IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD BASS,	§	
	§	
Defendant Below,	§	
Appellant,	§	No. 535, 1998
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware in and
STATE OF DELAWARE,	§	for New Castle County
	§	Cr. A. No. 96-07012102
Plaintiff Below,	§	
Appellee.	§	

Submitted: August 15, 2000
Decided: September 13, 2000

Before VEASEY, Chief Justice, WALSH and HOLLAND, Justices.

O R D E R

This 13th day of September 2000, upon consideration of the briefs of the parties, it appears that:

(1) Donald Bass ("Bass") appeals his convictions and life sentences as a habitual offender following a Superior Court jury trial in which Bass was found guilty of nineteen counts of robbery and weapons offenses. The court subsequently imposed a mandatory habitual offender sentence of eight life terms plus 78 years mandatory.

(2) Bass raises four issues on appeal. First, Bass contends that the Superior Court improperly refused to appoint standby counsel to assist him in his defense. Second, Bass claims that the prosecutor made improper and unduly prejudicial statements to the jury. Third, Bass submits that the court committed legal error by

sentencing him under the habitual offender statute. Lastly, Bass argues that the court erred by failing to merge the multiple counts of robbery first degree and possession of a firearm during the commission of a felony.

(3) On the morning of trial, prior to jury selection, Bass' court-appointed defense counsel informed the trial judge that Bass wished to represent himself, while retaining his court-appointed attorney to assist him. The trial judge responded, in part, that: "I'm aware of no authority that gives the defendant the right to have standby counsel, and I am aware of no authority that encourages that practice." The trial court then explained that it thought standby counsel was "bad practice for a number of reasons," which the court discussed, and then concluded that "it will not allow Mr. Figliola [Bass' court-appointed counsel] to participate as standby counsel. So the question becomes whether Mr. Figliola is the attorney here or [whether] Mr. Bass will represent himself."

(4) Although the Superior Court correctly noted that Bass did not have the "right" to standby counsel, federal and Delaware authority encourage that practice. *See Mayberry v. Pennsylvania*, 400 U.S. 455, 467-68 (1971) (Burger, C.J., concurring) (stating that when a defendant refuses or seeks to discharge counsel, "a trial judge is well advised … to have such 'standby counsel' to perform all the services a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence and making closing argument"); *Briscoe v. State*, Del.

Supr., 606 A.2d 103, 109 (1992) (noting that the "well-established practice in Delaware" is to permit a defendant "to proceed *pro se* with the assistance of standby counsel"); *Gordon v. State*, Del. Supr., Nos. 381, 1989 & 388, 1989, 1991 WL 165578, at *2, Walsh, J. (July 30, 1991) (ORDER) ("Even where self-representation is permitted, the trial judge should provide standby counsel to lessen the prospect of prejudice."); *Hicks v. State*, Del. Supr., 434 A.2d 377, 381 (1981) ("Delaware Courts have in the past followed the practice of appointing standby counsel for a defendant who elects to proceed *pro se*."). We believe the appointment of standby counsel is the preferred option, but each request must be evaluated on its merits and the circumstances.

(5) Although the better practice is to encourage the use of standby counsel, Delaware case law has consistently emphasized that the decision to appoint standby counsel rests within the discretion of the trial court. *See Briscoe*, 606 A.2d at 109. Thus, our standard of review is abuse of discretion. A review of prior decisions involving standby counsel reveals that this Court has found an abuse of discretion for failing to appoint standby counsel in only one case, *Hicks*, 434 A.2d 377. There, this Court emphasized that the decision was based on "all the facts and circumstances" of "this serious case." *Id*. at 380-81. Specifically, the defendant had a ninth grade education and this Court found that he "was in no position to adequately protect his own vital interests in a trial involving multiple defendants." *Id*. at 381. Further, in

Hicks the trial court permitted the defendant to exit the courtroom, leaving the defendant's cause "entirely unrepresented. This created a vacuum in a very serious criminal case — a vacuum which the active presence of standby counsel could have filled." *Id*.

(6) Here, although Bass possessed only a tenth grade education, he was not a newcomer to the criminal justice process. Bass was a defendant in three previous jury trials and, based on those previous experiences, insisted at trial that he could "do a better job than Mr. Figliola in showing this jury the evidence concerning this case." The trial judge engaged in an extensive colloquy with Bass, warning him of the dangers of self-representation. Bass acknowledged that by waiving counsel he would be precluded from arguing ineffective assistance of counsel at a later date and confidently told the court, "I know that I possess here today what it takes to win, and also that I'm an innocent man." Given his background and Bass' insistence on conducting his own defense, we find no abuse of discretion in the Superior Court's refusal to appoint standby counsel.

We also note that the principal issue at trial was identification of the perpetrator of five separate robberies. Bass was linked to all offenses by eyewitnesses and strong circumstantial evidence.

(7) Bass' second basis for appeal concerns various statements made by the prosecutor throughout the course of the trial. The first statement occurred during the State's rebuttal summation:

> Ladies and gentlemen, let's make it abundantly clear what Mr. Bass is saying. He's saying these folks are lying when they identified him. There's no other way to explain his argument. He's saying that each and every one of those people got on the stand, put their hand on the bible and lied to you. Do you believe that? Can you believe that? What possible motive could they have for doing that?

With regard to this statement, Bass alleges that "[t]he prosecutor [was] clearly telling the jury his personal belief that the Appellant was lying and that the State's witnesses were telling the truth." If any prejudice occurred, the trial judge cured it immediately by interrupting the prosecutor and instructing the jury:

> Ladies and gentlemen of the jury, I have to interrupt Mr. Wallace because I have to point out to you that the questions that you're being asked to decide are not whether the witnesses lied to you. The question is whether the testimony was accurate or not. And that is what you must decide when you deliberate.

(8) Bass sets forth his remaining examples of alleged improper prosecutorial conduct in a less organized manner. He first quotes from another portion of the prosecutor's rebuttal summation but nowhere states why this portion of the summation is improper. Next, Bass claims that the prosecutor expressed his personal opinion through use of the word "I" to improperly bolster the State's case but offers no analysis in support of this conclusory claim. Finally, Bass argues that the prosecutor bore him

personal animus but fails to offer any record support other than Bass' own statements to the court alleging such animus. After carefully reviewing the record, applying the three part analysis adopted by this Court twenty years ago, we find no reversible error. *See Hughes v. State*, Del. Supr., 437 A.2d 559, 571 (1981).

(9) Bass' next claim is that the Superior Court committed legal error by sentencing him under the habitual offender statute. Within this general contention, Bass makes three specific arguments: (i) insufficient proof existed that he was a habitual offender under 11 *Del. C.* § 4214; (ii) his sentence of eight life sentences plus 78 years mandatory constituted an excessive punishment that violates the Eighth Amendment's protection against cruel and unusual punishment; and (iii) the only reason the prosecutor petitioned the court to declare Bass a habitual offender was out of animus and this decision reflected "selective enforcement of the statute if not selective prosecution."

(10) None of these arguments is persuasive. The Superior Court found that the certified records showing that Bass had been previously convicted of felonies on three separate occasions — escape second degree in 1984, delivery of cocaine in 1987 and robbery first degree in 1990 — constituted *prima facie* evidence of those convictions. In light of Bass' failure to respond with any proof or argument other than simply denying involvement in the above offenses, the court's finding that Bass was a habitual offender was legally correct. Further, because Bass' severe sentence reflected the

application of the habitual offender statute, Bass is essentially arguing that the habitual offender statute is, itself, unconstitutional. This Court has held otherwise, affirming the constitutionality of the statute under which Bass was sentenced. *See Williams v. State*, Del. Supr., 539 A.2d 164, 180 (1988). Finally, aside from Bass' own personal comments, he has offered no proof of prosecutorial bias that would constitute reversible error.

(11) Bass' final basis for appeal is that the Superior Court erred by failing to merge the robbery and weapons charges related to each of the two robberies because they arose from a "single incident." In support of this view, Bass argues that "when property belonging to different owners is taken at the same time and place, only one theft count, not multiple counts, occur." This Court has made clear that multiple criminal counts are permitted in a single transaction when harm, such as that which occurs in a robbery, results to several persons. *See McCoy v. State*, Del. Supr., 361 A.2d 241, 243 (1976). Similarly, a defendant may be sentenced for both first degree robbery and possession of a firearm during the commission of a felony, "even when the charged offenses arise from essentially the same set of facts." *Corbin v. State*, Del. Supr., No. 54, 1998, 1998 WL 188562, at *1, Hartnett, J. (April 3, 1998) (ORDER). Accordingly, Bass' claim of error fails here as well.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

s/Joseph T. Walsh
Justice