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Case Number 53,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN HAIRSTON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 53, 2020
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On July 16, 2018, Stephen Hairston, ("Hairston"), was indicted on drug dealing (heroin), aggravated possession (heroin), possession of marijuana, resisting arrest and multiple motor vehicle offenses.[1] Trial was scheduled for January 23, 2019. However, at the State's request, trial was continued three times because Corporal Lynch, the officer who seized and packaged the drug evidence, could not attend.[2] The officer's presence at trial was required as Hairston made a proper demand under 10 *Del.C.* §4331. Despite Hairston's proper demand, despite the State's numerous continuances and despite the mandatory language of section 4331, the trial court granted the State's Motion *in limine* to introduce the drug evidence in Lynch's absence on the ultimate trial date. The court did so even in the face of Hairston's continued assertion of his Sixth Amendment right to confront Corporal Lynch. [3]

Hairston was acquitted of drug dealing but convicted of aggravated possession of heroin, possession of marijuana and all remaining charges. He was sentenced to 2 years in prison followed by probation plus fines.[4] This is his Opening Brief in support of a timely-filed appeal.

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[1] A-7, 8-11.
[2] A-3-5.
[3] *See* Trial Court's Grant of the State' Motion *in limine*, Ex.A.
[4] *See* January 24, 2020 Sentence Order, Ex.B.

SUMMARY OF THE ARGUMENT

1. There is no dispute that Hairston followed the requirements of 10 *Del.C.* §4332 (a) (1) and made a timely demand for the presence at trial of each person in the chain of custody of the drug evidence seized in this case. The statute is clear on its face that once the defendant complies with the demand requirement, the prosecution must comply with its corresponding production requirement. Therefore, because Corporal Lynch was the seizing and packaging officer, the statute required his presence at trial as a prosecution witness. However, at the urging of the State, the trial court erroneously thrust aside the plain language of the mandatory statute and supplanted it with the general standards governing the admissibility of evidence.

The trial court not only erred when it granted the State's motion *in limine* and relieved the State of its burden to require the presence of the seizing and packaging officer as a prosecution witness, it denied Hairston the right to cross examine Lynch with respect to his collection and packaging of the drug evidence. Further, the surrogate testimony it presented did not meet the constitutional requirement under the Confrontation Clause. Accordingly, this Court must reverse Hairston's convictions of aggravated possession of heroin and possession of marijuana.

STATEMENT OF FACTS

On June 13th, 2018, between 5:00 p.m. and 6:00 p.m., Corporal Lynch, ("Lynch"), of the Wilmington Police Department was driving a fully marked and equipped patrol car in the City of Wilmington. He, along with his partner, Corporal Bartolo, ("Bartolo"), were headed west on 2nd Street toward Scott Street when they saw a silver Chevy Equinox, ("Equinox" or "SUV"), also heading west on 2nd Street. The officers noticed that all of the windows on the SUV, including the rear window, appeared to have after-market tint which reduced visibility into the vehicle.[5] The officers did a registration inquiry and learned that there was no waiver permitting after-market tint for the vehicle.[6]

Lynch continued to follow the Equinox which turned north on to Scott Street without signaling.[7] So, the officers activated the lights and sirens on the patrol car and stopped the SUV in the 200 block of North Scott Street.[8] Both officers then got out of the patrol car. Bartolo never wrote a report, but, over 15 months later, he claimed to remember that he saw, through the back tinted window, the driver look back at them, reach in front of the front-seat

[5]A-40-47, 67.
[6]A-46.
[7]A-46.
[8]A-46.

passenger then retract his hand quickly.[9] However, Bartolo did not see anything in the driver's hand.[10]

Lynch, whom the State failed to present at trial, purportedly approached the driver of the SUV while Bartolo approached the front-seat passenger. There were only two occupants of the vehicle.[11] The front-passenger window was completely down and, Bartolo claimed, there was an odor of marijuana emanating from inside the car.[12] The officer also asserted that on the floor, near the front-seat passenger's feet, there was a plainly visible disposable cup with no lid.[13] On top of the cup was a clear knotted bag containing a powdery substance.[14]

At some point, police learned that the driver, Stephen Hairston, ("Hairston"), had a suspended driver's license.[15] During the stop, Hairston provided Lynch with a copy of his registration.[16] Bartolo testified that he removed the passenger from the SUV and Lynch removed Hairston from the

[9] A-48-49.
[10] A-69.
[11] A-50.
[12] A-49.
[13] A-66.
[14] A-50.
[15] A-51, 52-53.
[16] A-82.

SUV.[17] The State failed to present any further evidence of Lynch's interaction with Hairston.

Bartolo testified that he and Lynch took Hairston and the passenger, whom the State never identified at trial, to the back of the SUV. Corporals MacNamara and O'Keal arrived on the scene and were tasked with watching the two occupants while Bartolo and Lynch returned "to the front of the Equinox to conduct a search for the marijuana."[18] However, their search was interrupted almost immediately when Bartolo heard MacNamara yell, "Stop. Police. Stop."[19] Hairston had apparently run from the scene.

As MacNamara chased Hairston, Bartolo left the Equinox, got in MacNamara's patrol car and headed off to assist him in regaining custody of Hairston. MacNamara found Hairston between two cars, used his taser in an effort to subdue him and took him into custody. Hairston was placed in MacNamara's car and the officers drove him back to the Equinox. Bartolo then participated in a search incident to Hairston's arrest. While officers found over $700 on him, no weapons or other contraband were found.[20]

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[17] A-53.
[18] A-53-55, 70-71.
[19] A-54-55, 72.
[20] A-56-60, 73.

According to Bartolo, he returned to the SUV and assisted Lynch in the interrupted search of the vehicle.[21] He claimed that it was only at that point that Lynch recovered the clear plastic bag which Bartolo had found at the passenger's feet before he removed the passenger from the vehicle. Bartolo also claimed that it was at this time that Lynch recovered a green leafy plant-like substance from the center console of the car which was equidistant from where both the driver and the passenger had been seated.[22] However, police did no DNA or fingerprint testing of the drug evidence.[23] Nor did police take any photographs at the scene.[24] Significantly, the State presented no evidence regarding Lynch's actions at the scene of the Equinox or with respect to the drug evidence during the time Bartolo was off assisting MacNamara.

Prior to trial, and in compliance with 10 *Del.C.* §§ 4330-4332, Hairston properly demanded that the State present Lynch as a prosecution witness at trial because he was the officer who seized and packaged the drug evidence.[25] However, the trial court granted the State's subsequent motion *in limine* and relieved the State of its statutory obligation to produce Lynch and allowed it to present Bartolo as a surrogate witness.

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[21] A-59-60.
[22] A-60, 65.
[23] A-68.
[24] A-68.
[25] A-12.

At trial, Bartolo testified, based on his "observation" of Lynch, that the substance inside an envelope labeled TL-1 "appear[ed] to be the same powdery substance we recovered from the vehicle."[26] And, a substance in an envelope marked TL-2 contained a "green leafy plant-like substance" that "was located inside the center console of the vehicle."[27] The forensic chemist who tested the substances after the State received its third continuance based on Lynch's inability to attend the prior trial dates, testified that, in her opinion, the powdery substance was approximately 6.62 grams of codeine, heroin trans-3-Methylfentanyl and cis 3-Methylfentanyl and the leafy substance was about 2.3363 grams of marijuana.[28]

[26] A-61-62.
[27] A-63-64.
[28] A-77-81.

I. NOT ONLY DID THE TRIAL COURT ERR AS A MATTER OF LAW WHEN IT SUPPLANTED THE PLAIN LANGUAGE OF THE NOTICE AND DEMAND STATUTE APPLICABLE IN CONTROLLED SUBSTANCE CASES WITH AN INAPPLICABLE EVIDENTIARY STANDARD, IT DENIED HAIRSTON HIS CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESS WHICH THE STATE WAS REQUIRED TO PRESENT AT TRIAL.

Question Presented

Whether the trial court erred as a matter of law and violated Hairston's right to confrontation provided by the Sixth Amendment of the United States Constitution when it relieved the State of its statutory duty to produce the officer who seized and packaged the drug evidence in this case even though Hairston complied with the demand requirements of 10 *Del.C.* §4332 (a) (1) and the language in the statute setting forth the demand requirement and the State's corresponding duty is plain on its face.[29]

Standard and Scope of Review

"This Court typically reviews *de novo* the Superior Court's interpretation of a statute[.]" [30] A violation of a defendant's right to confrontation is also reviewed *de novo*.[31]

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[29] A-13, 16, 36-37, 77.

[30] *Wiggins v. State*, 2020 WL 1802813, at *12 (Del. Apr. 7, 2020) (*citing Dennis v. State*, 41 A.3d 391, 393 (Del. 2012)).

[31] *Williamson v. State*, 707 A.2d 350, 354 (Del. 1998).

Argument

"In a criminal proceeding [for a controlled substance or "drug" case], the prosecution shall, upon written demand of a defendant filed in the proceedings at least 5 days prior to the trial, require the presence of the forensic toxicologist or forensic chemist, or any person in the chain of custody as a prosecution witness."[32] The Delaware legislature defines "chain of custody" for the notice and demand statute in drug cases as follows:

> a. The seizing officer;
> b. The packaging officer, if the packaging officer is not also the seizing officer; and
> c. The forensic toxicologist or forensic chemist or other person who actually touched the substance and not merely the outer sealed package in which the substance was placed by the law-enforcement agency before or during the analysis of the substance.[33]

On July 2, 2018, "pursuant to 10 *Del. C.* Sections 4330-4332," Hairston made a "demand for all persons involved in the chain of custody of any [drug] evidence to be presented in court[.]"[34] Trial was originally scheduled for January 23, 2019. However, the State obtained 3 continuances because Corporal Lynch, the seizing and packaging officer, was unable to attend.[35]

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[32] 10 *Del.C.* § 4332.
[33] 10 *Del.C.* § 4331.
[34] A-12.
[35] A-2, 3, 4, 5.

The State's final request, made on April 24, 2019, was to continue a May 7, 2019 trial date. In addition to the request, the State informed the court that even though Bartolo had observed Lynch seize and package the drug evidence, Hairston would not agree to substitute Bartolo's testimony for that of Lynch.[36] On May 3, 2019, the trial court granted this final request and the trial was scheduled for September 17, 2019.[37]

Interestingly, it was only after the trial court granted this third and final request that the prosecutor had the evidence re-tested, because the first analyst no longer worked for the Division of Forensic Sciences and, presumably the State would be unable to satisfy its duty to present that analyst's testimony.[38] Then, on September 3, 2019, the State filed a motion *in limine* to introduce the drug evidence through Bartolo due to the State's anticipated inability to comply with its duty, pursuant to §4332, to present Lynch as a prosecution witness at the upcoming trial.[39] It essentially argued that it was not required to comply with the law because it could meet the general standards of evidence. On the morning of trial, the court conducted a hearing at which Bartolo was the only witness. The judge granted the motion:

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[36] A-4.
[37] A-5.
[38] A-38-39.
[39] A-15.

> I find that there is, for admissibility purposes, a reasonable probability that the evidence offered is what the proponent says it is, and that the evidence has not been misidentified, and no tampering, or adulteration, occurred for purposes of the seizing officer and packaging officer portion of the testimony.
>
> Again, the confrontation issues are mitigated and alleviated by the fact that any type of activity that occurred with regard to potential misidentification, or adulteration, can be addressed by the State's proffered witness.[40]

There is no dispute that Hairston followed the requirements of 10 *Del.C.* §4332 (a) (1) and made a timely demand for the presence at trial of each person in the chain of custody of the drug evidence seized in this case. The statute is clear on its face that once the defendant complies with the demand requirement, the prosecution must comply with its corresponding production requirement. Therefore, because Lynch was the seizing and packaging officer in our case, the statute required his presence at trial as a prosecution witness.[41] However, at the urging of the State, the trial court erroneously thrust the statute aside and supplanted it with the general standards governing the admissibility of evidence.

The State cited to this Court's law interpreting the authentication requirements under *D.R.E.* 901 (a) and argued that even though Hairston

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[40] A-31.

[41] *State v. Croce*, No. 9511004078, 1997 WL 524070, at *2–5 (Del. Super. Ct. May 14, 1997).

followed the statutory requirements of §4332 and properly asserted his confrontation rights, the State should be relieved of its statutory duty to produce Lynch because Bartolo's testimony was sufficient to establish a reasonable probability that the evidence was what it was claimed to be. The error in the State's argument, however, is that ours is not a "simple evidentiary matter" involving authentication. Rather, ours is a case governed by a statute that creates, in plain language, a duty on the part of the State to present at trial certain witnesses defined by statute as being in the chain of custody of evidence even if, under common law, a break in the wider chain of custody of that evidence would generally not be fatal to admissibility.

In *State v. Croce,*[42] the Superior Court addressed the distinction between the plain language of the 1997 version of the notice and demand statute applicable in "DUI" cases, 21 *Del.C.* §4177 (h) (4), and the requirements for authentication under *D.R.E.* 901 (a). The language in that statute required "*any person in the chain of custody*" to appear at the proceeding when a proper demand was made. Yet, the State sought to have the presence of the phlebotomist excused at trial.

The State argued that the testimony of the officer who witnessed the phlebotomist take the blood was sufficient to establish admissibility under

[42]1997 WL 524070, at *2–5.

D.R.E. 901 (a).[43] Essentially, the State claimed that, pursuant to *State v. Tricoche*,[44] it was only "required to eliminate possibilities of misidentification and adulteration, not absolutely, but as a matter of reasonable probability." Thus, it argued, it need only present a foundation witness to testify that the evidence is at least like the one associated with the crime and is connected to the defendant.[45]

The judge in *Croce* agreed that, if the issue were merely limited to an appropriate evidentiary ruling, the absence of the phlebotomist's testimony was not "a break in the chain" that was "necessarily fatal to admissibility but goes to the weight of the evidence."[46] But, he noted, that was not the end of the analysis. There was a statute with plain language that required "*any person in the chain of custody*" to appear at the proceeding when a proper demand was made and, "[i]t is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a

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[43] *Id.* at *4.
[44] 525 A.2d 151, 153 (Del. 1987).
[45] *Croce*,1997 WL 524070, at *3.
[46] *Id*. *See Tatman v. State*, 314 A.2d 417, 418 (Del. 1973) ("the integrity of the chain of possession was a matter of weight, rather than admissibility, and was properly a matter for the jury"); *Demby v. State*, 695 A.2d 1127, 1134 (Del. 1997) ("The jury, as the ultimate finders of fact, may consider whether there are significant breaks in the chain of custody or tampering, when determining what weight the evidence should be accorded.").

statute."[47] Thus, the judge rejected the State's invitation to ignore the plain language of the statute. Instead, it relied on the well-established principle that, "[w]here the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls." [48]

The judge's point was underscored by the distinction between the narrow language used to define "chain of custody" in § 4177 (h) (4) and the broad language used in 23 *Del.C.* § 2303 (*l*) (5), the notice and demand statute for "boating under the influence." The broad language defining chain of custody in the "boating" statute reads as follows:

> The chain of custody or control of evidence defined in this section is established when there is evidence sufficient to eliminate any reasonable probability that such evidence has been tampered with, altered, or misidentified.

This broad language is in line with the standard of admissibility under *D.R.E.* 901(a) and was actually how the State sought to interpret the much more limited definition provided in § 4177 (h) (4).

As noted in *Croce*, if the legislature wanted the general standard of admissibility to apply to § 4177 (h) (4), it would have used the language in § 2303 (*l*) (5), *i.e.* "the boating statute." But, since that language was not used

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[47]*Croce*, 1997 WL 524070, at *4 (*quoting Sutherland Stat. Const.* § 46.06 (5th Ed.)).

[48]*Croce*, 1997 WL 524070, at *4 (*quoting Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989)) (citations omitted).

in the 1997 version of § 4177 (h) (4), "the phlebotomist would be a link in the chain of custody and a required witness if written demand is timely given."[49] Significantly, one year later, the legislature changed the chain of custody definition for DUI cases, § 4177 (h) (4), to match the broad language used in the "boating statute," § 2303 (*l*) (5).[50]

The definition of "chain of custody" in our case, as set forth in § 4331, is even more narrowly defined than in § 4177 (h) (4) in that it only identifies 3 crucial "links" that require live evidence upon objection by the defendant.[51] At no point has the legislature ever sought to broaden the language as it did with § 4177 (h) (4). Because the plain language in § 4331 controls and because Lynch is 2 of those crucial links, Lynch was the required witness upon the written demand that was timely given. This is so regardless whether Bartolo observed Lynch or not.

While it may be true in our case that "without any statutory interference, the inquiry would end, and the chain would be sufficiently established[]" the legislature nevertheless "enacted a statute which vests the defendant in a [drug] case with the right to demand that the State produce [the seizing officer and the packaging officer].This procedural right is balanced in the statute by

[49] *Croce*, 1997 WL 524070, at *2–5.
[50] 1998 Delaware Laws Ch. 222 (H.B. 237).
[51] 1994 Delaware Laws Ch. 237 (H.B. 305).

requiring notice to the prosecution without which the witnesses do not have to appear." [52] Therefore, the trial court erred when it granted the State's motion *in limine* and relieved the State of its burden to require the presence of the seizing and packaging officer as a prosecution witness.

The trial court's decision also denied Hairston his right to confrontation. "In *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause guarantees a defendant the right to confront all of those who bear testimony against him." [53] As a result, testimonial statements against the defendant are "inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination."[54] The primary purpose of testimonial statements is to "establish or prove past events potentially relevant to later criminal prosecution."[55]

In *Melendez-Diaz v. Massachusetts*, the United States Supreme Court recognized that statements establishing chain of custody are precisely the type of testimonial statements that trigger the Confrontation

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[52] *Croce*, 1997 WL 524070, at *3.
[53] *Milligan v. State*, 116 A.3d 1232, 1236 (Del. 2015) (*citing Crawford*, 541 U.S. 36). *See* U.S. Const. amend. VI.
[54] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009).
[55] *Bullcoming v. New Mexico*, 564 U.S. 647, 659 n.6 (2011) (*quoting Davis v. Washington*, 547 U.S. 813, 822 (2006)).

Clause.[56] While the confrontation clause does not require everyone in the chain of custody to testify at trial, it does require the State to identify which steps in the chain of custody are "so crucial as to require evidence" and, "if the defendant objects," to present that evidence live.[57] Here, in the creation of §§ 4331-4332, the State identified the seizing officer and the packaging officer as crucial links in the chain of custody. Thus, if the defendant objects, the evidence from those officers must be presented live.

When Hairston filed his notice and demand requirement, he properly asserted his right to confront Lynch, a witness defined by the State as two crucial links, (seizing officer and packaging officer) in the chain of custody.[58] Here, the "primary purpose" of Lynch's statements, with respect to the chain of custody, was to establish or prove the movement and location of the substances seized from the SUV and brought to court for Hairston's trial. Further, the statements were "made under circumstances which would

[56] *Melendez-Diaz*, 557 U.S. at 310 n.1.
[57] *Id.*
[58] *Martin v. State*, 60 A.3d 1100, 1109 (Del. 2013) (recognizing that defendant's compliance with notice-and-demand statute in drug evidence case amounts to an objection to the introduction of the forensic report and a timely assertion of his confrontation rights); *Melendez-Diaz*, 557 U.S. at 326 (approving of Delaware's notice-and-demand statute as proper procedural rule governing the manner in which the defendant must "raise a timely Confrontation Clause objection" to the introduction of the forensic report).

lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[59]

It was Lynch's method and reliability of collection and packaging that was subject to cross-examination. Bartolo had no first-hand knowledge regarding Lynch's possession of the drug evidence during the time Bartolo was off assisting MacNamara. The officers had located the powdery substance and suspected the presence of marijuana before MacNamara left Lynch with the vehicle. So, Bartolo "could not convey what [Lynch] knew or observed about the events" involved in the possession of the evidence during that time.[60] Therefore, Hairston was denied the right to cross examine Lynch with respect to his collection and packaging of the drug evidence and Bartolo's "surrogate testimony … d[id] not meet the constitutional requirement" under the Confrontation Clause. [61] Accordingly, this Court must reverse Hairston's convictions of aggravated possession of heroin and possession of marijuana.

[59] *Crawford*, 541 U.S. at 52.
[60] *Bullcoming*, 564 U.S. at 661.
[61] *Id.* at 652.

CONCLUSION

For the reasons and upon the authorities cited herein, Hairston's convictions of Aggravated Possession of heroin and Possession of marijuana must be reversed.

Respectfully submitted,

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