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Case Number 302,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY REED,	)	
	)	
Defendant Below-Appellant,	)	No. 302, 2022
	)	
	)	ON APPEAL FROM
v.	)	THE SUPERIOR COURT OF THE
	)	STATE OF DELAWARE
	)	ID No. 1809015387
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: November 21, 2022

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Appellant Jerry Reed, through the undersigned counsel, replies to the State's Answering Brief as follows:

I. THE SUPERIOR COURT ERRED IN DENYING MR. REED'S POSTCONVICTION RELIEF.

A careful consideration of the record makes clear that the Superior Court abused its discretion in dissecting Mr. Reed's testimony and finding him not credible, but finding that trial counsel should get the benefit of "the constraints of memory."

The Superior Court accepted trial counsel's account "within the constraints of memory,"[1] while subjecting Mr. Reed's testimony to a point-by-point dissection looking for any inconsistency.[2] After all, trial counsel candidly admitted that his memory of events was wrong and was corrected by the prosecutors during their preparation for the evidentiary hearing.[3] Moreover, trial counsel could not recall specifics of his crucial morning-of-trial meeting with Mr. Reed.[4] His testimony was not based on a specific recollection of the meeting.[5]

Nevertheless, the State asserts that "whereas some lapses of memory should be expected with the passage of time, verifiable inaccuracies – such as those in Mr. Reed's account – stand out as problematic."[6] Neither the State nor the Superior

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[1] *State v. Reed*, 2022 WL 2967236 at *9 (Del. Super. July 27, 2022).
[2] *See*, *Id*. at *10-11.
[3] A335. *See also,* A450-465.
[4] A346.
[5] A349.
[6] Ans. Br. at 25.

Court explain why any lapses of Mr. Reed's memory are not explained by the passage of time, while trial counsel's lapses are. The State instead asserts that a witness testifying to *more* detail is less credible than a witness who admittedly cannot remember.

For example, Mr. Reed had specific memories of a pretrial meeting with trial counsel in which he flipped his eyeglass case in the air to see how it landed to illustrate his 50-50 chances at trial.[7] During the day-of-trial meeting, trial counsel explained to Mr. Reed that his chances were down to 20-80.[8] The Superior Court found Mr. Reed's specific recollections not credible, because "Mr. Phillips doubted he would have expressed Mr. Reed's chance numerically and Ms. Murray did not recall it."[9] Mr. Phillips testified that he doubted he discussed odds with Mr. Reed but it was possible.[10] He was, however, sure that they spoke about different scenarios based on how the testimony came in. [11]Ms. Murray, as her testimony makes clear, remembers very little about this case.

So, in this instance, Mr. Reed had a specific recollection, trial counsel did not, and yet this counted as an illustration of Mr. Reed's lack of credibility.

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[7] A282.
[8] A288.
[9] *Reed*, 2022 WL 2967236 at *10.
[10] A342.
[11] *Id*.

The State also supports the Superior Court's finding that a lack of corroboration makes Mr. Reed not credible.[12] Like the Superior Court, the State does not explain who was supposed to corroborate what happened in the meetings Mr. Reed had with his counsel. Short of having an independent witness present, it is difficult to see how Mr. Reed could have met the Superior Court's requirement of corroboration of his testimony. Surely, Mr. Reed could not have expected that trial counsel would have so little recall of the case, nor would they have any memoranda to memorialize crucial events in the representation.[13]

The State, like the Superior Court, claims that Mr. Reed took the plea not due to trial counsel's advice, but due to conversations with his family.[14] This speculation is largely premised on trial counsel's recollection that Mr. Reed's girlfriend thought he should take the plea.[15] It is not clear why Mr. Reed's sworn testimony is worthy of so little credit. He testified that his girlfriend told him, "please don't take no plea that you didn't do. Don't plea to something you didn't do."[16] Mr. Reed's testimony had more persuasive force than trial counsel's dimly remembered suppositions; it was error to hold otherwise.

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[12] Ans. Br. at 25.
[13] *See*, A335; trial counsel's practice not to write memos, unless "I feel some reason to cover my backside for some reason."
[14] Ans. Br. at 30-31.
[15] *See*, A369-70; A404-405.
[16] A313.

The same can be said of the State's assertion that he "accepted" the plea on January 3, 2020 by signing plea forms.[17] Not so. A plea is not accepted by the mere signing of forms. Mr. Reed did not accept the plea on January 6, 2020. He did not have any intention of doing so.[18] He testified that counsel asked him to sign the forms in case he changed his mind.[19] Mr. Phillips testified, "We scheduled a plea for Monday. I don't know what my confidence was that it would happen."[20]

Again and again, the Superior Court chose to ignore or discredit Mr. Reed's sworn testimony while giving full credit to trial counsel, who by their own admission had little memory of events. This Court's careful consideration of the record[21] will establish that the Superior Court erred in its factual findings.

The Superior Court fundamentally misapprehended the sequence of events by finding that Mr. Reed concocted his claims "to create a way out of the sentence I imposed."

Misapprehending the sequence of events, the Superior Court held, "in my view, Mr. Reed then made the claim that Trial Counsel told him that 'no Black man can ever get a fair trial in Sussex County' to create a way out of the sentence I had imposed."[22] The Court went on to hold that "[Mr. Reed] was disappointed and

[17] Ans. Br. at 27.
[18] A284.
[19] A283.
[20] A341.
[21] *See*, *Neal v. State*, 80 A.3d 935, 941 (Del. 2013).
[22] *State v. Reed*, 2022 WL 2967236 at *11 (Del. Super. July 27, 2022).

had damaged expectations by the sentence he received."[23] The Court held further that Mr. Reed's "buyer's remorse" resulted in "what I have found to be incredible attacks on trial counsel. I suspect Mr. Reed now has convinced himself that what he says his lawyers told him is true, but that does not make it so."[24]

These holdings by the Superior Court are not susceptible to multiple interpretations. The Superior Court held that Mr. Reed concocted his claim to get out of a sentence – a sentence, that when Mr. Reed first made the claim, had yet to be imposed.

The State characterizes the Court's holding as "an inartful way to express the idea."[25] That argument does not hold up because the Court expressed the same incorrect holding twice: first in holding that Mr. Reed invented his claim to try to get out of his sentence, and again when it held Mr. Reed was disappointed and had damaged expectations by the sentence he received. The Court clearly misconstrued the timing of Mr. Reed's claim, which led the Court to disregard his sworn testimony and go so far as to suppose that Mr. Reed now believes a fallacy.

[23] *Id.* at *18.
[24] *Id.*
[25] Ans. Br. at 28.

The Superior Court erroneously modified the inquiry on remand, holding that Mr. Reed would only be entitled to relief if trial counsel told him, "no Black man can ever get a fair trial in Sussex County."

In its remand order, this Court directed the Superior Court to conduct an evidentiary hearing to determine "whether Reed's attorney told him words to the effect that a Black man cannot get a fair trial in Sussex County.[26] This Court provided further guidance for the Superior Court:

> Of particular importance is the precise content of counsel's advice to Reed about how his race, or the racial mix of the Sussex County jury pool, would affect his trial prospects and the impact of any such advice on the voluntariness of his plea.[27]

The Superior Court reframed the question: whether trial counsel ever said to Mr. Reed that "no Black man can ever get a fair trial in Sussex County."[28] The Court framed the inquiry as to "whether absolute comments were made."[29] The Court then made a factual finding that "in my view, Mr. Reed then made the claim that Trial Counsel told him that 'no Black man can ever get a fair trial in Sussex County' to create a way out of the sentence I had imposed."[30] The Court

[26] *Reed v. State*, 258 A.3d 807, 826 (Del. 2021).
[27] *Id*. at 831.
[28] *State v. Reed*, 2022 WL 2967236 at *11 (Del. Super. July 27, 2022).
[29] *Id.* at *9.
[30] *Id.* at *11.

admonished Mr. Reed for turning legitimate advice into its "lowest common denominator"[31] and making "incredible attacks on Trial Counsel."[32]

But this Court did not remand this case to determine if trial counsel specifically told Mr. Reed, "no Black man can ever get a fair trial in Sussex County." Nor, in fact, has Mr. Reed ever claimed that was said. In his first written pleading seeking to withdraw his pleas, he wrote:

> My attorney advised me that it was in my best interest to take this plea weather [sic] or not I was innocent or not because if I would of went to Trial I was going up against a justice system that is set up to go against Black people and minorities and no matter what I was going to get found guilty of something…"[33]

In his subsequent motion to withdraw his plea, he wrote:

> Going to trial will prove my innocents [sic] which my attorney failed to mention and bring to my attention instead of telling me that going to trial would of been a bad decision because I would be going against a system made to go against Black people and minorities to already lose Trial.[34]

In the evidentiary hearing, Mr. Reed testified that counsel told him if he went to trial, "you willingly put your life in the hands of a system that's already set up to go against blacks and minorities."[35] Because of this, he would lose trial and get a

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[31] *Id*. at *18.
[32] *Id.*
[33] A100.
[34] A158.
[35] A289.

life sentence.[36] Specifically, counsel explained that the jury would not be his peers; instead it would be all older people and white people. These people, according to trial counsel, would not know where he came from, what he has experienced, or why he lied to police.[37]

The State argues that "the Superior Court adopted a similarly empathetic view of how the sensitive issue of race might impact the criminal justice system."[38] The State goes on to argue that certain passages in the Superior Court's Opinion demonstrate that the Court conducted a "specific, searching inquiry" regarding trial counsel's advice.[39] Not so. Although the Opinion contains some dicta about race in the criminal justice system, the Superior Court framed and answered only one question: whether trial counsel specifically told Mr. Reed, "no Black man can ever get a fair trial in Sussex County."

As is obvious from the record, the Superior Court modified the inquiry on remand, found that the "absolute" statement was not made, then criticized Mr. Reed for making accusations he did not make. This was error and should be reversed. Had the Superior Court conducted the proper inquiry, it would have held that trial counsel's advice to Mr. Reed contained several reasons why he would not

[36] A316.
[37] A290.
[38] Ans. Br. at 33.
[39] Ans. Br. at 34.

get a fair trial because the justice system is biased against Blacks and minorities – just as Mr. Reed claimed.[40]

The Superior Court erred in holding that there was no reasonable probability his motion to withdraw his plea would have been granted.

As discussed, the Superior Court erred in finding that Mr. Reed voluntarily entered the plea. The deficient advice given on the morning of trial caused Mr. Reed's decision. He was in trial clothing and ready for trial. As far as he knew, all plea offers were off the table after he rejected the plea on January 6, 2020. It was only the 90-minute meeting with trial counsel that caused Mr. Reed to change his mind. In Mr. Reed's case, this is the most overwhelming factor, and the granting of the plea withdrawal motion should have been granted on this basis alone.[41]

The State asserts that Mr. Reed has no basis to assert legal innocence and that the Superior Court properly held that "being able to subject the case to adversarial testing is not equivalent to asserting a legally cognizant defense."[42]

Mr. Reed has a basis to assert legal innocence. His attorneys laid it out at the sentencing hearing. They asserted there was reasonable doubt of Mr. Reed's guilt.[43] They argued that Mr. Reed's only role was setting up a fistfight between

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[40] *See*, Op. Br. at 33-34.
[41] All five *Scarborough* factors must be reviewed, but some factors in and of themselves justify relief. *Reed*, 258 A.3d at 830, *citing*, *Scarborough v. State*, 938 A.2d 644, 649 (Del. 2007).
[42] Ans. Br. at 37-38.
[43] A106-107.

the two combatants to settle their differences.[44] According to trial counsel, that exposed him to "conspiracy liability" for the murder charge.[45] Mr. Reed refused to plead guilty to firearm possession and instead pled no contest, because he adamantly denied having a firearm at the time of the shooting.[46]

Mr. Reed never got to present his defense due to trial counsel's deficient advice. The State argues that Mr. Reed can only meet the assertion of legal innocence factor by asserting a statutory defense such as mental illness, involuntary intoxication, duress, entrapment, and the like.[47] But nothing in our jurisprudence requires the movant to establish the existence of a statutory or affirmative defense to establish this factor.

Ultimately, the Superior Court's consideration of the Withdrawal Claim is undermined by its error in determining the Advice Claim. The great weight of the evidence establishes that on the day of trial, Mr. Reed's attorneys advised him that the justice system in Sussex County is set up against Blacks and minorities. The Superior Court erroneously held that Mr. Reed invented the advice he was given to get out of a sentence. But Mr. Reed has been making the same claim since eight days after the plea hearing. Perhaps as a result, the Superior Court accepted trial

[44] A110-114.
[45] A107.
[46] A117.
[47] Ans. Br. at 39.

counsel's vague account "within the constraints of memory," while systematically subjecting Mr. Reed's testimony to heavy scrutiny.

The Superior Court also improperly framed the issue on remand, finding that the issue was whether trial counsel specifically told Mr. Reed "no Black man can ever get a fair trial in Sussex County." The Court criticized Mr. Reed for making "incredible attacks on trial counsel" and for engaging in the "lowest common denominator" regarding race. But this Court remanded to determine "the precise content of counsel's advice to Reed about how his race, or the racial mix of the Sussex County jury pool, would affect his trial prospects and the impact of any such advice on the voluntariness of his plea."[48]

The Superior Court misapprehended the sequence of events, incorrectly framed the issue, and made unreasonable credibility assessments. As such, the Superior Court should be reversed.

[48] *Reed v. State*, 258 A.3d 807, 831 (Del. 2021).

CONCLUSION

For the foregoing reasons, and those set forth in the Opening Brief, Appellant Jerry Reed respectfully requests that this Court reverse the judgment of the Superior Court.

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