EFiled: Dec 24 2020 01:38PM EST
Filing ID 66210379
Case Number 75,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AJ MCMULLEN,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	**No. 75, 2020**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE SUPERIOR COURT
IN AND OF SUSSEX COUNTY

Santino Ceccotti, Esquire [#4993]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5150

Attorney for Appellant

DATE: December 24, 2020

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

I. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE STATE TO RELY UPON 11 *DEL.C.* § 3507 TO INTRODUCE THE PRIOR OUT-OF-COURT STATEMENT FROM TWO KEY WITNESSES WHICH ALLOWED THE STATE TO DOUBLE THE IMPACT OF THEIR EVIDENCE.

The State, in its answering brief, provides an incomplete anatomy of 11 *Del.C. §* 3507 and the requisite foundational requirements in order to comport with the Sixth Amendment. Section 3507 claims implicate defendant's Sixth Amendment right to confrontation. The Confrontation Clause serves to facilitate the truth seeking function of a trial by "ensuring the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing" in the adversarial proceedings.[1]

11 *Del.C. §* 3507 was designed to allow the use in a criminal prosecution of a voluntary out-of-court prior statement of a witness who was present and subject to cross-examination as affirmative evidence with substantive independent testimonial value by allowing the admission into evidence of the out-of-court statements of the "turncoat" witness. "The statute was enacted to address the problem of a 'turncoat' witness.[2] "The draftsmen of § 3507 expressly contemplated

[1] *Maryland v. Craig,* 497 U.S. 836, 845 (1990).

[2] *Richardson v. State,* 43 A.3d 906, 909 (Del. 2012).

a circumstance where a witness voluntarily gives a prior statement but later denies the substance of that statement at trial."[3]

Keshawn and Shernell were not "turncoat" witnesses. The State fails to comprehend that the Statute was not enacted for situations like in the instant case, to back door prejudicial hearsay simply because the testimony of the witness may be "confusing" or "oblique". Ans. Br. at 20. 11 *Del.C. §* 3507 does not attach when testimony might be "less clear than the recorded statement". Ans. Br. at 20.

In 2010, as part of a trilogy of cases consolidated because of recurring problems with regard to the admission of evidence under section 3507, this Court issued its decision in *Blake v. State.* This Court held that "The Sixth Amendment requires an entirely proper foundation, if the prior statement of a witness is to be admitted under section 3507 as independent substantive evidence against an accused."[4] The State, pursuant to *11 Del.C. §* 3507, is statutorily required to engage in direct examination of its witness as to both the events perceived or heard it alleges incriminates the defendant and the out-of-court statement itself.[5] The direct examination must be meaningful and exhaustive enough to ascertain whether there is a lack of recall or contradiction.[6] In essence, the State is not permitted to

---

[3] *Collins v. State*, 56 A.3d 1012, 1018 (Del. 2012).
[4] *Blake v. State,* 3 A.3d 1077, 1083 (Del. 2010).
[5] *Id.*
[6] *Richardson,* 43 A.3d at 909.

do an end-around, as they did here, admitting the testimony that best suits their case.

Here, the record reflects that during their direct examinations, neither Keshawn or Shernell had a lack of recall pertaining to the events in question or recanted making the statements in the first place. Moreover, the witnesses testified consistent with the questions that were asked and their testimony was not contradictory to the out of court statements. The State is not permitted admission of a different version because they are not quite satisfied with the witness responses. If anything, the inadequate direct examination of the 3507 witnesses in the instant case was such that there was non-compliance with the requirements for the admission of prior statements pursuant to section 3507. The State has not responded to that argument because this Court's decisions do not support that position which is reflected in the State's argument.

The fatal defects with the foundation for admissibility of 3507 statements do not end here. The State also failed to meet the section 3507 requirements for admission of Keshawn's out of court statement because Detective Csapo's trial testimony was a classic example of a "narrative interpretation" of a witness statement that is inadmissible under *11 Del.C. §* 3507. At the time of Appellant's trial, it was well established that a police officers "interpretive narrative" of the out-of-court statement of a witness was beyond the scope of §3507. "[T]his court

has held that a "narrow interpretation" of the statute is required because of a defendant's constitutional right to confront and cross-examine witnesses providing testimonial evidence. One type of statement that is beyond the scope of §3507 is an "interpretive narrative"...The statute admits as affirmative evidence "the voluntary out-of-court prior statement of a witness." It is the statement of the declarant that is being admitted, not the interpretive narrative of the person who heard the statement. Care should be taken to guarantee that the statute is not abused by permitting a witness, such as a police officer, to embellish the prior statement by his own interpretation, even if the embellishment is made in the utmost good faith. Obviously, the best protection in this regard is a written statement.[7] Here, Keshawn's statement to Detective Csapo inculpating McMullen was not recorded. Moreover, there was no mention in the record that any notes of words uttered by the witness were taken. Thus, the detective's statement is classic "interpretive narrative" prohibited by well-established precedent.

Finally, its rather dubious of the State now to argue that the error complained of is harmless beyond a reasonable doubt while in the same breath admitting that the witnesses 3507 statements "contained the most crucial parts" of their testimony. Ans. Br. at 17. The State's own explanation as to how the out-of-court statements were most helpful to its case highlights the level of prejudice

[7] *Hassan-el v. State,* 911 A.2d 385, 395-396 (Del. 2006).

accompanying the evidence. The State's case against McMullen was exceedingly weak. The State offered no physical evidence connecting him to the crime charged. Instead, the State's case rested exclusively on the tenuous connection of uncorroborated witness testimony alleging that McMullen confessed to the crime. As a result, there can be little doubt that the 3507 statements contributed significantly to McMullen's conviction. It would be conjecture to conclude that admission of out-of-court police interrogation statements from two of the State's crucial witnesses that incriminated McMullen was not a factor in his conviction. Therefore, reversal is required in order to ensure that McMullen is not deprived of his right to a fair trial.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that AJ McMullen's convictions should be reversed.

\s\ Santino Ceccotti
Santino Ceccotti, Esquire

DATE: December 24, 2020