

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MITZI ELLISON,)
) No. 172, 2002
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware,
) in and for New Castle County
)
 STATE OF DELAWARE,) ID No. 9908021746
)
 Plaintiff Below,)
 Appellee.)

Submitted: October 30, 2002
Decided: November 27, 2002

Before **VEASEY**, Chief Justice, **BERGER**, and **STEELE**, Justices.

ORDER

This 27th day of November, 2002, upon consideration of the briefs of the parties, it appears to the Court that:

1. On September 13, 1999, defendant-below, Mitzi Ellison, was indicted on various drug charges. On July 16, 2001, a Superior Court jury convicted Ellison of Trafficking in Cocaine, Conspiracy in the Second Degree, Delivery of a Narcotic Schedule II Controlled Substance (cocaine), and Use of a Dwelling for Keeping Controlled Substances. Ellison has appealed her conviction claiming the trial judge erred when he allowed the State to introduce certain evidence.

2. We conclude that the trial judge properly permitted the State to introduce evidence of the defendant's prior bad acts pursuant to D.R.E. 404(b) and our case law. In addition, the trial judge did not abuse his discretion when he permitted the chemist to testify to the combined weight and test results of the two bags of cocaine, despite the fact that only one bag was field-tested before commingling. Accordingly, we affirm Ellison's conviction.

2. Over defense objection before trial, the State proposed to offer testimony of the defendant's employee that, pursuant to the defendant's directions, had wired \$2,000 on June 18 and June 29 to individuals for the purchase of drugs. The defense argued that the State's evidence of the July 3 sale of cocaine was complete and more than sufficient to prove the alleged offense and that the testimony was irrelevant and unfairly prejudicial. The State argued that the wire transfers showed the identity of the defendant, as well as the *modus operandi* because without the evidence of the wire transfers, the jury would lack sufficient information as to the extent the defendant was involved in the transaction with the undercover operative. In addition, the State argued that the wire transfers were "inextricably intertwined" with the present charges.

3. The trial judge properly analyzed the six *Getz*¹ factors before admitting the evidence. Excluding the bad act evidence would also have "create[d]

¹ *Getz v. State*, 538 A.2d 726 (Del. 1988).

a chronological and conceptual void in the State's presentation to the jury that would likely result in significant confusion."² The facts indicate that the defendant did not actually transfer the drugs to the undercover operative. Rather, the operative called the defendant and handed the defendant money (which was caught on video and recorded by wire) but another associate of the defendant actually transferred the drugs to the operative. The testimony concerning the wire transfers was necessary to explain the defendant's supervisory position in the drug dealing hierarchy rather than depicting the defendant as a "runner" or "middle man." Thus, the evidence was "independently relevant to an issue or fact that the State must prove as part of its *prima facie* case."³

4. Trafficking carries a more severe sentence depending on the weight of the cocaine. The defendant claims that a possibility existed that one of the bags did not contain cocaine and therefore the chemist erred by adding the bags together before conducting the tests.

5. At trial, the chemist explained that testing a sample from the bag was not necessary because:

It's not a test of everything; it was a test of a portion of it. So it doesn't matter whether the portion came from one bag or ten bags. The mixture is [the] entire substance in all of its containers. It doesn't require every container to have the drug in it.

² *Pope v. State*, 632 A.2d 73, 76 (Del. 1993).

³ *Taylor v. State*, 777 A.2d 759, 766 (Del. 2001).

6. While there are two competing rules concerning random sampling of drug contraband,⁴ the better rule rejects the defendant's position. The two bags appeared identical in appearance and were delivered together in one larger plastic bag. In addition, drugs are generally marketed in a diluted or impure form.⁵ Furthermore, the statute refers specifically to: "5 grams of cocaine or any mixture containing cocaine."⁶

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

BY THE COURT:

/s/ Myron T. Steele
Justice

⁴ See Michael D. Osteen, Annotation, *Sufficiency of Random Sampling of Drug Contraband to Establish Jurisdictional Amount Required for Conviction*, 45 A.L.R. 5th 1.

⁵ *Id.*

⁶ 16 *Del.C.* § 4753A(a)(2).