

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

criminal law

post-conviction relief

criminal appellate procedure

ineffective assistance of counsel

evidence

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)