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Re: State v. Michael Barlow – Cr. A. No. 0705036134

Submitted: February 21, 2008

Decided: February 26, 2008

Gentlemen:

The defendant was convicted, after trial on January 7, 2008, of driving under the influence of alcohol and/or drugs in violation of 21 Del. C. §4177(a).

On February 6, 2008, defendant filed a motion for a new trial under Rule 33 of the Rules of Criminal Procedure alleging that there was newly discovered evidence which was not cumulative and would probably change the outcome of a new trial.

The State has filed an answer to the motion and argued that defendant has not alleged true newly discovered evidence and that it would not change the outcome of a new trial.

The three prongs necessary for the grant of a new trial for newly discovered evidence pursuant to Rule 33 of the Criminal Rules are clearly stated in Lloyd v. State,

534 A2d 1262 (Del. 1987): 1) the evidence must be newly discovered since trial and was not discoverable before trial with due diligence; 2) the evidence should not be merely cumulative or impeaching; and 3) the evidence must fairly show that it would probably change the result of the trial. Failure to show any of the three prongs will preclude the granting of a new trial.

Defendant's newly discovered evidence is that he was wearing dentures on the day he was arrested and that this compromised the breath test which was administered after his arrest and the result from that test which was admitted into evidence.

The Court concludes that this is not such newly discovered evidence as contemplated by the Rule. Clearly this evidence existed at and before trial. The defendant was aware of the evidence prior to trial as shown by an exhibit attached to the motion which notes that he had the partial denture since at least 1997. The evidence could have been developed by due diligence in preparation for the trial. The issue of whether or not defendant wore dentures and whether or not he had them in his mouth at the time of the testing could have been tested by cross examination at trial.

Since one of the three prongs necessary to grant a motion for new trial on the basis of newly discovered evidence is lacking, there is no need to consider the other two prongs.

The motion for new trial is denied.

IT IS SO ORDERED.

Judge Alfred Fraczkowski¹

¹ Sitting by appointment pursuant to Del. Const.; Art IV §38 29 Del. C. §5610