SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

August 3, 2006

Andre′ M. Beauregard, Esquire
401 Rehoboth Avenue
P.O. Box B
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Carole E.L. Davis, Esquire
Department of Justice
114 E. Market Street
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RE: Bonnie L. Papaleo v. State of Delaware, Def. ID# 0510013648

DATE SUBMITTED: May 4, 2006

Dear Counsel:

Pending before the Court is an appeal which defendant Bonnie L. Papeleo ("defendant") has filed from a decision of the Court of Common Pleas ("CCP") after a bench trial finding her guilty of driving under the influence and sentencing her thereon. Defendant is represented on this appeal by an attorney other than the one who represented her at trial. This is my decision remanding the matter to CCP.

At trial, the defense virtually conceded the fact that defendant was impaired and focused on the issue of whether defendant had actual physical control over the vehicle.

Defendant and her friend John A. Malloy, Jr. ("Malloy") were in Rehoboth Beach, Delaware, on October 13, 2005. Defendant had driven a rental car there and had parked it on

Rehoboth Avenue. She and Malloy went to dinner and then afterwards, went drinking at Arena's Deli ("Arena's").

The testimony of defendant and Malloy was as follows. They agreed they would not drive home. Defendant gave Malloy the keys to lock up the car. Defendant went to the bathroom. Meanwhile, Malloy called a cab to come pick them up. Malloy then left Arena's and on the way out, stole a pumpkin. When defendant reached the car, Malloy was on the passenger side of the vehicle and the manager of Arena's came up, yelling about the pumpkin having been taken. Defendant was confused about what was happening, so she got into the driver's side of the vehicle. The manager then flagged down a Rehoboth Beach Police Officer. Malloy gave the pumpkin back to the manager. The manager said he did not want to press charges. The Rehoboth Beach Police Officer, who was Officer Robert Whitman, started talking to defendant. This contact led to her arrest on a charge of driving under the influence.

Defendant testified she did not have the keys, but Malloy did. Malloy testified that Officer Whitman found the car keys in his pocket. Defendant and Malloy denied that either one of them had moved the car from one parking space across the median to its location at the time of the arrest.

Officer Whitman testified to the following. He saw the vehicle move from one side of the median to the other and park at the location of the arrest. He had no idea who was driving. The manager of Arena's flagged him down. He pulled in beside defendant's car. While he was pulling into the parking spot, the manager got the pumpkin back and said he did not want to press charges. Officer Whitman, in order to complete his report, contacted the person in the driver's seat. That was defendant. The engine was not running. The keys appeared to be in the ignition.

The officer could not positively state that the keys were in the ignition because the steering wheel blocked his view. However, he saw what he thought were keys hanging from below the steering column. Later, he found the keys in the console. He could not remember if they were on the floor or between the seats, but they were in the area between the two seats. When he found them there, his "reaction was that the passenger must have pulled the keys from the ignition." Transcript of December 20, 2005, Proceedings at page 29 ("Trans. at ___"). The officer responded, on cross-examination, that he would disagree that he took the keys from Malloy.

The Court below found that the State met its burden in establishing that defendant was under the influence. It noted the only question was whether the State met its burden in establishing defendant had actual physical control of the vehicle. On this issue, the Court below rendered the following decision:

> The question remains whether or not the State has met its burden of proof that the defendant was driving a motor vehicle while under the influence of alcohol. Under Delaware law, driving includes being in actual physical control of the vehicle.
>
> Officer Whitman testified that he did see this vehicle that he found the defendant sitting behind the wheel of, move from one side of Rehoboth Avenue to the other while he was sitting at a red light. Once he was flagged down by the manger of Arena's, he approached that vehicle, found the defendant in that vehicle.
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> The officer clearly and candidly testified he did not see who was driving the vehicle as it moved from one side of Rehoboth Avenue to the other. He also testified, again candidly, that he did not actually see the ignition key in the ignition of the vehicle, but he did see what he believed were the balance of that key chain hanging down from the column. He also testified that after the defendant had exited the vehicle and after the arrest of the defendant, he found, in the inventory search of the vehicle, he found the ignition keys on the floor or console area between the two seats.
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> The officer did not testify that he actually saw the keys there when he saw Miss Papaleo in the vehicle. He did testify there was a passenger in the vehicle, Mr. Malloy. And there could be a question raised as to whether or not Mr. Malloy placed those keys in the console if they weren't in the possession of Miss Papaleo.

> However, Mr. Malloy did not so testify. He testified that the keys were in his pocket at all times until the officer removed those keys. That testimony is in clear conflict with the officer's testimony and the Court, quite frankly, found the officer's testimony very credible. So, if Mr. Malloy did not put the keys in the console, then they were there through the other passenger of the vehicle.
>
> So the Court does find that the State has met its burden of proof as to actual physical control and the defendant is found guilty of driving under the influence.

Trans. at 89-91.

Before the Court sentenced defendant, it provided her with the opportunity to speak. The following colloquy occurred:

> THE DEFENDANT: I never drove the car, never had the keys. And that is the truth and I would subpoena the owner of the bar or whoever, take a lie detector, I did not drive that car. Had no intention of driving that car. Did not move that car, did not have the keys in my possession.
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> ***
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> THE COURT: I would have like to have heard from the manager.
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> THE DEFENDANT: Pardon me?
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> THE COURT: I would have liked to have heard from the manager.
>
> THE DEFENDANT: I asked the public defender and he said not to. Not this gentleman [the trial attorney], the other one.

Trans. at 92.

The Court then sentenced defendant to pay costs, fines and assessments and to serve sixty days at Level 5, suspended for Level 1 probation for a period of one year. A special condition was that she complete the Driving Under the Influence ("DUI") course of instruction within five months. The Court ordered that she could be discharged from probation once she completed the DUI course.

This Court takes judicial notice of the fact that defendant remains on probation.

In her appeal, defendant raises ineffective assistance of counsel claims. Defendant argues trial counsel was ineffective in four ways, including his failure to call the manager of Arena's to testify. The record shows that defendant requested her attorney to subpoena this witness and the CCP judge stated twice on the record that he would have liked to have heard from this witness.

Defendant also argues on appeal that the trial court's decision indicates that it improperly shifted the burden of proof onto the defendant in two areas.

Defendant misrepresents the facts with regard to one area.[1] She argues that "the Court commented on whether or not a taxi was called or the absence of proof as to this issue." That did not occur. The Court below sought clarification on Malloy and defendant's testimony regarding calls to the cab company. Trans. at 47-8; 69. It never commented on whether a taxi was called or the absence of proof as to that issue. Consequently, this Court ignores any argument defendant makes based on that misrepresentation.

The other area where defendant argues the Court below improperly shifted the burden of proof concerns the lack of testimony from the Arena's manager. That subject matter also is raised in the context of the ineffective assistance of counsel claim.

Defendant argues this Court should make a finding regarding ineffective assistance of counsel. The appellate court does not consider a claim of ineffective assistance of counsel within the context of a direct appeal and the Court below makes any findings regarding ineffective

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[1]Defendant also misrepresents the trial court's findings regarding the keys. She states: "[T]he court below has as a matter of fact, determined the keys were in the ignition, but never explained how the keys arrived on the passenger side of the vehicle or in Mr. Malloy's pocket." Letter of March 20, 2006, at page 3. The Court below found the keys were not in Malloy's pocket because it specifically rejected his testimony and accepted that of the officer. It also concluded that either Malloy or defendant took the keys out of the ignition and put them in the console area.

assistance of counsel. Wing v. State, 690 A.2d 921 (Del. 1996); Duross v. State, 494 A.2d 1265 (Del. 1985). The usual procedure is to consider the issues which can be raised on direct appeal and then require the defendant to raise any ineffective assistance of counsel claims in a postconviction relief motion pursuant to Rule 61. Duross v. State, supra.

This case is unusual in that the trial court stated on the record that it would have liked to have heard from the manager of Arena's. That raises the question of whether trial counsel was ineffective for failing to subpoena this witness and if so, whether that failure resulted in prejudice to defendant's case. If this Court required the direct appeal process to take place before allowing the motion for postconviction relief to be filed, then there is a good chance that defendant would not be able to raise the issue. That is because the sentence would be completed before the matter made its way through the direct appeal process, and a motion for postconviction relief may not be filed once a defendant no longer is in custody or subject to future custody. Epperson v. State, 829 A.2d 935 (Del. 2003); Summers v. State, 818 A.2d 971 (Del. 2003); Fullman v. State, 746 A.2d 276 (Del. 2000); Guinn v. State, Del. Supr., No. 549, 1992, Walsh, J. (April 21, 1993); Petsinger v. State, Del. Super., Def. ID# 9605020352, Graves, J. (June 28, 2002); State v. Beles, Del. Super., Cr.A. No. 96-06-0468, Graves, J. (March 13, 1997). In unusual situations, the trial courts may hear an ineffective assistance of counsel claim at some point other than during a postconviction relief motion. For example, the appellate courts may remand a matter to the court below to decide an ineffective assistance of counsel claim. Burton v. State, Del. Supr., No. 236, 2000, Walsh, J. (Sept. 28, 2000). Or, the trial court may consider such a claim within the context of a motion for a new trial. State v. Webb, Del. Super., Def. ID# 9907021071, Stokes, J. (Oct. 23, 2000) at 17. Because of the trial court's statements regarding the manager of Arena's and because of the time

constraints posed by defendant's sentence, I consider this to be such an unusual situation. Accordingly, I remand this matter for the Court below to consider the ineffective assistance of counsel claims.[2]

Since the error which defendant properly asserts on appeal may be impacted by the ruling on the Rule 61 motion, this Court defers ruling on that issue in the interest of justice and judicial economy. Johnson v. State, 765 A.2d 926 (Del. 2000).

Based on the foregoing, this matter is REMANDED to the Court of Common Pleas for further proceedings in accordance with this decision. This matter shall be returned from remand within sixty days of the date of this Order.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Court of Common Pleas, Clerk's Office
The Honorable Kenneth S. Clark, Jr.

[2]The trial court should consider all of the claims of ineffective assistance of counsel for the sake of judicial economy. I remind defendant that speculating as to what the manager might have said would be insufficient to meet the standards of Strickland v. Washington, 466 U.S. 668 (1984). Defendant must establish that the manager's testimony would support her case so that the outcome of the trial would have been different. This reminder regarding defendant's burden applies to all of her ineffective assistance of counsel claims.