

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEREK TALLEY,	§
	§ No. 497, 2006
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0508011615
	§
Plaintiff Below-	§
Appellee.	§

Submitted: February 20, 2007

Decided: March 28, 2007

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices

ORDER

This 28th day of March 2007, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Derek Talley, was found guilty of Robbery in the First Degree and Receiving Stolen Property. On the robbery conviction, he was sentenced as a habitual offender to twenty-five years of Level V incarceration.¹ On the conviction of receiving stolen property, he was sentenced to one year of Level V incarceration, to be suspended for decreasing levels of supervision. This is Talley's direct appeal.

¹ Del. Code Ann. tit. 11, § 4214(a).

(2) Talley's counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that arguably could support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.²

(3) Talley's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Talley's counsel informed Talley of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Talley also was informed of his right to supplement his attorney's presentation. Talley responded with a brief that raises five issues for this Court's consideration. The State has responded to the position taken by Talley's counsel as well as the issues raised by Talley and has moved to affirm the Superior Court's judgment.

² *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

(4) Talley claims that a) he was prejudiced by the Superior Court's limitation on the testimony of a police officer; b) the victim of the crime should not have been permitted to remain in the courtroom while a police officer testified about the victim's identification of Talley in a photo array; c) the jury should not have been shown the victim's drawings, rather than photographs, of the crime scene; d) the Superior Court judge improperly ruled that Talley was not permitted to represent himself; and e) the Superior Court judge erroneously informed Talley that a police officer whom he wished to recall to the stand had been excused and was unavailable. Because all of Talley's claims have been raised for the first time in this appeal, they will be reviewed for plain error.³

(5) The evidence presented at trial was as follows. Joseph Bell is a construction contractor who lives at 302 Cleveland Avenue in Newport, Delaware. On August 12, 2005, at around 3:30 a.m., Bell was sleeping in a chair in his living room when he was awakened by a loud noise outside. Bell looked out the window and saw a man near his van, which he had parked in front of his house. Bell stored his construction tools in the van and, in accordance with his usual practice, had left the van unlocked. Bell

³ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process).

observed the man taking his tools out of the van and placing them in the back seat of a white Honda Civic, which was parked behind the van with its engine running.

(6) Bell went outside and confronted the man, who threatened him with a raised toolbox. As they argued with each other, the man repeatedly attempted to hit Bell. Finally, when Bell got into the Honda to turn off the ignition, the man punched him. The man then climbed into the Honda and left the scene. Bell saw the Honda's license plate number and committed it to memory. Bell testified that the street lamps across the street and the lights on his house provided ample light and that he was able to see the man who robbed him distinctly. He was a white man, approximately 6 feet tall, approximately 175 pounds, with facial hair. Bell also testified that the man's speech sounded like "mumbling."

(7) Bell called the police and gave them the Honda's license plate number. Bell noticed that his left cheek was bloody from the punch he had received and that it was painful. Officer Peter Stewart from the New Castle County Police Department arrived at the scene several minutes later. He took a photograph of Bell's face. He later testified he observed that Bell's face was cut and swollen.

(8) Using the license number provided by Bell, Officer Stewart determined that the Honda was owned by an individual named Chrysta Crowley. He subsequently located the car parked in front of a house at 617 Clymer Street in New Castle, Delaware. With the permission of Elizabeth Reader, a resident, Officer Stewart entered the house and found Talley hiding in a closet on the second floor. He also found a number of tools in the backyard that Bell later identified as his. Officer Stewart testified that Talley's speech pattern was distinctive and sounded like "mumbling." Following his arrest, Talley showed Officer Stewart that he had approximately twenty stitches in his tongue. Two days later, on August 14, 2005, Officer Stewart showed Bell an array of six photographs, one of which was a photograph of Talley. Bell identified Talley as the man who robbed him on August 12, 2005.

(9) On the first day of trial, after Bell and Officer Stewart had completed their testimony and been excused, Talley requested permission to represent himself. The Superior Court denied the request, ruling that Talley had waived his right to self-representation by waiting so long to make the request. Following the judge's ruling, the State called its final witness, Detective Kevin Murphy, and trial then adjourned for the day.

(10) The next morning, the judge announced that her ruling the previous day had been in error. After discussing the situation with counsel, she engaged in a colloquy with Talley to ascertain whether his waiver of his right to counsel was knowing and voluntary. She also informed Talley that he would be permitted to recall only Detective Kevin Murphy to the stand, since Detective Murphy was the sole witness to testify following Talley's request to represent himself. The judge also cautioned Talley that the jury might infer guilt from the fact that he "mumbled" when he spoke. After his colloquy with the judge, Talley decided to withdraw his request to represent himself.

(11) Talley's first claim is that he was prejudiced by the limitations the Superior Court placed on Officer Stewart's trial testimony. According to Talley, Officer Stewart should have been required to testify to the grounds for his belief that Talley was at the Clymer Street residence and that Talley was the perpetrator of the robbery. The trial transcript reflects that, on cross-examination, Officer Stewart testified that an individual named Brian Green also was a person of interest during the robbery investigation. Green was the boyfriend of Chrysta Crowley, the owner of the white Honda used in the robbery. Talley's complaint appears to be that Officer Stewart should have

been permitted to testify that Crowley had a personal interest in implicating him, rather than Brian Green, as the robber.

(12) The trial transcript reflects that, when the prosecutor questioned Officer Stewart about his conversation with Crowley, defense counsel objected on the ground of hearsay. Having ascertained that Crowley would not be called as a witness, the Superior Court properly sustained the objection.⁴ Our review of the trial transcript reveals no error, plain or otherwise, in the Superior Court's ruling limiting Officer Stewart's testimony.

(13) Talley's second claim is that Bell should not have been permitted to remain in the courtroom during Officer Stewart's testimony concerning the photo identification of Talley. In essence, Talley claims that the proper procedures regarding the admission of the photo array under Del. Code Ann. tit. 11, § 3507 were not followed. The trial transcript reflects that the prosecutor called Bell as his first witness. He questioned Bell about the circumstances of the robbery, including, specifically, the lighting conditions at his house and the injuries he sustained. The prosecutor asked Bell if the man who robbed him was present in the courtroom and Bell identified Talley.

⁴ Del. Unif. R. Evid. 801; 802.

(14) The prosecutor then questioned Bell about the photo array he had been shown by Officer Stewart. He asked, “And prior to [Officer Stewart] showing these photographs to you, did he at any time suggest to you who to pick out?” Bell answered, “No, sir.” The photo array was then admitted into evidence without objection. Following some additional questions concerning the stolen property, the prosecutor called Officer Stewart to the stand to testify about the circumstances of Bell’s identification of Talley from the photo array and Bell’s injuries. Defense counsel had no questions for Officer Stewart and Bell, who had been sitting in the courtroom, again took the witness stand.

(15) This Court reviews a trial court ruling on the admissibility of a robbery victim’s out of court statement to an investigating police officer pursuant to Del. Code Ann. tit. 11, § 3507 under an abuse of discretion standard.⁵ If we conclude that there has been an abuse of discretion, we next determine whether it caused sufficient prejudice to deny the accused a fair trial.⁶ The prosecutor must offer the statement before the conclusion of the declarant’s direct examination and must demonstrate the voluntariness of the statement during direct examination.⁷ Moreover, the trial judge must make a

⁵ *Barnes v. State*, 858 A.2d 942, 944 (Del. 2004).

⁶ *Id.*

⁷ *Id.* at 945.

finding that the out of court statement was voluntary before allowing the jury to hear it.⁸ The trial transcript reflects that the first two requirements were clearly met in this case. Although the trial judge did not make an explicit finding that Bell's statement was voluntary pursuant to the third requirement, we find that omission to have been harmless in light of the clearly voluntary nature of the statement. There is, thus, no merit to Talley's claim.

(16) Talley's third claim is that the jury should have been shown photographs of the crime scene rather than drawings by Bell. The trial transcript reflects that, following Officer Stewart's testimony, Bell was recalled to the stand. The prosecutor then asked Bell to stand at an easel and draw the crime scene, including the location of street lights and lights on nearby houses, for the benefit of the jury. The drawing was admitted into evidence without any objection by defense counsel.

(17) Talley has failed to present any legal authority for the proposition that photos, rather than drawings by Bell, should have been used to depict the crime scene. In the absence of a showing of any error, much less any error that was so clearly prejudicial to substantial rights as to

⁸ Id. (citing *Smith v. State*, 669 A.2d 1, 7 (Del. 1995)).

jeopardize the integrity of the trial process, we also find this claim to be without merit.

(18) Talley's fourth claim is that the Superior Court erred when it ruled that he could not represent himself. The trial transcript reflects that, while the judge initially denied Talley's request to represent himself, the next day she corrected what she deemed to be her legal error and engaged in a colloquy with Talley to determine if his waiver of the right to counsel was voluntary. After considering the pitfalls of representing himself, Talley decided not to do so.

(19) This Court has held that a defendant may waive his right to self-representation by inaction.⁹ Arguably, at the time Talley asserted his right to self-representation, it had come too late, as the judge originally ruled. The next day, however, the judge, believing that her denial of Talley's request to proceed *pro se* constituted legal error, engaged Talley in a colloquy regarding his request to proceed *pro se*. The trial transcript reflects that the judge engaged in an extensive colloquy with Talley to determine, first, whether he was knowingly and voluntarily waiving his constitutional right to counsel and, second, whether he was aware of the risks inherent in going forward in a criminal trial without the assistance of

⁹ *Walker v. State*, Del. Supr., No. 517, 2005, Ridgely, J. (Feb. 15, 2007) (citing *United States v. Stevens*, 83 F. 3d 60, 67 (2d Cir. 1996)).

legal counsel.¹⁰ Determining that it was in his best interest to continue to be represented by counsel, Talley withdrew his request to proceed *pro se*. As such, we find no merit to this claim.

(20) Talley's final claim is that the Superior Court erred when it informed Talley that Officer Stewart had been excused and, therefore, was unavailable to testify. The trial transcript reflects that, at the close of Officer Stewart's testimony, defense counsel stated that he had no further questions for him. The judge then told Officer Stewart that he could step down. Defense counsel did not request that Officer Stewart remain available for further questioning. When the judge engaged in her colloquy with Talley, she told him that, if he chose to represent himself, he would not be able to recall Officer Stewart to the stand, but would be restricted to questioning Detective Murphy, who was the only witness to testify following his request to represent himself. In the circumstances, this was a reasonable exercise of the Superior Court's discretion and we find no error, plain or otherwise, on the part of the Superior Court in so ruling.

(21) This Court has reviewed the record carefully and has concluded that Talley's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Talley's counsel has made a

¹⁰ *Hartman v. State*, Del. Supr., No. 260, 2006, Holland, J. (Mar. 9, 2007) (citing *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996)).

conscientious effort to examine the record and has properly determined that Talley could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Randy J. Holland
Justice