

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDRE R. THOMAS,	§	
	§	
Defendant Below-	§	No. 226, 2003
Appellant,	§	
	§	
v.	§	Court Below – Superior Court
	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr. A. No. IN02-09-1615
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: November 21, 2003  
Decided: February 9, 2004

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

**ORDER**

This 9th day of February 2004, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Andre R. Thomas, was found guilty by a Superior Court jury of Assault in a Detention Facility. He was sentenced to 8 years incarceration at Level V<sup>1</sup> and forfeiture of good time.<sup>2</sup> This is Thomas' direct appeal.

(2) The record reflects that Thomas' preliminary hearing originally was scheduled for August 28, 2002 and was rescheduled at the request of the defense

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<sup>1</sup> Thomas already had been adjudicated an habitual offender in connection with a previous conviction. Del. Code Ann. tit. 11, § 4214(a) (2001).

<sup>2</sup> Del. Code Ann. tit. 11, § 4382(a) (2001).

for September 12, 2002. The preliminary hearing did not take place, however, because the grand jury handed down the indictment against Thomas on September 9, 2002.

(3) The record also reflects that the Office of the Public Defender initially was appointed to represent Thomas at trial, but on October 1, 2002, filed a motion to withdraw on the ground that Thomas wished to proceed pro se. On October 28, 2002, Thomas entered a plea of not guilty and the Superior Court granted the Public Defender's motion to withdraw. On the same date, the Superior Court also denied Thomas' pro se motions for a preliminary hearing and for the appointment of standby counsel. The record reflects that, on November 8, 2002, the Superior Court appointed conflict counsel for Thomas, but, on December 23, 2002, granted another request by Thomas for leave to proceed pro se.

(4) The case proceeded to trial on April 8, 2003. Prior to jury selection, the Superior Court judge asked Thomas if he recalled previously filing a motion for standby counsel and Thomas stated he did not. The judge asked Thomas if he was prepared to proceed pro se and Thomas stated he was. Thomas then requested the Superior Court to subpoena numerous inmates and correctional officers to

testify as defense witnesses.<sup>3</sup> He also requested a copy of his complete prison medical record.

(5) After an extensive colloquy during which Thomas was unable to articulate a factual basis for calling most of his proposed witnesses, the Superior Court judge offered to arrange to have 3 inmates and a correctional officer brought from the prison to testify and to have Thomas' prison medical record made available for trial. In addition, the prosecutor gave a copy of written discovery to Thomas that previously had been sent to Thomas' attorney, but which Thomas claimed he had never seen. In spite of the Superior Court's extraordinary efforts, Thomas refused to participate in the proceedings and he was tried in absentia.<sup>4</sup>

(6) At trial, Sergeant Michael Moran and Lieutenant Tom Seacord, both correctional officers at the Delaware Correctional Center, testified about an altercation involving Thomas that occurred at the prison on July 25, 2002. As inmates from Building 21 in the Maximum Security Housing Unit were leaving the dining hall, they were patted down in accordance with standard prison policy. As

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<sup>3</sup> Thomas initially requested that 30 inmates plus several correctional officers be subpoenaed to testify. He subsequently stated that he would be satisfied with 13 inmates and several correctional officers.

<sup>4</sup> The Superior Court judge exercised extreme patience with Thomas during a very lengthy colloquy and explored every reasonable alternative in attempting to resolve Thomas' concerns. In addition, the judge ordered Thomas to remain in the courthouse during trial and confirmed with him twice during the proceedings that he still did not wish to participate.

Thomas proceeded down the hall after being patted down, he approached Sergeant Moran, who was observing the procedure, and slapped him on the back of his head. When Moran turned toward Thomas, Thomas struck him with his fist two times on the left side of his head. Moran and another officer then subdued Thomas and handcuffed him.

(7) In this appeal, Thomas claims that the Superior Court abused its discretion by: a) failing to appoint standby counsel; b) permitting the trial to proceed in his absence; c) limiting the number of defense witnesses; and d) denying his pretrial motion for a preliminary hearing.

(8) Thomas' claims of abuse of discretion on the part of the Superior Court are without merit. Prior to jury selection, the Superior Court judge raised the issue of Thomas' previous motion to appoint standby counsel. Thomas stated that he did not remember filing such a motion and that he was prepared to proceed pro se. It was reasonable under the circumstances for the judge to assume that Thomas did not want standby counsel. Given that the facts of Thomas' case were not complex, the judge was within his discretion not to pursue the issue further.<sup>5</sup>

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<sup>5</sup> *Bass v. State*, Del. Supr., No. 535, 1998, Holland, J. (Sept. 13, 2000) (citing *Briscoe v. State*, 606 A.2d 103, 109 (Del. 1992) (Delaware case law has consistently emphasized that the decision to appoint standby counsel rests within the discretion of the trial court)).

(9) Moreover, Thomas voluntarily decided not to participate in his trial and, under those circumstances, the Superior Court judge had no choice but to proceed with trial in Thomas' absence.<sup>6</sup> The judge offered to arrange for a reasonable number of witnesses to testify on Thomas' behalf, but Thomas refused to proceed unless all the witnesses he wanted were brought to the trial to testify.<sup>7</sup> The judge properly refused to entertain Thomas' unreasonable demands. The judge was obligated to exercise reasonable control over the trial proceedings<sup>8</sup> and was within its discretion to exclude witnesses who had no personal knowledge of the facts of the case.<sup>9</sup>

(10) Finally, the prosecution is permitted to secure an indictment against a defendant prior to the preliminary hearing or, if the preliminary hearing is already underway, before it has concluded.<sup>10</sup> The defendant's right to a determination of probable cause to hold him for trial is served equally by a preliminary hearing or a grand jury indictment.<sup>11</sup> Because the grand jury returned an indictment against Thomas prior to the date of the rescheduled preliminary hearing, the Superior

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<sup>6</sup> Super. Ct. Crim. R. 43(b).

<sup>7</sup> The Superior Court judge offered to do so even though it was Thomas' obligation to subpoena his own witnesses. Super. Ct. Crim. R. 17.

<sup>8</sup> D.R.E. 611(a).

<sup>9</sup> D.R.E. 403.

<sup>10</sup> *Jenkins v. State*, 305 A.2d 610, 614-15 (Del. 1973).

<sup>11</sup> *Joy v. Superior Court*, 298 A.2d 315, 316 (Del. 1972).

Court did not abuse its discretion by denying Thomas' motion for a preliminary hearing.

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

BY THE COURT:

/s/ Randy J. Holland  
Justice