IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
	)	
v.	)	ID NO. 0812020623
	)	
JOSEPH M. TAYE	)	
	)	
Defendant	)	

Submitted: October 1, 2009
Decided: October 6, 2009

MEMORANDUM OPINION

Defendant's Motion for Reargument

DENIED

Appearances:

Sean P. Lugg, Esquire, John W. Downs, Esquire, Deputy Attorneys General, Department of Justice, Wilmington, Delaware, attorneys for State of Delaware

Joseph Hurley, Esquire, Wilmington, Delaware, attorney for the defendant

HERLIHY, Judge

Defendant Joseph Taye moves to reargue this Court's decision granting the State's motion *in limine* to admit evidence of a 2007 accident. Basically this Court held that evidence was admissible since it related to the material issue of identity of the driver in the upcoming trial, *modus operandi*, and state of mind. The facts of the incident for which he is to go to trial, the facts of the 2007 accident and the reasons for admitting the latter incident are discussed in the earlier opinion.[1]

Taye offers several bases for this motion. Primarily, he argues the Court decided it without hearing evidence at trial. Instead, he asserts, the Court should have first waited for the record at trial to be fully developed. This particular argument relates to another basis for the reargument motion. He claims the issue of proving the identity of the driver of the vehicle is not (or is no longer) an issue. That flows, he *now* claims, from the representations by counsel in this motion that it is "[p]robable, that the defendant will acknowledge [at trial] he was the operator of the vehicle."[2] This, he contends, means identity "is of no consequence" and is, therefore, no longer material. [3]

Taye also challenges the Court's ruling to allow the admission of the 2007 accident as it relates to the issue of his state of mind, namely recklessness. If admissible at all, he contends, it is possible rebuttal evidence only. He presents it in this way:

> If, indeed, the defendant were heard to say, "I saw the accident scene before me, and I was unable, through my substitute devices, to control the path of the vehicle", then his prior accident, using the same or similar devices,

[1] *See State v. Taye*, 2009 WL 3022148 (Del. Super. Sept. 23, 2009).

[2] Def.'s Mot. for Reargument at 2.

[3] *Id*.

> would reflect on his state of mind. If, on the other hand, as it decidedly more probable, the defendant is heard to say, "I was quite capable of stopping the vehicle using the devices, and I simply didn't see the victims and thought I could pass safely through the accident scene", then having negotiated a left-hand turn into the path of an oncoming vehicle has absolutely no logical connection that sheds any light on his state of mind in the instant case.[4]

Additionally, Taye challenges this Court's admission regarding his "departure" from the 2007 accident scene. He sees no relevance. He further argues the facts of the earlier accident, an intersectional one, differ from the striking of a stopped police car and hitting two people in the roadway. He disputes the *modus operandi* basis for the Court's earlier decision, arguing, again, that identity may not be an issue.

Finally, he reiterates that no curative instruction can take the back the "harm" he claims will be done by admitting the 2007 accident evidence.

The State's response is that identity of the driver is an essential element it must prove beyond a reasonable doubt in its case-in-chief. Identity, the State contends, is not anticipatory, but is a material issue, and the 2007 accident evidence directly relates to that. It further notes that any comment in the defendant's opening to the jury does not substitute for proving this element.

Discussion

Taye's motion for reargument is curious. He argues that the Court should have waited until the end of the *defendant's* case before it ruled on the admissibility of the 2007 accident evidence. This new argument is premised on the claim in his latest motion

[4] *Id*. at 3.

that Taye may no longer deny being the driver of the vehicle in December 2008. This, he contends, would remove the identity issue. The point of the earlier opinion, however, and the thrust of the State's motion *in limine* seeking to admit that evidence, was whether it would be admissible in the State's case-in-chief, not in any rebuttal. Also underlying the analysis in the prior opinion is that the Court is required to examine prior bad acts evidence more closely and with a view that the threshold to "admissibility" is higher when it is offered in the State's case-in-chief.[5]

Taye's reargument that various aspects of this Court's prior analysis may substantially change after Taye testifies also misses the case-in-chief point. Taye's counsel does not commit to his client testifying at trial. Various scenarios in the reargument motion are put conditionally, "if."[6] Nor can now or could the Court in its prior decision assume that Taye will testify. Most often that decision is made at the end of the State's case-in-chief.

What Taye seems to be now arguing is that in his opening his counsel might suggest that Taye was driving the striking vehicle on December 20, 2008. While the Court has significant reservations such would be stated, statements of counsel are not evidence and counsel are admonished not to make a factual statement not supported by the evidence.[7] Taye's motion to reargue further muddies the water by stating, "[T]he defendant acknowledges that should defense counsel, in his opening, make

[5] *Joynes v. State*, 797 A.2d 673, 676 (Del. 2002).

[6] Def.'s Mot. for Regargument at 3, 5, 6.

[7] *DeAngelis v. Harrison*, 628 A.2d 77, 80 (Del. 1993).

representations that clearly place the identity of the operator into issue, then the timing of this Court's decision can be advanced forward in time."[8]

All of this is new. At a pre-trial conference with counsel in April, the State indicated it had a pre-trial "404(b)" motion, there was no request to withhold a ruling until trial. That motion was filed on May 11, 2009. Taye's response was filed August 17th.

In the State's motion, it proffered the 2007 accident evidence for several purposes. One purpose was to help establish the identity of the driver of the striking vehicle (a BMW) in the events in this case.[9] Taye's response to that proffer included the statement, "The State ostensibly wishes to include the 2007 incident as proof that the defendant was the driver of the BMW. This point is in dispute."[10] He also argued in his August response that there was other evidence available to the State to establish Taye as the driver on December 20, 2008 so that the 2007 evidence would not be needed. This strongly suggests again that he denied being the driver. In another part of his earlier response, when referring to the 2007 evidence and the 2008 incident, Taye recites the similarities between the two events. One he cites is that "the defendant denied involvement in both instances."[11]

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[8] Def.'s. Mot. for Reargument at 6 n.1.

[9] State's Mot. *in Limine* at ¶ 20.

[10] Def.'s Resp. to State's Mot. *in Limine* at ¶ 21A.

[11] *Id*. at ¶ 21G.4.

In short, according to Taye's response to the State's motion to introduce the 2007 evidence, he denied being the driver of the BMW on December 20, 2008. Identity of an alleged culprit is an *ultimate* fact the State must prove in its case-in-chief. As the Supreme Court itself has said:

> The defendant's propensity to commit crime, or his general bad character, is inconsistent with the presumption of innocence and is never in issue, unless he tenders evidence of his character under D.R.E. 404(a)(1). However, if an ultimate fact such as *identity* . . . has been placed in issue by the defendant the State may offer misconduct evidence which tends to disprove this contention. While certainly the better practice is to present such evidence on cross-examination or in rebuttal, the prosecutor is not clairvoyant and has no assurance that the defendant will necessarily supply the predicate issue. For this reason the State is not foreclosed from presenting other misconduct evidence as part of its case-in-chief but must be prepared to make the necessary proffer of specific relevancy.[12]

In this posture of bad acts evidence during the State's case-in-chief, the rules of admissibility are stricter:

> In order to introduce evidence of other crimes in the State's case-in-chief, those crimes must be logically relevant not just to "an issue or ultimate fact in dispute to the case" but to an issue or ultimate issue *to be proved in the State's case-in-chief*." This language identifies a distinction between bad act evidence that is offered to prove an element of the State's *prima facie* case and bad act evidence that is offered to rebut an issue, dispute of fact or element of a defense, that might reasonably be raised in the defendant's case. Under this formulation of the *Getz* rule, that State may offer evidence of the defendant's bad acts only if: (1) the evidence is independently relevant to an element of the State's *prima facie* case (for example knowledge or intent) and (2) the State reasonably anticipates that the defendant will dispute that element of its case.
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> * * *

[12] *Getz v. State*, 538 A.2d 726, 731 (Del. 1988)(citations omitted, emphasis supplied).

> We hold that the State may introduce evidence of a defendant's other crimes in its case-in-chief only where that evidence is independently relevant to an issue or fact that the State must prove as part of its *prima facie* case.[13]

In addition, nowhere in his August response to the State's motion *in limine* did Taye suggest or request the Court to defer its ruling on the motion until some point in the trial. On the contrary, he requested the Court to deny it prior to trial. Normally, the admissibility of evidence like this would be resolved at trial, but the parties sought resolution prior to trial. Now, however, Taye has shifted positions and wants the Court to, in effect, withdraw its earlier decision and reconsider it at trial. The Court sees no basis to do so based on the points Taye advances in his motion for reargument.

Taye cites as support for his new argument that the 2007 accident is, at best, rebuttal evidence, the cases of *Milligan v. State*[14] and *Cobb v. State.*[15] They are inapposite. They each involved sex charges. Each had an issue of the complaining witness' delayed reporting of the sex act for which the defendants were on trial. The State anticipated the defense would raise that issue and convinced the trial court in both cases to admit in its case-in-chief the reasons for the delay, which were other sex acts. Since that evidence is really rebuttal in nature, it should not have been admitted at that

[13] *Taylor v. State*, 777 A.2d 759, 764, 766 (Del. 2002)(citations omitted, emphasis in original).

[14] 761 A.2d 6 (Del. 2000).

[15] 765 A.2d 1252 (Del. 2001).

point, the Supreme Court ruled. The prior sex act did not go to an ultimate material matter the State had to prove in either case. Such is not the case with identity.

There is another inconsistency between Taye's August response to the State's motion *in limine* and his motion to reargue. In his earlier response he states, "As a result of the impact between the BMW and a county police car, the BMW was immediately rendered disabled and travelled less than 50 yards from the accidents where it came to rest on the westbound shoulder of the road."[16] In his motion to reargue he states, "[I]n fact, the evidence supports the contention that the driver of the [BMW] drove it a very short distance, after collision, to the shoulder of the road and stopped the [BMW] without delay."[17]

This latter comment is made in the context of criticizing this Court's finding that what happened in 2007 goes to his state of mind in 2008. That finding needs no repeating. But the inconsistency of the arguments is striking.

What is more striking is that the BMW driver fled the 2008 scene as did the driver in 2007. Even assuming he brought it to a stop voluntarily in 2008, there is still a peculiar similarity between the actions of the BMW driver after the 2008 accident and Taye's flight after the 2007 accident.

The balance of Taye's motion for reargument is a rehash of his earlier arguments concerning the various factors of admissibility this Court must examine under *Getz v.*

[16] Def.'s Resp. to State's Mot. *in Limine* at ¶ 2.

[17] Def.'s Mot. for Reargument at ¶ 3.

State[18] and *DeShields v. State*[19] He also argues his prior contentions about the role of curative instructions. The Court finds nothing new in these arguments.

Conclusion

For the reasons stated herein, defendant Joseph Taye's motion for reargument is **DENIED**.

IT IS SO ORDERED.

/s/ Jerome O. Herlihy
J.

[18] 538 A.2d at 734.

[19] 706 A.2d 502, 506-07 (Del. 1998).