SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

July 29, 2011

Billy G. Johnson
SBI No. 0016
Sussex Correctional Institution
P.O. Box 500
Georgetown, DE 19947

RE: State of Delaware v. Billy G. Johnson
Def. ID No. 0611012659
Memorandum Opinion - Motion for Postconviction Relief

Date Submitted: July 11, 2011

Dear Mr. Johnson:

This is my decision on your second Motion for Postconviction Relief. You were charged with Delivery of Cocaine and Conspiracy in the Second Degree on November 27, 2006. These charges arose out of the delivery of cocaine by you and your girlfriend to an undercover police officer. Delaware State Police Officer William D. Crotty was participating with other police officers in an undercover drug investigation in the Cool Spring Farm area near Milton, Delaware. He was driving through a neighborhood in this area when you flagged him down. You approached Crotty's car and asked him what he needed. Crotty told you that he wanted some "tree," which is slang for marijuana. When you were unable to quickly get the marijuana, Crotty asked you if he could get some crack cocaine instead of the marijuana. You told Crotty to drive up the road. As Crotty was doing this, you went over to a white female standing near the road and engaged in a hand-to-hand transaction

with her. You then pointed Crotty towards the white female. When Crotty approached the white female, she gave him some crack cocaine. The white female was Lynn Bates. She pled guilty to Delivery of Cocaine. At your trial Bates testified that she was your girlfriend, that you gave her some crack cocaine, and that you told her to give it to Crotty. You were convicted by a jury on both charges on November 11, 2008. The State of Delaware filed a motion to have you sentenced as an habitual offender pursuant to 11 *Del.C.*§ 4214(a). I declared you an habitual offender and sentenced you to seven years at Supervision Level V, suspended after serving five years for probation on November 14, 2008. The Supreme Court affirmed your convictions on July 13, 2009.[1] You filed your first Motion for Postconviction Relief on September 25, 2009. I denied it and my denial was affirmed by the Delaware Supreme Court on September 21, 2010.[2]

In your second Motion for Postconviction Relief you argue that (1) I violated your constitutional rights when I added the offense of Liability for the Conduct of Another to the indictment, (2) I violated your constitutional rights when I instructed the jury on the elements of an offense that you were not charged with committing, (3) I violated your constitutional rights by amending the indictment to add another offense even though the prosecutor did not ask me to do so, and (4) there was insufficient evidence for the grand jury to indict you. The arguments in your motion are barred by Superior Court Criminal Rule 61(i)(3) because you could have raised them in your direct appeal, but you did not do so. In order to avoid the procedural bar of Rule 61(i)(3), you must show that there was

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[1] *State v. Johnson*, 976 A.2d 171 (TABLE), 2009 WL 2006881 (Del. July 13, 2009).

[2] *State v. State,* 5 A.3d 630 (Del. 2010) (Table), 2010 WL 3672859 (Del. Sept. 21, 2010).

some external impediment that prevented you from raising your claims[3] and that there is a substantial likelihood that if your claims had been raised on appeal, the outcome would have been different.[4] There is nothing in your second Motion for Postconviction Relief that even addresses, let alone satisfies, these requirements. Even though your allegations are procedurally barred, I will briefly address them.

DISCUSSION

1. <u>Liability for the Conduct of Another.</u>

You argue that I violated your rights under the Fifth Amendment to the United States Constitution and Article I, § 8 of the Delaware Constitution by adding the offense of Liability for the Conduct of Another to the indictment. You are mistaken about what I did. I did not add an additional offense to the indictment. I merely instructed the jury on the theory of liability that was applicable to your case. You were indicted on charges of Delivery of Cocaine and Conspiracy in the Second Degree. It was the State's theory that you told Bates to deliver the cocaine to Crotty. This implicates 11 *Del.C.* § 271, which deals with a person's liability for the conduct of another person. It provides that a person may be guilty of an offense actually committed by another person under certain circumstances. Your case fell within these certain circumstances. 11 *Del.C.* § 271 states that:

> A person is guilty of an offense committed by another person when:
> 1. Acting with the state of mind that is sufficient for commission of the offense, the person causes an innocent or irresponsible person to engage in conduct constituting the offense; or
> 2. Intending to promote or facilitate the commission of the offense the person:

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[3] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

[4] *Flamer v. State,* 585 A.2d 736, 748 (Del. 1990).

a. Solicits, requests, commands, importunes or otherwise attempts to cause the other person to commit it; or
b. Aids, counsels or agrees or attempts to aid the other person in planning or committing it; or
c. Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so; or

3. The person's conduct is expressly declared by this Criminal Code or another statute to establish the person's complicity.

At your trial I gave the jury the instruction on Liability for the Conduct of Another to show the jurors that you could be found guilty of Delivery of Cocaine even though it was Bates who actually handed the cocaine to Crotty. I gave the jury the following instruction:

"LIABILITY FOR THE CONDUCT OF ANOTHER"

With respect to the charge of Delivery of Cocaine the State contends that even though Lynn Bates committed the offense, the defendant may nevertheless be guilty as an accomplice.

The pertinent section of the Criminal Code reads follows:

A person is guilty of an offense committed by another when: . . . (2) intending to promote or facilitate the commission of the offense he (b) aids, counsels, or agrees or attempts to aid the other person in planning or committing it.

You may apply this particular code provision to the charge of Delivery of Cocaine.

You may find the defendant guilty of Delivery of Cocaine under this code provision only if you are satisfied beyond a reasonable doubt that:

1. Lynn Bates performed all of the elements of the offense of Delivery of Cocaine as a I have defined them for you.

AND

2. The defendant intended, that is, it was his conscious object or purpose, to promote or facilitate the commission of the offense of Delivery of Cocaine.

AND

3. The defendant aided, counseled, agreed or attempted to aid Lynn Bates in committing the offense of Delivery of Cocaine.

If you unanimously find beyond a reasonable doubt that a principal-accomplice relationship existed between the participants with respect to a particular charge, then both the principal and the accomplice are equally guilty of the offense.

Finally, the law provides that a person indicted for committing an offense may be convicted as an accomplice to another person guilty of

committing the offense. Likewise, a person indicted as an accomplice to an offense committed by another person may be convicted as a principal.

Your verdict must be unanimous. However, should you return a verdict of guilty, your verdict need not be unanimous as to a specific theory of liability as a principal or as an accomplice so long as you are all in unanimous agreement as to guilt."

Bates testified that you forced her to deliver the cocaine to Crotty. The jury instruction on Liability for the Conduct of Another was not for a separate offense, but rather an explanation of a theory of liability under which you could be held responsible for what Bates did. Therefore, I did not add a new offense to the indictment. I merely explained to the jury a theory of liability under which you could be held responsible for what Bates did. Your argument is without merit.

2. Uncharged Elements.

You argue that I violated your constitutional rights because the jury instruction on Liability for the Conduct of Another was not included in the indictment. The indictment is no place for the jury instructions. Moreover, it is not the responsibility of the grand jury to determine which instructions should be given to the jury at trial. The trial judge is charged with the responsibility for instructing the jury.[1] Your argument is without merit.

3. Amending the Indictment.

You argue that I violated your constitutional rights by amending the indictment even though the State did not request that such an instruction be given. As I have noted several times already, I did not amend the indictment. I did instruct the jury on the applicable theory of liability for your case. Jury instructions should be given in accordance with the

[1] *United States v. Cooper*, 812 F.2d 1283, 1286 (10th Cir. 1987).

evidence and the applicable law whether requested or not.[2] Therefore, it was not erroneous for me to instruct the jury on Liability for the Conduct of Another even though the State did not ask me to do so. Your argument is without merit.

4. <u>Insufficient Evidence to Indict.</u>

You argue that the grand jury had insufficient evidence to indict you. This claim is based on you erroneous belief that the indictment was invalid because it did not specify the person to whom you delivered the cocaine. The purpose of an indictment is to put the accused on full notice of what he is called upon to defend, and to effectively preclude subsequent prosecution for the same offense.[3] An indictment must "be a plain, concise and definite written statement of the essential facts constituting the offense charged."[4] "There is a strong presumption that the grand jury has faithfully performed its duty in returning an indictment, and a defendant bears the heavy burden of overcoming it." [5]

As to Count 1, Delivery of Cocaine, the indictment states:

> "LYNN M. BATES & BILLY G. JOHNSON, on or about the 21st day of September, 2006, in the County of Sussex, State of Delaware, did knowingly and unlawfully deliver COCAINE, a Narcotic Schedule II Controlled Substance, [as classified under 16 *Del. C.* Section 4716(b)(4)], in violation of Title 16, Section 4751 of the Delaware Code."[6]

The elements of Delivery of Cocaine under 16 *Del.C.* § 4751(a) are (1) the manufacture, delivery, or possession with intent to deliver or manufacture (2) a controlled

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[2] *Id.* at 1285.

[3] *E.g.*, *Malloy v. State*, 462 A.2d 1088, 1092 (Del. 1983); *State v. Lasby*, 174 A.2d 323, 324 (Del. Super. 1961), *aff'd* 185 A.2d 271 (Del. 1962); *State v. Minnick*, 168 A.2d 93, 95 (Del. Super. 1960); *State v. Martin*, 163 A.2d 256, 258 (Del. Super. 1960); *State v. Blendt*, 120 A.2d 321, 323 (Del. Super. 1956).

[4] Super. Ct. Crim. R. 7(c).

[5] *Malloy v. State*, 462 A.2d 1088, 1094 (Del. 1983).

[6] 16 *Del.C.* § 4751(a).

substance or a counterfeit controlled substance classified in Schedule I or II which is a narcotic drug. The statute does not require that the controlled substance be delivered to any certain person or class of persons in order for the conduct to be considered a crime. Therefore, the person to whom such a substance is delivered is not an essential element of the offense of Delivery of Cocaine, and need not be included in the indictment in order to preserve its validity.[7] The mere omission of such a fact in the indictment itself does not constitute a lack of sufficient evidence to indict. You were put on full notice of the crime with which you were charged, and the omission of the name of the person who received the cocaine in the indictment did not hinder your ability to defend your case. Pointing to a negligent omission does not satisfy the burden you must overcome to rebut the presumption that the grand jury has faithfully performed its duty in returning an indictment.[8] Your argument is without merit.

CONCLUSION

Your second Motion for postconviction Relief is **Denied**.

IT IS SO ORDERED.

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley

oc: Prothonotary's Office
cc: John W. Donahue, Esquire
Michael R. Abram, Esquire

[7] *See State v. Husser*, 1990 WL 161226, at *3 (Del. Super. Sept. 13, 1990).
[8] *Malloy v. State*, 462 A.2d 1088, 1094 (Del. 1983).