

IN THE SUPREME COURT OF THE STATE OF DELAWARE

|                    |                                |
|--------------------|--------------------------------|
| LARRY W. AUSTIN,   | §                              |
|                    | §                              |
| Defendant Below-   | § No. 429, 2000                |
| Appellant,         | §                              |
|                    | §                              |
| v.                 | § Court Below—Superior Court   |
|                    | § of the State of Delaware,    |
| STATE OF DELAWARE, | § in and for New Castle County |
|                    | § Cr.A. Nos. IN99-03-1467-1470 |
| Plaintiff Below-   | §                              |
| Appellee.          | §                              |

Submitted: June 21, 2001  
Decided: August 6, 2001

Before **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices

**ORDER**

This 6<sup>th</sup> day of August 2001, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Larry W. Austin, was found guilty by a Superior Court jury of Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance (Cocaine), Possession of a Controlled Substance Within 1000 Feet of a School, Possession of a Controlled Substance Within 300 Feet of a Park or Recreation Area and Resisting Arrest. On the conviction for possession with intent to deliver, Austin was sentenced to 30 years imprisonment at Level V, to be suspended after 15 years for decreasing

levels of supervision. On each of the next two possession convictions, he was sentenced to 9 months imprisonment at Level V, to be suspended for 9 months at supervision Level II. On the conviction for resisting arrest, he was sentenced to 12 months imprisonment at Level V, to be suspended for 12 months at Level I. This is Austin's direct appeal.<sup>1</sup>

(2) In his appeal, Austin claims that: a) the public defender who represented him at trial did not provide him with the necessary transcripts of the trial proceedings, which hampered his direct appeal; b) he had a conflict with his trial counsel, which prejudiced his right to a fair trial; c) the Superior Court improperly denied his request for a continuance of the trial in order to retain private counsel; d) the Superior Court abused its discretion by permitting the testimony of an expert prosecution witness who had not been identified in discovery; e) there was insufficient evidence to support the jury's finding that he intended to sell drugs; and f) the sentence imposed by the Superior Court violated his constitutional rights.

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<sup>1</sup>On January 18, 2001, following an evidentiary hearing in Superior Court, this Court granted Austin's motion to discharge his public defender and proceed pro se with his appeal.

(3) The evidence presented at trial established that, in March 1999, Officers Ronald Mullin and Stephen Misetic of the Wilmington Police Department responded to an early evening 911 call from a residence in the City of Wilmington. When they arrived at the residence, they found Austin and a male companion walking down from the front porch. Their hands were in their jacket pockets. When the officers asked the two men to remove their hands from their pockets, Austin began discarding items from his pockets. The officers observed Austin discard two plastic bags containing a white powdery substance. Austin fled on foot but was soon captured. A pat down search of Austin revealed that he was carrying \$1,482 in cash in his pants pocket. After arresting Austin, the officers returned to the residence, where they retrieved the two plastic bags.

(4) Detective Redemptor Hidalgo, drug evidence custodian for the Wilmington Police Department, testified that he was responsible for the safekeeping of the two plastic bags and for taking them to the Medical Examiner's Office for analysis. Farnan Daneshgar, forensic chemist with the Medical Examiner's Office, testified that his analysis of the substance in the two plastic bags revealed it to be cocaine. Officer Mullin testified that, apart

from the two plastic bags and the money, there were no other items of evidence seized at the time of Austin's arrest. Over the objection of the defense, Detective Liam Sullivan of the Wilmington Police Department was permitted to testify as an expert on illegal drug trafficking. He testified that, given the circumstances of the arrest, it was more likely Austin possessed the cocaine for sale rather than for his own personal use.<sup>2</sup>

(5) Austin's claim that his direct appeal was hampered by his public defender's failure to provide him with the necessary transcripts of the Superior Court proceedings is without merit. The crux of Austin's complaint is that his public defender failed to provide him with a transcript of his request for a continuance so that he could engage a private attorney. We have reviewed thoroughly the record in this case, including the Superior Court docket, the transcripts of the proceedings in the Superior Court and Austin's appendix to his opening brief, which contains portions of the trial and sentencing transcripts. There is nothing in the record to suggest that Austin requested a continuance. Thus, there is no support for his contention that such a transcript exists. Based upon our review of the record and the documents included in

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<sup>2</sup>Austin was present for the first day of trial, but did not appear for the second day. All the evidence in the case was presented on the second, and final, day.

the appendix to Austin's opening brief, we find nothing to support Austin's contention that his trial counsel failed to send him the necessary transcripts of the proceedings in the Superior Court for purposes of his appeal.

(6) Austin's next claim that a conflict with his trial counsel prejudiced his right to a fair trial is unavailing. While Austin had a right to counsel without a conflict of interest,<sup>3</sup> he did not have a right to counsel who would not disagree with him about how to proceed with his case, which is the "conflict" about which Austin complains here. The United States Supreme Court has held that a defendant does not have a constitutional right to a "meaningful relationship" with his public defender.<sup>4</sup> We have reviewed the record carefully, including the trial transcript, and find no evidence to support Austin's claim that his disagreements with his counsel prejudiced his right to a fair trial.

(7) Also unavailing is Austin's claim that the Superior Court improperly denied his motion for a continuance so that he might retain private

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<sup>3</sup>*Lewis v. State*, Del. Supr., 757 A.2d 709, 712 (2000).

<sup>4</sup>*Morris v. Slappy*, Del. Supr., 461 U.S. 1, 13-14 (1983).

counsel.<sup>5</sup> The order scheduling trial for March 14, 2000 was issued on February 25, 2000 and a copy of the order was sent to Austin's public defender. Austin does not contend that his public defender failed to notify him of the trial date in a timely manner. His alleged request for a continuance was not made until the morning of trial, however, and no private attorney had entered an appearance on his behalf. Even assuming arguendo that Austin requested a continuance on the morning of trial in order to retain private counsel and that the Superior Court was unwilling to afford Austin more than one additional day, this would not constitute an abuse of discretion on the part of the Superior Court or a violation of Austin's rights.<sup>6</sup>

(8) Austin's claim that the Superior Court abused its discretion in permitting expert testimony from a prosecution witness who had not been identified in discovery is without merit. Because Austin did not object to the testimony of the expert on that basis at trial, we review the claim for plain

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<sup>5</sup>Austin contends he made his request for a continuance on the morning of the first day of trial, but the judge was unwilling to allow him more than one additional day. Austin also contends that a private attorney was going to meet him at the courtroom at the time the request was made and that the judge, the private attorney and his public defender conferred in the judge's chambers. The record in this case does not reflect that these events took place.

<sup>6</sup>*Riley v. State*, Del. Supr., 496 A.2d 997, 1018 (1985).

error on appeal.<sup>7</sup> The trial transcript reflects that the Superior Court listened to argument from both counsel concerning the admissibility of the testimony and carefully instructed counsel for the State on the proper parameters for his questions to the witness. We conclude on this basis that the Superior Court did not commit plain error, but rather acted properly and within its discretion in permitting the expert testimony.<sup>8</sup>

(9) Austin’s claim that there was insufficient evidence presented at trial to support the jury’s finding of intent to sell illegal drugs is also without merit. We review this claim for plain error because it was not raised below. The standard of review in assessing an insufficiency of evidence claim is “whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt.”<sup>9</sup> We have reviewed the record carefully and conclude that there was sufficient evidence, both direct and circumstantial, to support the jury’s

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<sup>7</sup>*Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100, *cert. denied*, 479 U.S. 869 (1986). Defense counsel argued that the testimony was prejudicial and irrelevant.

<sup>8</sup>*Culp v. State*, Del. Supr., 766 A.2d 486, 489 (2001).

<sup>9</sup>*Monroe v. State*, Del. Supr., 652 A.2d 560, 563 (1995) (quoting *Robertson v. State*, Del. Supr., 596 A.2d 1345, 1355 (1991)).

finding of intent on the part of Austin to sell cocaine,<sup>10</sup> and that there was no plain error.

(10) Finally, Austin's claim that his sentence was improper and violated his rights is without merit. We review this claim, too, for plain error since no objection was made to the sentence at the time it was imposed. As the transcript of the sentencing hearing reflects, Austin's sentence was enhanced on the basis of an admitted prior conviction. The enhancement of Austin's sentence was mandated by statute<sup>11</sup> and did not constitute plain error or a violation of any constitutional right.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

s/Joseph T. Walsh  
Justice

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<sup>10</sup>*Seward v. State*, Del. Supr., 723 A.2d 365, 369 (1999).

<sup>11</sup>16 Del. C. § 4751; 16 Del. C. § 4763(a) (3).