

IN THE SUPREME COURT OF THE STATE OF DELAWARE

YA'SIN ABDUL WASI, A.K.A.	§	
ANYTHONY JASPER	§	
	§	No. 103, 2003
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. A. No. IN94-10-1519
IN94101469 through 1472	§	through IN94-10-1528
	§	IN94-10-1469
Plaintiff Below,	§	through IN94-10-1472
Appellee.	§	

Submitted: August 5, 2003

Decided: September 12, 2003

Before **VEASEY**, Chief Justice, **HOLLAND**, **BERGER**, **STEELE** and **JACOBS**, Justices, constituting the Court en Banc.

ORDER

On this 12 day of September, 2003, upon consideration of the briefs of the parties, it appears to the Court as follows:

(1) Appellant Ya'Sin Abdul Wasi, a.k.a. Anthony Jasper, ("Wasi") was convicted of two counts of Unlawful Sexual Intercourse in the First Degree, Robbery in the First Degree, Kidnapping in the First Degree, two counts of Burglary in the Second Degree, Felony Theft and Misdemeanor Theft.

(2) Wasi's convictions stem from a violent rape and from the theft of the victim's automobile and bankcard on October 16, 1994. Immediately after the assault, the victim notified the police and was taken to the hospital for examination, where evidence was gathered using a rape kit. The evidence at trial included a videotape of Wasi removing money from a nearby ATM using the victim's bankcard, and the undisputed fact that Wasi was arrested two days later driving the victim's car.

(3) At the trial Wasi did not mount a defense, and at sentencing he acknowledged having committed the crime. The Superior Court sentenced Wasi to two life terms, plus 59 years, in prison. Wasi's conviction was affirmed on direct appeal to this Court.¹

(4) In August 2002, Wasi moved for post-conviction DNA testing of trial exhibits containing hair fibers and stains found on clothing and linens belonging to him and to the victim. The Superior Court denied Wasi's motion.² Wasi appeals from that denial.

(5) It is undisputed that during the trial, Wasi considered having performed DNA testing of the evidence. It is also undisputed that such testing was not performed. At the beginning of Wasi's trial, Wasi moved for a continuance to permit the DNA testing. The trial court denied that motion,

¹ *Abdul-Wasi v. State*, 1996 Del. LEXIS 264 (Del. 1996).

² *State v. Wasi*, Del. Super. Ct. ID No. 9410008008 (Feb. 3, 2003).

but informed Wasi that if he were to establish, through post-trial DNA testing, that someone other than Wasi had committed the crime, the court would grant a new trial. On the final day of Wasi's Superior Court trial, defense counsel again broached the subject of DNA testing. The court reiterated its earlier ruling--Wasi could have the DNA testing performed after trial and if that evidence established his innocence,³ a new trial would be granted.

(6) The record shows that at the close of trial, defense counsel was deliberating whether or not to have the evidence tested. That no DNA testing was ever performed leads to only one conclusion: the Defendant chose to not have any DNA testing performed. The consequence of that decision is that the Defendant waived his right to post-trial DNA testing.

(7) A defendant may waive a substantive right. To be valid, the waiver must be knowing, voluntary and intelligent.⁴ That is, based on the totality of the circumstances, the Court must be satisfied that the waiver was "the product of a free and deliberate choice rather than intimidation, coercion or deception."⁵

³ Trial Transcript of November 20, 1995 at p. 4-6.

⁴ See, e.g., *Norcross v. State*, 816 A.2d 757 (Del. 2003) (waiver of Fifth Amendment rights); *Davis v. State*, 809 A.2d 565 (Del. 2002) (waiver of jury trial right); *Lewis v. State*, 757 A.2d 709 (Del. 2000) (waiver of right to assistance of counsel).

⁵ *Norcross* at 762, citing *Moran v. Burbine*, 475 U.S. 412, (1986).

(8) Wasi was at all times represented by an attorney, who was aware of the availability of testing and the potential risks and benefits of having the samples tested.⁶ There is no evidence that Wasi's decision not to conduct the DNA testing was the result of intimidation, coercion, or deception, as distinguished from being the product of maturely weighing the risks and benefits of such testing. Wasi's waiver, therefore, was valid.

(9) Wasi's waiver of DNA testing is unaffected by the later enactment of 11 *Del. C.* § 4504. That statute was intended to create an opportunity for DNA testing of evidence in circumstances where testing was previously unavailable. Its purpose was not to allow a convicted defendant to reconsider a previous voluntary, informed decision not to test. Having validly waived his opportunity to seek post-conviction DNA testing, Wasi is foreclosed from seeking such testing now.

WHEREFORE, IT IS HEREBY ORDERED that the Superior Court's denial of Appellant's Motion for Post-Conviction DNA Testing is hereby AFFIRMED.

By the Court:

/s/ Jack B. Jacobs
Justice

⁶ Defense attorney stated to the court, "[I]f the Public defender's office did do the DNA testing on the items that were originally sent to the FBI and they came back positive for Mr. Wasi, that that would never be entered into the record. That if it came back inconclusive, it would not be—that information would not be entered into the record. If the DNA testing came back and clearly showed that it was somebody else other than Mr. Wasi, then the court would give strong consideration to a new trial." Trial Transcript of November 20, 1995 at p. 5.