

SUPREME COURT OF DELAWARE

Wisher v. State

957 A.2d 3 (Del. 2008) · No. No. 7, 2008 · Decided September 9, 2008

SUMMARY

The Delaware Supreme Court affirmed the denial of William Wisher's first motion for postconviction relief. The court rejected claims involving an alleged false statement in a police report, appellate counsel's compliance with Delaware Supreme Court Rule 26(c), burden shifting, hearsay, and a missing-evidence instruction. It held that some claims lacked merit or factual support and that the burden-shifting claim was procedurally barred because it had been previously litigated.

CASE DETAILS

COURT	Supreme Court of Delaware
WRITING FOR THE COURT	Carolyn Berger, Justice; Holland, Justice; Berger, Justice; Jacobs, Justice
JURISDICTION	Delaware
DECIDED	September 9, 2008
DOCKET	No. 7, 2008
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the Superior Court of Delaware's denial of Wisher's first motion for postconviction relief alleging ineffective assistance of counsel.
STANDARD OF REVIEW	The Supreme Court reviewed the denial of postconviction relief for error and affirmed where the claims were procedurally barred, vague and unsupported, or meritless.
PRECEDENTIAL VALUE	Published and precedential Delaware Supreme Court opinion.
PARTIES	William Wisher v. State of Delaware

TOPICS

- state post-conviction relief
- ineffective assistance
- appellate procedure
- evidence
- hearsay

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether an alleged typographical error in a police report concerning ownership of seized money required reversal under *Franks v. Delaware*.
2. Whether trial counsel was ineffective for failing to follow Delaware Supreme Court Rule 26(c) when withdrawing from representation on appeal.
3. Whether Wisher's burden-shifting claim was procedurally barred because it restated an insufficiency-of-the-evidence claim previously rejected on direct appeal.
4. Whether appellate counsel was ineffective for failing to challenge unspecified hearsay and the absence of a missing-evidence instruction.

HOLDINGS

1. A typographical discrepancy in a police report did not implicate *Franks* or require reversal because *Franks* concerns deliberate falsehoods in probable-cause affidavits used to secure arrest warrants, and the discrepancy was disclosed to and considered by the jury.
2. Delaware Supreme Court Rule 26(c) applies when appellate counsel concludes that there are no meritorious issues to raise on appeal; it did not apply where privately retained trial counsel withdrew and a public defender entered an appearance and filed a merits brief.
3. A postconviction claim is procedurally barred when it restates an insufficiency-of-the-evidence claim that was previously adjudicated on direct appeal, even if the claim is refined or presented in different language.
4. An ineffective-assistance claim must identify and substantiate concrete attorney error and actual prejudice; a vague allegation that counsel failed to challenge unspecified hearsay is insufficient. A missing-evidence instruction was not required for evidence that was not relevant or exculpatory to the defendant's charges.

FACTUAL BACKGROUND

Wisher and two codefendants were arrested after a controlled drug purchase arranged by an informant. Police found 112 grams of crack cocaine, a scale, and marijuana in the vehicle driven by Wisher, along with cash in Wisher's pocket. A codefendant later testified that Wisher was his business partner and knew the drugs were in the car. Wisher's postconviction claims concerned an alleged false statement in a police report, appellate counsel's withdrawal procedures, burden shifting, hearsay, and missing evidence.

PROCEDURAL HISTORY

A Superior Court jury convicted Wisher in June 2005 of trafficking cocaine, possession with intent to deliver, possession of marijuana, possession of drug paraphernalia, and conspiracy. The Delaware Supreme Court affirmed the convictions on direct appeal. Wisher filed a first postconviction motion in March 2007, voluntarily

withdrew it in June 2007, and filed another motion in August 2007. The Superior Court treated the later motion as timely but denied relief, and Wisher appealed.

DISPOSITION

affirmed

CASES CITED

- Wisher v. State, 2006 WL 2008774 (Del. July 17, 2006)
- Franks v. Delaware, 438 U.S. 387 (1978)
- Somerville v. State, 703 A.2d 629, 631 (Del. 1997)
- Anders v. California, 386 U.S. 738 (1967)
- Skinner v. State, 607 A.2d 1170, 1172 (Del. 1992)
- Younger v. State, 580 A.2d 552, 556 (Del. 1990)
- Lolly v. State, 611 A.2d 956, 960 (Del. 1992)

OPINION

PER CURIAM.

WILLIAM WISHER, Defendant Below-Appellant, v. STATE OF DELAWARE, Plaintiff Below-Appellee. No. 7, 2008. Supreme Court of Delaware. Submitted: June 6, 2008. Decided: September 9, 2008. Before HOLLAND, BERGER, and JACOBS, Justices. ORDER Carolyn Berger, Justice. This 9th day of September 2008, upon consideration of the parties' briefs and the record below, it appears to the Court that: (1) The appellant, William Wisher, filed this appeal from the Superior Court's denial of his first motion for postconviction relief.

Wisher's postconviction motion alleged ineffective assistance of counsel. We find no merit to Wisher's appeal. Accordingly, we affirm the Superior Court's judgment. (2) The record reflects that a Superior Court jury convicted Wisher in June 2005 of trafficking cocaine, possession with intent to deliver, possession of marijuana, possession of drug paraphernalia, and conspiracy.

We affirmed his convictions on appeal.[1] Thereafter, in March 2007, Wisher filed his first motion for postconviction relief, which he voluntarily withdrew in June 2007. He filed again for postconviction relief in August 2007.

The Superior Court treated the motion as timely filed but denied Wisher postconviction relief.[2] This appeal followed. (3) Wisher enumerates four arguments in his opening brief on appeal. First, he contends that his conviction should be reversed because the investigating officer made a false statement in his police report.

Second, Wisher asserts that his trial counsel was ineffective for not following the procedures set forth in Supreme Court Rule 26(c) when he moved to withdraw as Wisher's counsel on appeal. Third, Wisher contends that the burden of proof was impermissibly shifted to the defense at trial.

Finally, he claims that his public defender on appeal was ineffective for failing to challenge hearsay evidence that was admitted at trial and for failing to argue reversible error because of the Superior Court's failure to give a missing evidence instruction at trial.

We do not address any other issues that Wisher might have raised to the Superior Court but failed to argue in his opening brief on appeal. Such claims have been waived.[3] (4) The record at trial established that Wisher and two codefendants were arrested following a controlled drug purchase, which had been arranged by an informant, Marcus Johnson. Marcus Johnson initially informed police that a man named Charles Johnson (no relation) was a drug dealer.

After arranging a drug purchase, the informant met Charles Johnson at a Wawa store. Charles Johnson arrived in a car driven by Wisher and with a backseat passenger named Kevin Stigars. Police surrounded the car and removed all three men.

In searching the vehicle, police found a bag with 112 grams of crack cocaine, a scale, and a marijuana cigarette. They also found marijuana in Charles Johnson's coat and \$1431 in cash in Wisher's pocket. Initially, Charles Johnson told police that neither Stigars nor Wisher were involved in the drug sale and had only been along for a ride. Later, however, Charles Johnson recanted that statement.

After pleading guilty and being criminally sentenced, at Wisher's trial he testified for the State that Wisher was his business partner and knew the drugs were in the car. (5) Wisher's first contention in this appeal is that his conviction should be reversed because the police report contained a false statement in violation of *Franks v. Delaware*. [4] At trial, Corporal Grotty testified that Wisher stated that the money seized from his pocket was not his.

Grotty acknowledged, however, that his police report contained a typographical error, which erroneously stated that Wisher indicated the money seized from his pocket was his. To the extent Wisher argues that this discrepancy requires reversal of his conviction, we find no merit to such an argument.

In the first instance, we note that *Franks v. Delaware* dealt with deliberate falsehoods contained in a probable cause affidavit used to secure an arrest warrant. The ruling in that case simply does not apply to this set of facts.

Moreover, the typographical error in Grotty's police report was brought out at trial during Grotty's testimony and was submitted to the jury for its consideration with all of the other evidence. To the extent the jury found no significance to the typographical error, we find no miscarriage of justice.

[5] (6) Wisher next contends that his trial counsel was ineffective for failing to follow the procedures set forth in Supreme Court Rule 26(c) in withdrawing as his counsel on appeal.

Wisher's argument, however, misapprehends Rule 26(c). In this case, Wisher's trial counsel had been privately retained. On appeal, counsel moved to withdraw, which this Court permitted. Because of Wisher's indigency and his right to counsel on direct appeal, this Court allowed the public defender to enter an appearance on Wisher's behalf.

The public defender representing Wisher filed a brief arguing the merits of Wisher's appeal. The procedures of Rule 26(c) are only applicable when appellate counsel finds there are no meritorious issues to raise on appeal.[6] Such was not the case in Wisher's direct appeal.

Accordingly, there is no merit to this claim. (7) Wisher next contends that the State impermissibly shifted the burden of proof at trial. This argument essentially restates the claim that Wisher raised on direct appeal, namely that the State had failed to sustain its burden of proving that Wisher knew there were drugs in the car.

We rejected this claim on appeal, holding that the testimony of Charles Johnson was sufficient to prove Wisher's guilt beyond a reasonable doubt. This postconviction claim, therefore, was procedurally barred.[7] Reconsideration of this insufficiency of the evidence claim was not required simply because the claim was refined or restated.[8] (8) Wisher's final claim is that his appellate counsel was ineffective for failing raise arguments regarding hearsay evidence and missing evidence.

The Superior Court rejected both of these contentions. First, Wisher's contention that appellate counsel failed to raise a hearsay argument does not identify, or even hint at, what alleged hearsay testimony should have been challenged.

The Superior Court found no basis to review such a vague claim, and we find no error in this ruling. A defendant asserting an ineffective assistance of counsel claim must set forth and substantiate concrete allegations of error and actual prejudice.[9] Wisher failed to do so.

Moreover, Wisher's missing evidence argument simply has no merit. The missing evidence that Wisher alludes to was a scale found on Charles Johnson and cash found in Johnson's apartment. While the State conceded that that evidence had been lost, the evidence was not relevant to the charges against Wisher. There was nothing exculpatory about the evidence so a missing evidence instruction was not required.[10] Accordingly, we find no error in appellate counsel's failure to raise this as an issue on appeal.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED. NOTES [1] Wisher v. State, 2006 WL 2008774 (Del. July 17, 2006). [2] Wisher v. State, Del. Super., Crim. ID XXXXXXXXXXXX, Babiarz, J. (Oct. 22, 2007).

[3] *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997). [4] 438 U.S. 387 (1978). [5] See Del. Super. Ct. Crim. R. 61(i)(5). [6] See *Anders v. California*, 386 U.S. 738 (1967). [7] Del. Super. Ct. Crim. R. 61(i)(4) (2007) (barring any postconviction claims for relief that were previously adjudicated).

[8] *Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992). [9] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990). [10] See *Lolly v. State*, 611 A.2d 956, 960 (Del. 1992) (holding defendant entitled to a missing evidence instruction when State fails to gather or preserve material evidence).