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Case Number 244,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN WHEELER	)	
	)	
Defendant Below-Appellant,	)	No. 244, 2022
	)	
	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID No. 1610013171
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

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

REPLY BRIEF

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Dated: October 18, 2022

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Appellant Stephen Wheeler replies to the State's Answering Brief as follows:

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING MR. WHEELER'S MOTION FOR POSTCONVICTION RELIEF; TRIAL COUNSEL'S DEFICIENT PERFORMANCE CAUSED MR. WHEELER'S WAIVER OF HIS RIGHT TO A JURY TRIAL.

Applicable legal standard for prejudice

In the Opening Brief, Mr. Wheeler argued that the proper standard for considering prejudice was not whether the petitioner would have succeeded at trial, but whether the petitioner would, but for deficient advice by counsel, insisted on exercising his right to a jury trial.[1] The State agrees.[2] The Superior Court did not determine the question. Rather, the Court found that if it applied the *Strickland* standard, Mr. Wheeler's motion must be denied because he did not establish that the result of his trial would have been different.[3] The Court then applied the "modified" standard set forth by the Third Circuit in *Vickers v. Superintendent Graterford SCI*.[4] The Superior Court held that Mr. Wheeler fails under this standard too because he did not establish he would have had a jury trial.[5]

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[1] Op. Br. at 32-36.
[2] Ans. Br. at 14, fn. 8; Ans. Br. at 23.
[3] *State v. Wheeler*, 2022 WL 2134686 at *9 (Del. Super. June 14, 2022).
[4] 858 F.3d 841 (3d. Cir. 2017).
[5] *Wheeler*, 2022 WL 2134686 at *9.

For the reasons set forth in the Opening Brief, this Court should apply the *Vickers* standard to assess whether Mr. Wheeler was prejudiced by his attorney's deficient advice.

This Court should not defer to the Superior Court's erroneous factual findings.

The State asserts that the Superior Court's factual findings are entitled to deference.[6] It is indeed true that under an abuse of discretion standard, the lower court's factual findings are reviewed deferentially. However, this Court "carefully review[s] the record to determine whether 'competent evidence supports the court's findings of fact and whether its conclusions of law are not erroneous.'"[7] Here, the Superior Court's factual findings are at odds with the record and do not survive careful examination. The Court held:

> Based on the testimony at the evidentiary hearing, summarized above, I must weigh the credibility of Petitioner against that of Trial Counsel. I find serious discrepancies in Petitioner's testimony. He himself admitted that he was untruthful with the Court during his jury trial waiver colloquy immediately preceding his trial.[28] During that colloquy, he told the Court that he wanted to have a bench trial and that no one was forcing him to do that. However, at the evidentiary hearing, he admitted that that was not true, that he wanted a jury trial, and that he was forced into having a bench trial.
>
> On the other hand, Trial Counsel's testimony at the evidentiary hearing was consistent throughout. His testimony that he did not tell Petitioner that a bench trial would be better than a jury trial, because certain evidence could be admitted in a bench trial that could not be

[6] Ans. Br. at 18-20.
[7] *Capano v. State*, 889 A.2d 968, 974 (Del. 2006), *citing*, *Outten v. State*, 720 A.2d 547, 551 (Del. 1998).

> admitted in a jury trial, was credible. What Trial Counsel may have been suggesting is that, when there is an objection in a bench trial, the Court often hears evidence with the understanding that he or she is able to give it the appropriate weight and to parse through the evidence to separate the inadmissible from the admissible in a way a jury cannot. Having heard Petitioner and Trial Counsel, I am convinced that Trial Counsel was telling the truth.[8]

The Court's credibility determinations are not supported by the record. Mr. Wheeler's answers during the plea colloquy were the product of trial counsel's advice to waive a jury trial. As such, the answers were of limited relevance, as the judge acknowledged during a pre-hearing teleconference:

> …if counsel gave the advice that he could get evidence in front of a judge that he couldn't in front of a jury and if that is why the defendant made his decision to waive the jury trial, then I'm not sure what it matters what the judge said in terms of the colloquy because the defendant was making all his answers and making his decision based upon that faulty evidence. Now I don't know that faulty evidence was given.[9]

Such was the case here. Mr. Wheeler testified that his attorney told him he would have to answer the judge's questions and to say "yes" to the questions.[10] The purpose of the colloquy from Mr. Wheeler's perspective was to get the judge to approve a bench trial – because that is what his attorney advised him to do.[11]

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[8] *Wheeler*, 2022 WL 2134686 at *7.
[9] A936.
[10] A952.
[11] A953-955.

Trial counsel admitted in his testimony that he advised Mr. Wheeler that "everything goes in front of the judge in a bench trial."[12] Despite having been told minutes before his meeting with Mr. Wheeler that the salacious evidence he sought to admit was inadmissible, counsel sought any advantage "within the realms of the law."[13] His theory was that the judge, having ruled on an evidentiary issue, would nevertheless be influenced by what the judge had heard.[14] Trial counsel wanted the judge to "at least get a flavor" of the fact that the victim, Mueller, did not have "clean hands."[15] Trial counsel believed a bench trial was the way to do it.

The evidentiary hearing demonstrated that trial counsel and Mr. Wheeler told essentially the same account of the morning-of-trial meeting that resulted in the bench trial request. Mr. Wheeler heard trial counsel advise a bench trial was better because he could get evidence in front of a judge that he could not in front of a jury. Trial counsel testified he advised he was looking for an advantage and wanted the judge to be influenced by evidentiary arguments about the victim's sexual habits – even if the evidence was ruled inadmissible.

The State essentially concurs with this assessment. It argues that "trial counsel explained to Wheeler that in a bench trial, the judge would hear more

[12] A973.
[13] A974.
[14] A976.
[15] *Id.*

evidence as the trier of fact than in a jury trial because the judge would also be making decisions on the admissibility of the evidence."[16]

The Superior Court erred in finding that trial counsel did not advise Mr. Wheeler to have a bench trial because he could get evidence in front of a judge he could not in front of a jury. The record demonstrates that he did.

The Superior Court also erred in finding that the bench trial decision was not made at the last minute.[17] The State, citing the Superior Court, argues the waiver was valid because counsel had discussed waiving a jury trial with Mr. Wheeler "on at least two separate occasions."[18] These facts are refuted by the record. After the initial morning-of-trial office conference and meeting with Mr. Wheeler, trial counsel came into the courtroom and requested a bench trial. He stated it was a "last minute thing."[19] When the judge stated he wish he knew it sooner, because a jury had been brought in, trial counsel responded, "you don't have to kill the messenger, Your Honor. I'm just communicating."[20]

It is unclear why the Superior Court placed such importance on the fact that counsel discussed a jury versus bench trial decision a week prior to the trial date. The decision was clearly made at the last minute. At that meeting the week prior

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[16] Ans. Br at 21-22.
[17] *Wheeler* at *8.
[18] Ans. Br. at 19.
[19] A190.
[20] *Id.*

to trial, Mr. Wheeler was given to understand he was having a jury trial. At counsel's urging, he had a family member supply trial clothing to counsel.[21] Trial counsel recalled discussing trial options with Mr. Wheeler once before the trial date, "but the conversation the day of trial is when a decision was made."[22] As such, the Superior Court's finding that trial counsel spoke to Mr. Wheeler about waiving his right to a jury trial "on at least two separate occasions"[23] is of little consequence because the decision was made on the morning of trial. It was at this meeting that trial counsel, having just come from the office conference, discussed his evidentiary theory with Mr. Wheeler.

For these reasons, the State's argument that this Court should defer to the factual findings of the Superior Court should be rejected.

Trial counsel's advice was unreasonable.

The State next argues that trial counsel's advice was not objectively unreasonable, because there can be benefits to a non-jury trial.[24] Specifically, the State asserts that trial counsel's objective was to get the judge to hear evidence of the victim's sexual proclivities while considering evidentiary arguments.[25] This argument aligns with the Superior Court's holding that "trial counsel was able to

[21] A949-950.
[22] A966.
[23] *Wheeler* at *8.
[24] Ans. Br. at 21-22.
[25] *Id.*

get the salacious impeachment evidence into the record, although presumably *the judge did not consider it as to credibility, in keeping with his prior ruling on inadmissibility*."[26]

Therein lies the problem with the State's argument and the Court's holding as to the reasonableness of trial counsel's advice. The judge was never going to consider the evidence that trial counsel wanted considered.

At the first morning-of-trial office conference, trial counsel told the judge he wanted to admit evidence of salacious material found on the cellphones. Trial counsel stated that the victim, Mueller, was a 64 year-old man who had teenage girls living with him and that he enticed them with drugs and had sex with them.[27] Counsel sought to admit, for example, a video of Mueller watching Melton and another girl have sex in his home.[28] The judge inquired how that had anything to do with impeachment under Rule 608.[29] Counsel replied that it "goes to moral turpitude."[30] The judge advised trial counsel, "before you ask your questions in there, and you ask me before you ask the question, I'm telling you, you better go

[26] *Wheeler* at *7 (Emphasis added).
[27] A179.
[28] A180.
[29] A180-181.
[30] A181-182.

get some 608 brushup before you walk into the courtroom."[31] The judge ruled that this "moral turpitude" evidence was inadmissible.[32]

Directly after this office conference, trial counsel went to the lockup and advised Mr. Wheeler to have a jury trial because he could get evidence in front of the judge that he could not in front of a jury. In other words, counsel gave this advice just *after* the judge told him he would not consider such evidence. Under any objective standard, counsel provided deficient advice to Mr. Wheeler. The Superior Court supposed that trial counsel may have been advising that trial counsel thought a judge would better be able to parse through the evidence, give it the appropriate weights and to "separate the inadmissible from the admissible in a way the jury cannot."[33] But in this case, the judge had already ruled the sought-after evidence inadmissible.

There are certainly cases where an attorney may advise a client to consider a bench trial and for good reasons. This was not one of them.

Mr. Wheeler established that he would not have waived a jury trial but for trial counsel's deficient advice.

The State argues that Mr. Wheeler did not establish that he would have gone forward with a jury trial. In support, the State only asserts that the Court's

[31] A183.
[32] A181-182.
[33] *Wheeler* at *7.

credibility determination is entitled to deference. The Court found that because trial counsel and Mr. Wheeler had discussed what type of trial to have in a prior meeting, that Mr. Wheeler's testimony that he wanted a jury trial was not credible.[34]

As is abundantly clear from the record, Mr. Wheeler's decision to seek a bench trial was a "last minute thing."[35] At the evidentiary hearing, trial counsel testified that there were prior discussions, but "the conversation day of trial is when a decision was made."[36]

It is obvious from the record that Mr. Wheeler wanted a jury trial right up until the morning of trial, when trial counsel advised him about the supposed benefits of a bench trial. But for this deficient advice, Mr. Wheeler would have exercised his right to a jury trial.

A written jury trial waiver is not a "procedural failsafe" but is required by rule in Delaware.

The State asserts that the waiver requirement is a "procedural failsafe" and can be cured by a colloquy.[37] Not so. The written waiver is required by rule.[38] The colloquy is the failsafe. As discussed in the opening brief,[39] in *Davis v. State* and

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[34] Ans. Br. at 22-23.
[35] *Id*.
[36] A966.
[37] Ans. Br. at 23-24.
[38] Super. Ct. Crim. R. 23(a).
[39] Op. Br. at 41-42.

all other cases cites in the Superior Court's opinion, the defendant executed a written waiver.[40]

To hold, as the Superior Court did and the State asserts, that the waiver requirement is not a requirement at all but a helpful companion to a colloquy would eviscerate the Superior Court rule. A written waiver is required and did not occur in Mr. Wheeler's case.

[40] *See*, *Wheeler* at *7, *citing*, *Davis v. State*, 809 A.2d 565 (Del. 2002).

CONCLUSION

For the foregoing reasons and those stated in the Opening Brief, Appellant Stephen Wheeler respectfully requests that this Court reverse the judgment of the Superior Court.

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