

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PERRY D. JONES,	§	
	§	No. 198, 2003
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for Kent County
	§	Cr. I.D. No. 0201005099
Plaintiff Below,	§	
Appellee.	§	

Submitted: November 4, 2003  
Decided: January 28, 2004

Before **VEASEY**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

**ORDER**

This 28<sup>th</sup> day of January, 2004, upon consideration of the briefs of the parties, it appears to the Court that:

1) Perry D. Jones appeals from his convictions, following a jury trial, of trafficking in cocaine, possession with intent to deliver cocaine, and possession of marijuana. He argues that the Superior Court erred in refusing to give a “missing evidence” instruction based on the fact that the State failed to examine for fingerprints the drugs and other items seized by the police.

2) On May 31, 2001, a team of Dover Police officers executed a search warrant at a house on Water Street, Dover, Delaware. Officer Nicholas Berna entered the

house from the rear, and noticed someone flash by the kitchen window and head toward the basement. Berna searched the basement and found Jones hiding behind a heater. Jones had \$1,140 on his person, and the police discovered another \$7,194 on top of some duct work, a few feet from where Jones had been hiding. On the duct work, the police also found three identification cards, including a California ID bearing Jones's picture and a different name.

3) Jones was the only person found in the house. Two others, Robert Ross and Monique Harris, ran out the front door and were apprehended on the front lawn. While Ross and Harris were being handcuffed, Officer Kerry Bittenbender was attending to perimeter security, watching the front of the house. When he heard a scuffling noise coming from the basement, Bittenbender looked at the basement window and saw a package in the window that had not been there when he first observed the window. Bittenbender alerted another officer, who retrieved the package. In it, the police found a plastic baggie of marijuana and another containing crack cocaine.

4) In their search of the house, police officers found: 1) crack cocaine drying on a towel on the kitchen counter; 2) a Pyrex dish and butter knife that appeared to have crack residue; 3) two bags of crack cocaine in a kitchen cabinet; 4) a loaded

pistol in the same cabinet; 5) boxes of baking soda (which is used in the production of crack cocaine); and 6) two digital scales.

5) The police did not check any of the seized items, except the pistol, for latent fingerprints. Corporal David Boney testified that the police generally do not dust money or plastic baggies for fingerprints because money is touched by many people and baggies are not conducive to fingerprinting. He explained that several other items were not dusted because they had been washed, and, therefore, would not have any latent fingerprints.

6) Jones asked the trial court to instruct the jury that the State's failure to test the seized evidence for fingerprints allows the jury to draw an inference that the fingerprint testing, if performed, would have tended to prove that Jones was not guilty. The trial court's refusal to give that instruction forms the sole basis for Jones's appeal.

7) In *Deberry v. State*,<sup>1</sup> this Court explained how missing evidence claims should be examined:

1) would the requested material, if extant in the possession of the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or *Brady*?

2) if so, did the government have a duty to preserve the material?

3) if there was a duty to preserve, was the duty breached, and what consequences should flow from a breach?

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<sup>1</sup>457 A.2d 744, 750 (Del. 1983).

In determining the consequences of a breach, *Deberry* identified three additional factors to be considered:

(1) the degree of negligence or bad faith involved, (2) the importance of the lost evidence, and (3) the sufficiency of the other evidence adduced at the trial to sustain the conviction.<sup>2</sup>

8) We find no error in the trial court's decision not to give a missing evidence instruction. First, the evidence established that the lack of fingerprint testing was not the result of negligence or bad faith. The police department does not test money or drugs for fingerprints because: (i) the plastic bags containing drugs are not conducive to fingerprint testing, and (ii) paper currency is handled by so many people that any fingerprints would have little probative value. Second, the missing fingerprint evidence had little, if any, potential to exculpate Jones. He was arrested with two other people, while all three apparently were in the process of manufacturing crack cocaine. Thus, the presence or absence of Jones's fingerprints on any particular item would not be very meaningful. Third, the evidence against Jones was strong. At the time of his arrest, the police found a kitchen full of evidence that they had interrupted a cocaine cooking session. Crack cocaine was drying on a towel, cooking utensils with traces of cocaine were lying on the counter, and bags of crack cocaine were in

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<sup>2</sup>*Id.* at 752 (quoting *United States for Loud Hawk*, 628 F.2d 1139, 1152 (9<sup>th</sup> Cir. 1979).

the kitchen cabinet, along with a loaded gun. Considering all of these factors, we conclude that a missing evidence instruction was not required.<sup>3</sup>

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court be, and the same hereby are, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>3</sup>*Lunnon v. State*, 710 A.2d 197, 200-01 (Del. 1998).