

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERIC M. GRAVES,)
) No. 460, 2002
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for New Castle County
)
 STATE OF DELAWARE,) Cr. Nos. IN01091272, IN01091273,
) and IN01091274
 Plaintiff Below,)
 Appellee.)

Submitted: January 16, 2003

Decided: February 5, 2003

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

ORDER

This 5th day of February 2003, on consideration of the briefs of the parties, it appears to the Court that:

1. On July 10, 2001, New Castle County police arrested Erick Graves. A New Castle County Grand Jury later indicted him for Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance,¹ Use of a Vehicle for Keeping Controlled Substances,² and Conspiracy in the Second Degree.³ Trial began on June 11, 2002 in the New Castle Superior Court. At the close of the State's case-in-chief, Graves moved for a judgment of acquittal on all counts. The

¹ 16 Del. C. § 4751.

² 16 Del. C. § 4755(a)(5).

³ 11 Del. C. § 512.

trial judge granted the motion for two of the three counts: Use of a Vehicle for Keeping Controlled Substances and Conspiracy in the Second Degree. The jury found Graves guilty of Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance. In this appeal, Graves asserts two grounds of error: (i) the trial judge abused his discretion by denying Graves' motion for judgment of acquittal on the count of Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance and (ii) the trial judge abused his discretion when he allowed a police officer to testify as an expert witness and offer an opinion that the packaging of drugs Graves possessed was consistent with street level drug sales.

2. We review the denial of a motion for judgment of acquittal *de novo* to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.⁴ After doing so here, we conclude that the State presented sufficient evidence for the jury to consider the charge of Possession with Intent to Deliver.

3. At trial, the New Castle police officers testified that they pulled over a car in which Graves was a passenger. The officers further testified that Graves sat above a sewer grate while the officers searched the car. The record shows that within a few minutes after the stop, Graves approached Krista Arthur's house and asked to use her phone. Arthur overheard Graves tell someone that he had

⁴ *Seward v. State*, 723 A.2d 365, 369 (Del. 1999).

removed something from his boot during the police stop and thrown it into the sewer. Arthur called the police and reported the conversation that she overheard. The officer returned to the scene of the earlier incident, shined his flashlight down the sewer grate, and discovered two clear plastic bags containing smaller orange bags similar to bags found in the car during the previous stop. The bags contained crack cocaine. From this circumstantial evidence, a rational trier of fact could have found beyond a reasonable doubt that Graves had knowingly possessed crack cocaine.

4. We further conclude that the trial judge did not abuse his discretion by allowing the police officer to give expert testimony. This court applies an abuse of discretion standard when “it reviews a trial court’s decision to admit or exclude expert testimony.”⁵

5. The prosecutor elicited testimony from the officer concerning the officer’s training and background in narcotics investigation. Specifically, the officer testified that he attended six police academy schools and received DEA school training. He also worked on a DEA task force, conducted undercover drug buys and had participated in several hundred drug investigations. After this foundation, the prosecutor asked if, in the officer’s opinion, the packaging of the drugs was consistent with street level drug sales. At that point, for the first time,

⁵ *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 522 (Del. 1999) (quoting *General Electric Co. v. Joiner*, 522 U.S. 136 (1997)).

defense counsel objected and raised a challenge to the officer's "expert" testimony. Graves now asserts that "it is inherently unreasonable for the trial court to allow expert witness opinion testimony prior to opposing counsel being offered the chance to challenge the expert's qualifications."⁶

6. Delaware Rule of Evidence 705(b) grants trial judges discretion to allow an adverse party, *upon that party's motion*, to conduct a limited *voir dire* of a proffered expert.⁷ Contrary to the defendant's assertion, a limited *voir dire* of an expert's qualifications is not mandated by the rule. Nor should a trial judge be expected to halt an examination of a witness *sua sponte* to ask opposing counsel if there is an objection to an expert's qualifications even where a witness, such as a police officer, would not necessarily be giving testimony limited exclusively to "expert opinion." Well before the State attempted to elicit expert opinion, as opposed to factual testimony from the officer, the defendant had several viable options. The defendant had ample opportunity to file a motion *in limine* before trial. Defense counsel could have asked the prosecutor to disclose the extent to which the prosecutor would attempt to elicit any expert testimony from police witnesses; or, simply if the prosecutor intended to elicit expert testimony at all. Then defense counsel could request an opportunity to examine the witness out of the presence of the jury on *voir dire* or demand that the State first qualify the

⁶ Appellant's Reply Brief at 3.

⁷ D.R.E. 705(b) (2000); *Re v. State*, 540 A.2d 423, 425-26 (Del. 1988).

witness outside the presence of the jury and then assert to the trial judge alone any objection to any part of the State's proffer. Defense counsel instead chose to walk to the edge of a precipice and then blame the trial judge for a precipitous ruling. It is unlikely, given the manner and timing of defense counsel's challenge, that any trial judge would have ruled otherwise. Certainly it is unlikely given the tactics employed by defense counsel here. In effect, defense counsel chose to opt for the tactic least likely to give the defense an effective option to attack the officer's qualifications, experience, training and expertise. Clearly, on this record, the officer was qualified through his training and experience to help the triers of fact understand the significance of the drug packaging. When the trial judge overruled the objection, he was careful to instruct the jury that by overruling the objection that he was not endorsing the testimony but simply allowing the jury to consider it and give it the weight the jury deemed to be appropriate. The trial judge did not abuse his discretion by admitting the officer's expert testimony. We conclude that circumstantial evidence sufficiently established knowing possession and that the quantity of drugs and the expert testimony supporting intent to deliver, combined with the trial judge's careful caution to the jury, demonstrates that Graves' argument is without merit.

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

BY THE COURT:

/s/ Myron T. Steele
Justice