

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRED T. CALDWELL,	§	
	§	
Defendant Below-	§	No. 12, 2004
Appellant,	§	
	§	
v.	§	Court Below---Superior Court
	§	of the State of Delaware,
	§	in and for Kent County
STATE OF DELAWARE,	§	Cr. A. Nos. IK02-11-0188-0190
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: October 29, 2004
Decided: December 17, 2004

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 17th day of December 2004, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Fred T. Caldwell, was found guilty by a Superior Court jury of Trafficking in Cocaine, Delivery of Cocaine and Conspiracy in the Second Degree. He was sentenced as an habitual offender¹ to 2 terms of imprisonment for life at Level V and an additional 2 years of Level V imprisonment.²

¹ Del. Code Ann. tit. 11, § 4214(b) (2001).

² After Caldwell's direct appeal was filed by his counsel, Caldwell moved for leave to proceed pro se. Following an evidentiary hearing in the Superior Court, this Court granted Caldwell's motion by Order dated July 16, 2004.

(2) Prior to trial, Caldwell moved to suppress two videotaped interviews with the police on the ground that the videotapes, which were approximately three and a half hours long, contained four gaps where the tape was stopped and then restarted. Caldwell argued that the four gaps constituted “missing evidence” that the State was obligated to preserve. The State argued that the tape had been stopped during breaks in the interviews in order to save tape. At the hearing on the motion to suppress, Caldwell testified that, during the gaps, he denied being a drug dealer. The police testified that Caldwell made no such statements. The Superior Court found the police testimony to be credible and, on that basis, determined that no exculpatory evidence was missing from the videotape. The Superior Court denied Caldwell’s request for a “missing evidence” jury instruction and denied his motion to suppress.

(3) The testimony presented at trial established the following: On the evening of June 25, 2002, Caldwell and his cousin, Warner Henry, were visiting at the home of Colleen Thompson at 266 Richard Bassett Road in the Rodney Village subdivision south of Dover, Delaware. At approximately 10:00 p.m., a man Thompson did not recognize knocked on the front door. When no one answered the front door, the man began breaking through the back door. Caldwell told Henry to retrieve a handgun that was located in the house. Caldwell escaped by

jumping out of a front window and running across the street. He ran to a nearby house where he called the Delaware State Police to report the break-in. The intruder entered the house and started beating Henry, who eventually was able to escape by climbing out a bathroom window.

(4) The police were notified about the break-in at approximately 10:15 p.m. Detective William Porter and Corporal Robert Wallace were assigned to the case. As Wallace drove through the Rodney Village subdivision looking for the intruder, he encountered a man running toward him who matched the intruder's description. As the man approached Wallace's car, Wallace jumped out and grabbed him. Wallace found a plastic baggie containing what appeared to be crack cocaine in the man's right front pocket and a scale in the man's left front pocket. The man, who was later identified as Warner Henry, had a bleeding head wound.

(5) Caldwell telephoned Thompson, who reported that Henry had been hurt and that the police had found drugs in Henry's pocket. Caldwell agreed to be interviewed by the police and Thompson drove him to Delaware State Police Troop 3. Thompson and Caldwell arrived at the troop between 12:00 midnight and 12:30 a.m. At the troop, Porter interviewed Caldwell about the incident. During the interview, which was videotaped, Caldwell told Porter that Henry and he had been out delivering drugs in the Capitol Park area of Dover earlier in the day.

Caldwell also told Porter that, at the time of the break-in, he had between \$2, 000 and \$3,000 in cash in his pocket.

(6) After hearing about Caldwell's drug dealing, Porter contacted two of the Drug Unit detectives at Troop 3, Donald Boulерice and David Ellingsworth. Detective Ellingsworth interviewed Caldwell during the early morning of June 26, 2002. This interview also was videotaped. During the interview, Caldwell admitted to Ellingsworth that he had given a half ounce of cocaine to Henry the day before the break-in, that he owned the handgun he told Henry to retrieve, and that he had \$3,000 and 4 ounces of crack cocaine in his possession at the time of the break-in. Caldwell also stated that he "moved" one to two kilograms of cocaine per week.

(7) Detective Boulерice interviewed Henry, who told Boulерice that at the time of the break-in he had some crack cocaine in his possession which he had obtained from Caldwell and for which he owed Caldwell \$950. Henry told Boulерice that Caldwell sold approximately 3 kilograms of cocaine per week. At trial, Henry claimed that what he told Boulерice during the interview was false. He also testified that he had pleaded guilty to conspiring with Caldwell to traffic in cocaine.

(8) Caldwell testified in his own behalf at trial. He acknowledged that he previously had been convicted of drug trafficking and possession with intent to deliver illegal drugs, but denied that he was currently a drug dealer. Caldwell claimed that he had only pretended to be a big time drug dealer in the interview because Ellingsworth said Henry had sustained potentially fatal injuries and Caldwell was concerned about being charged with Henry's homicide if he did not tell Ellingsworth what he wanted to hear.

(9) In this appeal, Caldwell claims that: a) the Superior Court should have given a jury instruction regarding missing evidence based on gaps in his videotaped interview or, in the alternative, should have suppressed the videotaped interview; and b) the prosecutor violated his constitutional rights when he characterized Henry as Caldwell's "codefendant" in his closing statement.

(10) When the State is charged with failure to preserve evidence that could be favorable to the defendant, the court must engage in an analysis that draws a balance between the nature of the State's conduct and the degree of prejudice to the defendant.³ If the State is found to be responsible for the loss of evidence, due process may require a jury instruction stating that the defendant is entitled to an inference that the missing evidence would have been exculpatory.⁴

³ *Hammond v. State*, 569 A.2d 81, 87 (Del. 1990).

⁴ *Id.* at 90.

(11) Based upon the testimony presented at Caldwell's pretrial suppression hearing, the Superior Court found that Caldwell's claim of missing evidence was not credible. That determination is supported by competent evidence and is not clearly erroneous.⁵ We, therefore, affirm that finding and, on that basis, further affirm the Superior Court's rulings that no missing evidence instruction was warranted and that Caldwell's motion to suppress would be denied.

(12) Caldwell's second claim is that he was prejudiced by the prosecutor's closing statement, which characterized Warner Henry as Caldwell's "codefendant."⁶ Defense counsel made no objection to the remark during the closing statement. After the prosecutor was finished, however, the judge brought counsel to sidebar and reminded them that Henry was not a codefendant in the case being tried. The prosecutor offered to correct the misstatement, but defense counsel said that was not necessary. The judge took no further action in the matter.

(13) The trial transcript reflects that there was no prejudice to Caldwell since, by the time of the prosecutor's closing statement, the jury had already heard Henry testify that he had pleaded guilty to conspiring with Caldwell to traffic in cocaine. Moreover, when alerted to the prosecutor's misstatement by the judge,

⁵ *Woody v. State*, 765 A.2d 1257, 1261 (Del. 2001).

⁶ Caldwell and Henry originally were charged in the same indictment. At the time of Caldwell's trial, however, Henry had pleaded guilty to drug trafficking and conspiracy in connection with the June 25, 2002 incident and was serving a 5-year prison term. The conspiracy charge was based upon Henry's agreement with Caldwell to traffic in cocaine.

defense counsel essentially conceded that there had been no prejudice. Under these circumstances, there clearly is no merit to Caldwell's claim.

(14) This Court has reviewed the record carefully and has concluded that Caldwell's appeal is wholly without merit and devoid of any arguably appealable issue.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice