EFiled: Sep 14 2022 12:48PM EDT
Filing ID 68101907
Case Number 102,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEREK HOPKINS,	)	
	)	
Appellant,	)	
	)	No. 102, 2022
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY
DUC 2001012867

APPELLANT'S REPLY BRIEF

HUDSON JONES JAYWORK & FISHER

/s/ Zachary A. George
ZACHARY A. GEORGE, ESQ.
Bar ID No. 5613
225 South State Street
Dover, Delaware 19901
(302) 734-7401
zgeorge@delawarelaw.com
Attorney for Appellant
Words: 3309

Dated: September 14, 2022

TABLE OF CONTENTS

TABLE OF CITATIONS

Case Law **Page**

Statutes & Court Rules

ARGUMENT

I. EVEN IF THERE WERE NO CHANGED CIRCUMSTANCES FOR THE STATE, THERE WAS A MARKED CHANGE FOR MR. HOPKINS AND THERE WAS GOOD CAUSE PURSUANT TO SUPERIOR COURT CRIMINAL RULE 11(e)(3).

Initially, in its Answering Brief, the State attributed fault to Mr. Hopkins for failure to adhere to the Plea by Appointment deadline, referring to the non-compliance as "his noncompliance."[1] However, the State gently concedes that the State was the party in this litigation that did not adhere to the deadline. "The State was admittedly remiss in extending the revised plea off after that [PBA Deadline] date."[2] The trial court knew that this was the State's fault, too. "I understand that there was another plea offer made by the State, so maybe I should be hearing from the State."[3] "So, I realize, [defense counsel], in a sense, you did not have this offer before this weekend. So, again, I look to the State, unless it can be shown to the court that there was some change in circumstances that prevented the State from making this offer before a plea by appointment deadline, I don't see any basis to reconsider Judge Clark's decision."[4]

---

[1] Answering Brief page 7.
[2] Answering Brief page 17.
[3] A-169.
[4] A-170.

From Mr. Hopkins' perspective, the new plea offer was a changed, unforeseen circumstance constituting good cause. "Good cause in this context should be somewhat of an elastic concept, existing in some circumstances even though no unforeseen events occur after the deadline."[5] It is Mr. Hopkins who is serving a term of incarceration – it is changed circumstances from his perspective that should control.

In its answer, the State correctly points out that the parties had "ample opportunity" to argue good cause to the trial court.[6] In fact, the parties were heard on the issue. However, the trial court focused on the wrong perspective. The trial court should have focused on the changed circumstances from Mr. Hopkins' perspective. Certainly, a probation plea offer, after all previous offers required Level V, is a "marked change" in the offer – as noted by Judge Clark.[7] Certainly, the marked change was good cause.

Here, Mr. Hopkins did not seek to accept a plea that he previously rejected or was even previously made. This was the first time he ever received a probation offer. Under these circumstances, it was impossible for him to adhere to the strict PBA deadline. As such, the trial court abused its discretion.

---

[5] *People v. Jasper*, 17 P.3d 810, 815 (2001).
[6] Answering Brief page 17.
[7] A-177.

In *Slade v. State*,[8] this Court noted that the Superior Court's case management procedures require the State to make its best offer no later than the date of final case review. In fact, the New Castle County Criminal Case Management Plan available on the Court Website does say that, absent exceptional circumstances, the plea offer extended by the State at final case review should be the best and final offer that the State will make.[9] While that language appears to have existed in the Kent County Criminal Case Management Plan when *Slade* was tried in Kent County, the current Kent County plan, available on the Court Website, appears to exclude the language.[10] Regardless, Superior Court is a State wide Court. In Mr. Hopkins case, the State tendered an improved plea offer after the deadline.

The State misapplies the following cases – which it fails to recognize are clearly distinguishable from the relevant procedural facts of the present case.[11] The Court should reject the State's analysis because, in fact, their distinguishable procedural postures lead to the conclusion that good cause existed in Mr. Hopkins' case.

[8] *Slade v. State*, 746 A.2d 277, 277 (Del. 2000).
[9] AR-1.
[10] AR-19.
[11] Answering Brief page 18.

For instance, in *United States v. Gamboa* the State offer a plea agreement before trial but the defendant did not accept it until the second day of trial.[12] The court set a deadline to accept the plea 9:00 AM the day before the trial.[13] After this deadline, the court gave the defendants and their counsel opportunity after the first day of trial to meet with an interpreter and discuss the offer, again with a cutoff of 9:00 AM, just prior to the jury being seated.[14] The defendants did not come to a unanimous decision until 9:40 AM the next day, with the court ultimately rejecting the plea agreement for reasons including the merits of the agreement itself.[15] Not only was the jury already seated, but the sentencing did not reflect the seriousness of the crime.[16]

Also, in *United States v. Ellis,* the court gives no reasoning or enthusiasm for strict enforcement of plea deadline but merely holds that they are bound by precedent.[17] In his concurrence, J. Roney, while also deferring to precedent, expresses concern in doing so as it was based on a local rule that was of no precedential value, but there was just no other precedent to follow.[18] Subsequent

[12] 166 F.3d 1327 (11th Cir. 1999).
[13] *Id.*
[14] *Id.* at 1331.
[15] *Id.* at 1331.
[16] *Id.*
[17] 574 F.2d 863 869 (5th Cir. 1977).
[18] *Id.*

citing decisions within the 5th Circuit show a practice of first extending the original plea deadline anywhere from several hours to several days before enforcement.[19]

Similarly, in *People v. Grove*, the parties were given over two months after the scheduling order to enter a plea agreement and did not present the agreement until a month after the cutoff date.[20]

In fact, all of this Court's Opinions on this issue are distinguishable from the present case in that they involve pleas that were previously offered in a timely manner with ample time for consideration and rejected at least once.[21] In all of these cases that the defendant *could* have accepted the plea deal before and could not show good cause as to why they did not. Mr. Hopkins never had the opportunity to reject this plea agreement as he did not have it before the deadline. Nor did the court grant an extension for Mr. Hopkins to miss. Mr. Hopkins' ability to accept the probation plea offer on DUC 2001012867 was out of his hands.

[19] *United States v. Hemphill*, 748 F.3d 666 (5th Cir. 2014)

[20] 566 N.W.2d 439, 4710, (Mich. 1997).

[21] See *Washington v. State*, 844 A.2d 293 (Del. 2003). (where defendant sought to accept the rejected plea after trial and sentencing); *Slade v. State*, 746 A.2d 277 (Del. 2000); *Dickson v. State*, 32 A.3d 988 (Del. 2011) (where the state withdrew the offer and defendant sought to compel its reinstatement after trial).

The State is incorrect in asserting that this Court's decision in *Berryman v. State* controls, as the relevant procedural facts of *Berryman* are inconsistent with the case at hand.[22] In *Berryman*, the defendant repeatedly rejected a plea agreement that had been offered to them prior to trial. Here, Mr. Hopkins did not have the opportunity to refuse a plea agreement because of the court's rapid-fire scheduling. The trial court in *Berryman* also left open the door for a second final case review if more time was needed to resolve the matter without trial.[23] No such pressure valve was allowed to Mr. Hopkins, where his plea deadline was only 15 days after his initial case review and the day before his pretrial conference.[24] Further, in *Berryman*, the change of mind came 3 *months* after the previous deadline without an accompanying change in the terms of the plea agreement.[25]

The State relies on the reasoning of *People v. Jasper* to provide a standard for 'good cause' but misinterprets the standard *Jasper* sets forth for a court to reject a plea on grounds of lateness.[26] A condition of the holding in *Jasper* is that the trial court must provide *adequate notice* to the parties of the plea cutoff deadline *and must permit an exception to the deadline for good cause* [emphasis

---

[22] *Berryman v. State*, 897 A.2d 767 (Del. 2006).
[23] *Id*.
[24] A-114.
[25] *Berryman v. State*, 897 A.2d 767 (Del. 2006).
[26] Answering Brief page 14 (citing *People v. Jasper*, 17 P.3d 807, 814 (Colo. 2001)).

added].[27] The expectation is that trial courts will set "reasonable controls" to "provide orderly and impartial direction to the movement" of cases.[28]

The facts of this case much more closely follow the facts of cases that favor flexibility in enforcing plea agreement deadlines. For instance, in *People v. Allen*, the difficulty of communication between defense counsel and the defendant left the defendant unaware of a plea offer until the afternoon before trial.[29] The defendant promptly accepted and the State and counsel submitted the agreement to the court for consideration the morning of trial.[30] The trial court reasoned that because jurors had already been selected and were then waiting it would be a waste of their time to have them wait to be dismissed while the State drew up the necessary paperwork.[31] Rather than allow a few minutes to complete the plea agreement procedures the trial court decided it would be better to have a trial.[32] The appellate court stated that because "plea bargaining is vital to and highly desirable for our criminal justice system … no reasonable person could agree with a decision to reject out of hand a proposed plea agreement simply because it contemplates the miniscule expenditure of time necessary to draft a charge".[33] Nor was the appellate

---

[27] *People v. Jasper*, 17 P.3d 810 (2001).
[28] *Id*. at 812.
[29] 351 Ill. App. 3d 599, 601 (Ill. App. Ct., Aug. 11, 2004)
[30] *Id.*
[31] *Id*.
[32] *Id.*
[33] *Id*. at 605.

court persuaded that jurors, if given the option to wait and go home or go forward with one or more days of trial would have felt waiting a waste of their time and trial the wiser use of their time.[34] Also, in *State v. Darelli*, with similar facts and reasoning, the Court of Appeals held that a self-imposed procedural rule cannot pre-empt the need to give individualized consideration to the merits of a plea agreement.[35] These cases, unlike the cases referenced by the State, accurately reflect the nature of the issue currently before this Court, highlighting that where there was no bad faith on the part of the Mr. Hopkins, a plea agreement cannot be timely where there is no time to make an agreement.

The onus is on the courts to ensure that plea negotiations receive adequate constitutional protections. Placing impossible to meet standards on the defendant is neither reasonable nor in the best interests of justice. "For the Constitution is concerned with the practical consequences, not the formal categorizations, of state law."[36]

---

[34] *Id.*

[35] *State v. Darelli*, 72 P.3d 1277, 1282 (Ariz. Ct. App. 2003). See also *State v. Sears*, 542 S.E.2d 863, 868 (W. Va. 2000); See also, *United States v. Robertson*, 45 F.3d 1423, 1439 (11th Cir.) 1995) (where the plea was offered the morning of trial. Holding that "rejecting a plea … solely out of concern for the district court's scheduling is, under the facts of this case, impermissible").

[36] *N.C. v. Alford*, 400 U.S. 25, 37 (1970).

In this case, on September 24th, the trial court ordered that fifty cases scheduled for Final Case Reviews and Trials (FCR/Trial) on September 29th have their September 29th FCR/Trial dates be converted instead to initial case reviews.[37] This left the State and Mr. Hopkins to complete plea negotiations, what the *Jasper* Court acknowledges as "an essential component of the administration of justice",[38] in fifteen days.[39] The need to "batch" reschedule fifty cases for trial because they had not had their initial case review speaks to the lack of order caused by the pandemic shutdowns and the unreasonableness of attempting to strictly enforce deadlines, such as the original September 29th trial date.

The court may have set these dates and deadlines in good faith, but failure to recognize the good cause created by these circumstances, as required by Superior Court Criminal Rule 11(e)(3), was an abuse of discretion. This unfair prejudice impacted the parties' ability to efficiently resolve matters in a way that would have relieved the court's docket, met the State's duties to society, and protected Mr. Hopkins from subsequent undue prejudice. Fairness is key to the use of plea deadlines in creating and efficient judicial process.[40] Enforcing this cutoff date is simply not fair - neither to Mr. Hopkins, nor to the criminal justice system.

---

[37] A-91.
[38] *People v. Jasper*, 17 P.3d 812 (2001).
[39] A-114.
[40] *People v. Jasper*, 17 P.3d 813 (2001), (citing *People v. Brimage,* 638 A.3d 904, 907 (N.J. Super. Ct. App. Div. 1994).

II. EVEN VIEWING THE FACTS IN A LIGHT MOST FAVORABLE TO THE STATE, NO REASONABLE JURY COULD HAVE FOUND INTENT TO DELIVER BEYOND A REASONABLE DOUBT.

The State argues that neither *Farren v. State*[41] nor *Redden v. State*[42] apply a proper standard to the consideration of a motion for judgment of acquittal.[43] The State is wrong. Both *Farren* and *Redden* remain good law – cited repeatedly and without negative history. In those decisions, the Court applied the correct standard but commented that guilt was not the only reasonable conclusion after hearing the evidence. If guilt is not the only reasonable conclusion, then no reasonable juror can find guilty beyond a reasonable doubt. It is only logical that a reasonable explanation of innocence does mandate acquittal because "a reasonable explanation of innocence" is the corollary to "beyond a reasonable doubt." *Williams v. State*,[44] which was cited by the State but addresses neither *Farren* nor *Redden*, does not say otherwise.

That Mr. Hopkins merely possessed the controlled substances in this case, without the intent to deliver them, is supported by case law. In *Laws v. State*, the prosecution was supported by small drug quantities with an admission of guilt

[41] 285 A.2d 411 (Del. 1971)
[42] 281 A.2d 490 (Del 1971).
[43] Answering Brief page 32.
[44] *Williams v. State*, 539 A.2d 164 (Del. 1988).

from the defendant.[45] In *Wilson v. State,* where the quantity of drugs was insufficient on its own to carry the charge the state presented recorded telephone conversations giving evidence of the defendant's drug dealing activities.[46] In *Ashley v. State,* in the absence of other indicators the Detective determined there was intent to sell because the quantity of the drugs was significantly more than what is consistent with personal use.[47] Further, the drugs were individually package and stamped as if ready for distribution.[48] In *Morales v. State,*[49] the defendant actually sold cocaine to a detective and the cocaine sold to the detective was later matched to the cocaine in the defendant's apartment.[50]

As the State acknowledges, the possession, quantity, and packaging of drugs alone is not necessarily sufficient to prove intent to deliver.[51] Here there was no packaging with which to deliver the drugs, requiring a presumption that buyers were expected to bring their own Tupperware or baggies. The quantities found were not even large enough to be tiered in the highly detailed Delaware Criminal Code.[52] There was mere possession of the drugs with a quantity of cash just shy of

---

[45] 2003 WL 22998850 (Del. Dec. 18, 2003).
[46] *Wilson v. State,* 343 A.2d 613, 618 (Del. 1975).
[47] 988 A.2d 420, 422 (Del. 2010).
[48] *Id.*
[49] 696 A.2d 390, 394 (Del. 1997).
[50] *Id.*
[51] Answering Brief page 27.
[52] 16 *Del. C.* § 4751C.

one month's rent for a small room in Dover.[53] Tellingly, Mr. Hopkins was only accused of intending to deliver cocaine.

The officer admitted that this was not consistent with his normal experience of a drug transaction.[54] But, because there were no signs of imminent use, the officer assumed there must be intent to sell. Probability is not sufficient evidence to carry a moral certainty of guilt.[55] Similarly, asserting that Mr. Hopkins was likely intending to distribute because his manner of possessing the drugs was inconsistent with the typical drug user's manner of possession, is not sufficient empirical evidence.

Further the State asserts too high of a standard for a reasonable doubt. A reasonable doubt is not a "grave uncertainty" or "an actual substantial doubt", those are too high a standard and unconstitutional.[56] Reasonable doubt is a doubt that a reasonable man can seriously entertain.[57] If there is a real possibility that the defendant is not guilty based on the evidence then the trier of facts must give the defendant the benefit of that doubt finding them not guilty.[58] Nor could the

---

[53] A-279.
[54] Answering Brief page 28.
[55] *Victor v. Nebraska*, 511 U.S. 8 (1994).
[56] *Id*. at 5.
[57] *Mills v. State*, 732 A.2d 845, 852 (Del. 1999).
[58] *Glover v. State*, 710 A.2d 217 (Del. 1998)

arresting officer discount the possibility of Hopkins and his companion intending to use the drugs themselves.[59] That Mr. Hopkins purchased just enough drugs to use at a bar with his companion is not just plausible, it is reasonable and even probable.

[59] Opening Brief page 13.

CONCLUSION

Wherefore, Appellant prays this Honorable Court **VACATE** Appellant's convictions for the reasons stated herein. Upon the Court finding insufficient evidence to sustain the convictions, Appellant prays that this Court **REMAND FOR ENTRY OF JUDGMENT OF AQUITTAL** as to Count 1 pursuant to Appellant's constitutional double jeopardy rights and 11 *Del. C.* § 207. As to the remaining charges in the case, Appellant prays that the Court **REMAND FOR ACCEPTANCE OF A PLEA AGREEMENT** consistent with 11 *Del. C.* § 207 and with the probation recommendation that was previously rejected by the Superior Court.

HUDSON JONES JAYWORK & FISHER

/s/ Zachary A. George
ZACHARY A. GEORGE, ESQ.
Bar ID No. 5613
225 South State Street
Dover, Delaware 19901
(302) 734-7401
zgeorge@delawarelaw.com
Attorney for Appellant
Words: 3309

Dated: September 14, 2022