stand-alone conspiracy counts. This is prohibited under 11 Del. C. §521(a) because each separate conspiracy count was a part of the overall continuing racketeering conspiracy.

Again, the State disregards the definition of racketeering to reach its conclusion.

[9] 15 Del. C. §1502(9)(b).

ARGUMENT III

IT WAS PLAIN ERROR TO PERMIT THE ACCOMPLICE LIABILITY INSTRUCTION TO BE APPLICABLE TO THE CONSPIRACY COUNTS.

1. Merits

There is no dispute that the accomplice liability instruction, examined in a vacuum, contains a correct statement of the law. The plain error is that it was not incorporated into a single instruction of a specific charge. The consequence of that error is that the jury was not properly guided as to which charges it applied. The prejudice is that without proper guidance the jury was misled to believe that it could convict White for one or more of the conspiracy charges based upon an accomplice liability theory. That result is contrary to the law.

The State alleges that the separate instruction directing the jury to independently evaluate each offense as separate and distinct from the other sanitizes the error.[10] The State is wrong. This instruction did not prevent the jury from convicting White of any of the conspiracy offenses based upon accomplice liability. It did not guide the jury on which charges the accomplice liability instruction applied.

[10] A146.

To the extent that the State argues that White can be convicted of conspiracy based upon an accomplice liability theory, it is wrong. An agreement is not an essential element to find accomplice liability.[11]

The State's reliance on *Turner* is misplaced because that case did not deal with whether a defendant can be convicted of conspiracy based upon an accomplice liability.[12] Instead, Turner's argument was that the accomplice liability instruction as applied to the trafficking in cocaine charge was confusing when compared against the elements of the separate conspiracy charge. *Turner* did not involve the application of accomplice liability to support his conviction for conspiracy. It applied to the trafficking charge.

White raises a different issue. He cannot be convicted of conspiracy based upon an accomplice liability theory although he could be convicted of other substantive offenses based upon that theory. The error is that the Court did not make it clear which offenses the accomplice liability instruction was applicable for a basis of liability.

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[11] *State v. Travis*, 1992 WL 147996, at*2, affirmed on other grounds, *Travis v. State*, 637 A.2d 829 (Del. 1993)

[12] *25 A.3d 774 (Del. 2011).*

ARGUMENT IV

THE INDICTMENT ACTED UPON BY THE JURY WAS DEFECTIVE.

1. Merits

Defense counsel disputes he misread Count Sixteen of the indictment. There were many indictments in this case. The final reindictment (A21-43)(DKT 51) occurring on April 29, 2019 was assigned criminal action numbers reflecting the 2019 reindictment. Its effect was to supersede any prior indictments. It was provided by Court staff to counsel as the applicable indictment for this case. AR35. However, it does not correspond to the jury instructions or indictment (hereinafter "trial indictment") provided to the jury as part of the jury instructions.[13]

The 2019 indictment, and the trial indictment acted upon by the jury, do not match. Count 1 (Racketeering) of the 2019 indictment contains 21 predicate acts whereas the same count for the trial indictment contains 19 predicate acts. Counts 15 through 24 of the indictments charge different offenses and do not match each other. The 2019 indictment contains 36 counts whereas the trial indictment only has 24 counts. The ineluctable conclusion is that the correct

[13] AR1-20, Jury Instructions, pertinent portions. The indictment is contained in AR2-19, pages 6-23 of the jury instructions. Count 16 of the indictment is found on page 66, AR20 of the jury instructions. Counsel was remiss in not providing this material in the appendix for the opening brief.

indictment was not applied in this trial and that the jury was presented with and acted upon a superseded indictment instead of the 2019 reindictment.[14]

This argument relates to Count 16 involving a charge of Conspiracy Second Degree. It corresponds to the instruction read to the jury for Count 16. A144. It also corresponds to Count 16 of the indictment (AR15), and the written instruction for count 16. AR20. The jury was instructed that:

> Conspiracy Second Degree, Count 16, reads identical to the Conspiracy instructions I've to you otherwise except that the specific offense identified in Count 16 is Drug Dealing Cocaine. A144.

Count 16 of the indictment in the written instructions given to the jury as part of the jury instruction package provides, in pertinent part, that:

> Conspiracy Second Degree (Count 16). In order to find a defendant or the defendants guilty of this charge, you must find that the State has proved the following elements beyond a reasonable doubt: 1. A defendant or the defendants agreed to aid another person in the planning or the commission of Drug Dealing -Cocaine, ***as alleged in Count 16 . . .*** (AR20)(emphasis added).

The verdict sheet shows that Count 16 relates to a charge of Conspiracy Second Degree further corroborating that it was based on the indictment referenced herein. AR15.

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[14] This raises the issue of whether Defendant's convictions relating to counts of a superseded indictment are void ab initio because it was the substantially different 2019 reindictment that was in effect at the time of trial and was the basis for this prosecution.

On the other hand, Count 16 of the indictment containing the criminal action numbers (A34) relates to a charge of Drug Dealing Cocaine, not Conspiracy Second Degree, which conflicts with the instruction for Count 16 read to the jury and contained in the verdict sheet.

In short, Count 16 of the indictment, which served as the basis for the jury instruction actually given, and listed on the verdict sheet, was for Conspiracy Second Degree. Count 16 of that indictment does not state a charge as it refers to conspiracy to commit drug dealing as "alleged in Count 16." Count 16 does not allege a crime of drug dealing.

This conviction must be vacated because the indictment does not state a crime.

ARGUMENT V

THE SUPERIOR COURT COMMITTED PLAIN ERROR BY PERMITTING A DEFENSE ATTORNEY TO TESTIFY.

1. Merits

Attorney Benson's scope of representation of members of the enterprise and/or certain legal entities, was not relevant for any purpose except to explain how sealed documents were inadvertently provided to Ziare Miller. The sealed documents were eventually published on the internet.

The State argues that Benson's testimony was relevant because it was probative of the existence of an enterprise. Contrary to the States assertion, Benson's testimony did not show "common interest, economic relationships, or a hierachical structure involving the defendants . . ."[15] It *cites United States v. Castellano,*[16] to support this proposition.

In *Castellano*, the court ruled that Gerald Shargel's activities and practices as an attorney were admissible to help establish the existence of a relationship among several of the defendants which suggested an organized crime "enterprise" under federal RICO.

The Second Circuit previously indicated that payment of attorneys' fees by one individual on behalf of other suspected members of a criminal enterprise "may imply facts about a prior or present relationship" between the benefactor

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[15] Ans. Br. At 35.

[16] *United States v. Castellano,610 F. Supp. 1151 (S.D.N.Y. 1985)*

and his beneficiaries.[17] It found that evidence of such payments is highly relevant to whether the benefactor is the head of a criminal enterprise as defined by the RICO statute.[18]

On the other hand, evidence that a single attorney represented members of an alleged conspiracy, on its own, has no probative force. As stated in *Shargel*, "the fact that a lawyer has multiple clients in no way implies a connection between them."[19] The court noted that its observation was made under circumstances in which there was no other evidence of a criminal association between the attorney's clients. The court specifically noted that, had appellants consulted with an attorney as a group rather than as individuals, the evidence would have been probative of concerted activity among the several clients.[20]

Shargel's activities and practices in connection with the defendants was much more extensive than the attorney involvement here. Associates stated that leaders of the crew picked the attorneys who represented crew members. Shargel was alleged to have met with one of the associates without a request. Shargel said that his fee was being paid by another associate. Another associate indicated that Shargel advised him that he could not represent him due to a

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[17] *See In re Shargel 742 F.2d 61, 64 (2d Cir.1984).*
[18] *See In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 251 (2d Cir.1985) (en banc), cert. denied, 475 U.S. 1108, 106 S.Ct. 1515, 89 L.Ed.2d 914 (1986).*
[19] *742 F.2d at 63 n. 3.*
[20] *See id. at 64. See, e.g., United States v. Castellano, 610 F.Supp. 1151, 1160 (S.D.N.Y.1985) ("[W]hen other suspicious circumstances are present, the decision of a number of persons to retain the same lawyer may be probative of an association among them.").*

conflict, but that he told him that another attorney was going to represent him, and that Shargel would take care of the fee.[21]

Benson did not engage in this type of activity. While there is evidence that White assisted with securing representation, it is not unusual for friends or family to arrange and pay for representation when the accused is incarcerated. Delaware ethical rules envision this dynamic when it requires that under such circumstances, the attorney must advise that his obligation is to represent the client, even if the legal fee is being paid by someone else, and that the attorney is restricted from discussing the case with whomever paid the fee unless authorized by the client.

Shargel was alleged to have acted as house counsel to the enterprise and to have received large "benefactor" payments by crew leaders to represent other members of the crew. He also claimed to perform services for several alleged crew members without asking for compensation. He admitted to having represented, to some extent, 8 of the 21 defendants charged in the indictment.[22] The court found that this was probative of an association.

The facts in this case are much different than in *Castellano*, and fall short of the "suspicious circumstances" required for admissibility of Benson's testimony as probative of a RICO association. There is no evidence that Benson met with the associates as a group, or that associates were required to use him as

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[21] *Castellano, 1155-1158.*
[22] *Castellano at 1159.*

their attorney. He did not arrange or pay for other counsel when he had a conflict. In short, Benson's representation of multiple individuals was not probative of a connection between them.

ARGUMENT VI

THE SUPERIOR COURT COMMITTED PLAIN ERROR WHEN IT SENTENCED WHITE.

1. Merits

The State accurately recited the Superior Court's comments before White's sentence was issued. But, the State does not adequately address the error relating to Superior Court's substantial reliance upon the State's aggravating factors. The Court's only discussion of specific aggravating factors was the comment that the State accurately set forth the aggravating factors.[23] It was plain error to adopt the aggravating factors because they were not substantially accurate. The deficient aggravating factors adopted by the Superior Court amounted to reliance upon factual predicates which are either false, impermissible, or lack minimum indicia of reliability. One fact asserted as an aggravating factor, Defendant's one prior drug felony in 2012, was not sufficient to justify the excessive sentence imposed.

White thoroughly demonstrated the deficiencies in the State's aggravating factors. Conspicuous by its absence is any attempt by the State to defend against White's claims that its aggravating factors were not supported by the facts or law. The State's failure to defend its aggravating factors argument constitutes a tacit concession of their deficiencies. While the Superior Court issued the

[23] ("*I do think a sentence over the presumptive guidelines is warranted in this case. And I think, on balance, that the State has not completely, but accurately, set forth the aggravating factors, which includes prior violent criminal conduct, the 2012 Possession with Intent.*") A253.

sentence, it relied upon the State's aggravating circumstances to support a sentence in excess of SENTAC guidelines. To the extent the Superior adopted the State's aggravating circumstances, its sentence was based upon aggravating factors that were not substantially supported by the facts or the law.

CONCLUSION

Defendant respectfully requests this Court to reverse his Superior Court convictions and sentence and remand the matter for further proceedings consistent with the Court's decision.

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