

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHAWN L. FULLER,	§
	§
Defendant Below-	§ No. 164, 2001
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ Cr.A. No. IK99-09-0259-
Plaintiff Below-	§ 0261
Appellee.	§

Submitted: November 28, 2001

Decided: January 15, 2002

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

**ORDER**

This 15th day of January 2002, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) Following a November 8, 2000 Superior Court jury trial, the defendant-appellant, Shawn L. Fuller, was found guilty of Trafficking in Cocaine, Possession with Intent to Deliver Cocaine, and Possession of Cocaine as a lesser-included offense of Possession of Cocaine Within 1,000 Feet of School Property. Fuller was later sentenced on these

convictions, and on several additional convictions,<sup>1</sup> to a total of 13 years incarceration at Level V, to be suspended after 8 years and 6 months for decreasing levels of supervision. This is Fuller's direct appeal.<sup>2</sup>

(2) Fuller asserts the following claims of error in connection with his criminal trial: a) his constitutional confrontation rights were violated when a police officer who did not participate in his arrest was permitted to testify about the arresting officer's police report; and b) the State presented insufficient evidence concerning the execution of the warrant that led to his arrest. Laudably, the State also raises the additional issue that Fuller's dual convictions for Trafficking in Cocaine and Possession of Cocaine impermissibly subjected him to double jeopardy.

(3) The facts adduced at trial were as follows. Corporal William Wilson of the Smyrna Police Department testified that, on September 7, 1999, he was called to the Heron Run Apartment Complex in Smyrna, Delaware, to investigate a complaint. While there, he recognized Fuller and observed him enter apartment 206. After taking care of the complaint,

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<sup>1</sup>Fuller was convicted of two counts of Possession of Cocaine Within 1,000 Feet of a School, Assault in the Second Degree, Tampering with Physical Evidence, and Forgery in the Second Degree.

<sup>2</sup>After an evidentiary hearing and the filing of factual findings by the Superior Court, this Court permitted Fuller to proceed pro se in this appeal. SUPR. CT. R. 19(c); 26(d) (iii).

Corporal Wilson went to apartment 206 and took Fuller into custody.<sup>3</sup> Corporal Wilson then drove Fuller in his patrol vehicle, a 1999 Jeep Cherokee, to the Smyrna Police Department. Fuller was seated in the front seat next to Corporal Wilson. Following his customary practice prior to each shift, Corporal Wilson had checked the vehicle, including the areas under the seats, before driving Fuller to the police station.

(4) As Fuller got out of the vehicle at the police station, Corporal Wilson noticed pieces of what appeared to be crack cocaine both on Fuller's seat and dropping out of his pants to the ground. Once in the building, Fuller complained of something "sticking him." Corporal Wilson conducted a search of Fuller's person and located a bag of what appeared to be crack cocaine hanging from an unhooked safety pin on Fuller's boxer shorts. Corporal Wilson then went back outside, gathered up the material from the seat of the vehicle and the ground, took it back to the police station, and field tested it using a Narco Field Test Number 13. Corporal Wilson asked Fuller about the quantity of drugs he sold and Fuller told him that he was "not any big time."

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<sup>3</sup>Although Corporal Wilson was not permitted to so testify at trial, there was an outstanding warrant for Fuller's arrest dated September 3, 1999.

(5) After conducting the field tests and ascertaining the weight of the material, Corporal Wilson placed it in an evidence bag, tagged it and placed it in the temporary evidence locker secured with a padlock. He stated that, under standard operating procedure, the detective in charge of evidence subsequently would place the evidence in a permanent envelope and enter the pertinent information about the evidence into a computer.

(6) Corporal Wilson identified the envelope with the crack cocaine at trial. He testified to his specialized training in and experience with drug crimes and that, in his opinion, the quantity of drugs Fuller had been carrying was in excess of what would be expected for purely personal use. He also stated that he found over \$400 on Fuller's person at the time of the arrest. Corporal Wilson, finally, testified that Heron Run Apartments is located less than 500 feet from a school called the Smyrna Kindergarten.

(7) Amalendu DasGupta, Ph.D., a forensic toxicologist supervisor with the Medical Examiner's Office, also testified at trial. Dr. DasGupta stated that he had performed chemical analysis for the Medical Examiner's Office for over 26 years. Dr. DasGupta stated that, on November 13, 1999, he took the drug evidence out of the evidence locker at the Medical

Examiner's Office and analyzed it. In accordance with standard procedure, the evidence would have been brought by courier to the Medical Examiner's Office from the police station in a locked box, put into an envelope, and then placed in the evidence locker. Dr. DasGupta testified that he determined the material was 8.02 grams of crack cocaine by conducting a number of standard tests. After testing and weighing the material, Dr. DasGupta placed it back in the evidence locker.

(8) Fuller's first claim that his constitutional confrontation rights were violated when Corporal Wilson, rather than the arresting officer, testified to the circumstances of his arrest based on the police report is without merit. While the documentation contains some apparent inconsistencies,<sup>4</sup> the trial record nevertheless clearly reflects that Corporal Wilson, who testified on behalf of the State without objection from the defense, was the arresting officer and, therefore, properly testified to the circumstances of Fuller's arrest.

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<sup>4</sup>Attached to Fuller's opening brief are copies of an Affidavit of Probable Cause and an Initial Crime Report, both dated September 7, 1999 and both referencing Corporal Norman E. Wood, rather than Corporal William Wilson, of the Smyrna Police Department. Neither document contains a signature and neither document is contained in the official record of this case.

(9) Also without merit is Fuller's second claim that the State presented insufficient evidence concerning the execution of the warrant that led to his arrest. The record reflects that Fuller's September 7, 1999 arrest was based on a warrant that had been executed on September 3, 1999. Immediately prior to trial on November 8, 2000, the State successfully moved, without objection by the defense, to have the charges recited in that warrant severed from charges stemming from the events of September 7, 1999. At the request of the defense, the Superior Court then ruled that, in order to minimize any prejudice to Fuller, there would be no testimony by the State's witnesses about the warrant itself. This Court reviews a determination by the Superior Court to admit or exclude evidence under an abuse of discretion standard.<sup>5</sup> In this case, the defense itself requested that evidence relating to the warrant be excluded in order to avoid prejudice to Fuller. It can not now complain of an abuse of discretion on the part of the Superior Court in excluding the evidence.

(10) To the extent Fuller claims that his September 7, 1999 arrest was illegal because the September 3, 1999 warrant was improper, he is precluded from making any such claim in this action. Fuller challenged

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<sup>5</sup>*Culp v. State*, 766 A.2d 486, 489 (Del. 2001).

the validity of the September 3, 1999 warrant for the first time in the instant appeal. In the absence of a defense motion to suppress and a pretrial suppression hearing, there is no record upon which to conduct an appellate review of Fuller's claim.<sup>6</sup> Stated another way, Fuller's failure to raise the validity of the warrant as an issue below limits the scope of our review to plain error.<sup>7</sup> Plain error is "limited to material defects which are apparent on the face of the record . . . ."<sup>8</sup> There is no evidence in this record of plain error on the part of the Superior Court.

(11) The State laudably admits error in connection with Fuller's dual sentences for Trafficking in Cocaine and Possession of Cocaine as a lesser-included offense of Possession of Cocaine Within 1,000 Feet of a School.<sup>9</sup> The Double Jeopardy Clause prohibits multiple punishments for the same offense.<sup>10</sup> The general test to determine whether separate counts of an indictment actually charge two offenses or only a single offense is

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<sup>6</sup>*Tricoche v. State*, 525 A.2d 151, 154 (Del. 1987).

<sup>7</sup>SUPR. CT. R. 8.

<sup>8</sup>*Wainwright v. State*, 504 A.2d 1096, 1100 (Del.1986), *cert. denied* , 479 U.S. 869 (1986).

<sup>9</sup>The Superior Court's sentencing order reflects that Fuller received a sentence of 6 months incarceration at Level V, to be suspended for 6 months at Level I, on the conviction for the lesser-included Possession charge.

<sup>10</sup>*Seward v. State*, 723 A.2d 365, 375 (Del. 1999).

whether each count requires proof of a fact that the other does not.<sup>11</sup> A conviction for Trafficking in Cocaine requires proof of knowing possession of cocaine and possession of a quantity between 5 and 50 grams.<sup>12</sup> The offense of Possession of Cocaine requires only proof of knowing possession of cocaine.<sup>13</sup> In this case, however, the quantity of cocaine Fuller was charged with and convicted of possessing exceeded 5 grams. There is, thus, an identity of statutory elements between the two offenses in this case that renders Fuller's dual convictions impermissible.<sup>14</sup>

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED. However, this matter is REMANDED to the Superior Court for re-sentencing and entry of a sentencing order that removes Fuller's conviction and sentence for the lesser-included offense of Possession of Cocaine, while preserving all of his other convictions and sentences.

BY THE COURT:

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<sup>11</sup>*Id.*; *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

<sup>12</sup>DEL. CODE ANN. tit. 16, § 4753A (1995).

<sup>13</sup>DEL. CODE ANN. tit. 16, § 4753 (1995).

<sup>14</sup>DEL. CODE ANN. tit. 11, § 206 (1953).



/s/ Randy J. Holland  
Justice