IN THE SUPREME COURT OF THE STATE OF DELAWARE

HECTOR QUIRICO,	§	
	§	
Defendant Below-Appellant,	§	No. 328, 2003
	§	
	§	Court Below---Superior Court
v.	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr. A. Nos. IN02-05-0483
	§	thru 0486
Plaintiff Below-Appellee.	§	
	§	

Submitted: November 10, 2003
Decided: January 27, 2004

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

O R D E R

This 27th day of January 2004, 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, Hector Quirico, was found guilty by a Superior Court jury of Possession of Cocaine (as a lesser-included offense of Possession with Intent to Deliver Cocaine), Possession with Intent to Deliver Marijuana, Maintaining a Dwelling for the Purpose of Keeping Controlled Substances, and Possession of Drug Paraphernalia. He was sentenced to a total of 6 years incarceration at Level V, to be suspended after 3 years for probation. This is Quirico's direct appeal.

(2) Quirico's trial 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 could arguably 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.[1]

(3) Quirico's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Quirico's counsel informed Quirico 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. Quirico also was informed of his right to supplement his attorney's presentation. Quirico responded with a brief that raises six issues for this Court's consideration. The State has responded to the position taken by Quirico's counsel as well as the issues raised by Quirico and has moved to affirm the Superior Court's judgment.

[1] *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) Quirico raises six issues for this Court's consideration. He claims that: a) the trial judge's questioning of the investigating officer was improper; b) the investigating officer's expert opinion that the drugs were packaged for sale rather than for personal use was improper because it encompassed an ultimate issue to be decided by the trier of fact; c) the prosecutor improperly injected a personal opinion into her closing argument by repeatedly using the pronoun "I"; d) the State failed to turn over pretrial discovery, which prejudiced his case; e) his attorney provided ineffective assistance by failing to provide him with requested documents; and f) the evidence of drug activity seized from his apartment should have been suppressed. We review Quirico's first four claims for plain error, since no objections were made either before or at trial with respect to those claims.[2]

(5) On the day before trial, defense counsel, who recently had been retained by the defendant, filed a motion for leave to file a motion to suppress out of time. On the morning of trial, the trial judge denied the motion on the ground that the defendant had not been diligent in retaining counsel and, moreover, there did not appear to be a factual basis for suppressing the evidence. The judge permitted the defendant to renew his motion during the trial.

[2] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (Plain error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.")

(6) The following facts were adduced at trial. In the morning of April 24, 2002, Sergeant Jason Sapp, a member of the Governor's Task Force on drug enforcement, a probation officer named Mark Lewis and a state trooper named David Myers attempted to execute a warrant on an individual named Chanel Harris at 2210 Market Street in Wilmington, Delaware. When they were not able to locate Chanel Harris, they went to Apartment B of 2208 Market Street, which adjoins 2210 Market Street. While Sergeant Sapp testified on direct examination that one of the other residents in the building suggested Chanel Harris might be in that apartment, neither the police report nor the affidavit of probable cause, which supported the application for a search warrant, specifically so stated.

(7) When the officers arrived at Apartment B, they detected an odor of marijuana. Sergeant Sapp knocked on the door, heard a male voice ask, "Who is it?" and identified himself as a police officer. A man, later identified as Quirico, partially opened the door with his left hand. The odor of marijuana intensified. Sergeant Sapp asked if he could enter and Quirico, with his left hand still on the doorknob, opened the door wider while backing away. Sergeant Sapp testified that Quirico also nodded his head up and down. Quirico had his right hand in his pocket and the officers asked him to remove it so they could check for the presence of a weapon. No weapon was found.

(8) Once inside the apartment, Officer Lewis observed marijuana and rolling paper lying on the kitchen table. Sergeant Sapp then handcuffed Quirico and patted him down. Inside Quirico's pants pocket he found a plastic baggie containing several smaller baggies. The smaller baggies contained a white, chalky substance later identified as crack cocaine weighing approximately 1 gram. While walking through the apartment, the officers also saw a bowl of marijuana, later determined to weigh approximately 91 grams, on the floor in the bedroom.

(9) After taking Quirico to the police station, Sergeant Sapp obtained a search warrant and executed it at the apartment. He found an additional 20 baggies of marijuana later determined to weigh approximately 30 grams, dozens of empty baggies, a baggie containing a white, chunky substance later determined not to be cocaine, a receipt for a bus ticket from Wilmington, Delaware to New York City showing the name of "Hector Quirico", approximately $135 in U.S. currency, and a digital scale. Sergeant Sapp testified that, in his opinion, the substance determined not to be cocaine could be a "cutting agent," which is used either to increase the weight of cocaine packaged for sale or to cook powdered cocaine to create crack cocaine. On cross examination, however, Sergeant Sapp agreed that the Medical Examiner's report identified the substance as "nicotinamide" and that he did not know if that substance could be used as a "cutting agent." He also

conceded that only crack cocaine, and no powdered cocaine, was seized at the apartment.

(10) Toward the end of Sergeant Sapp's testimony, the Superior Court judge asked the following question: " . . . if you just had the drugs . . . that quantity that you seized, in your opinion and experience, would that be something that would be utilized for their personal use, or would that be . . . an individual that was possessing them with the intent to distribute them to others for their use?" After Sergeant Sapp stated that he believed the drugs were intended for sale, the judge asked this question: "And I take it in your charging decision . . . you took that opinion . . . and made the decision to charge it as a Possession with Intent to Deliver . . . based upon all the evidence seized?" Sergeant Sapp answered, "Yes, sir, absolutely."

(11) At the close of the State's case, defense counsel moved to suppress the evidence of drug activity seized from Quirico's apartment, arguing that Quirico's non-verbal actions did not constitute consent to entry by the police and there were no exigent circumstances warranting a search of the apartment once the police had entered it. The Superior Court judge denied the motion to suppress stating that Quirico had consented to the search and that subsequent actions taken

by the officers to pat down Quirico and canvass the apartment were reasonable in the interest of their own safety.

(12) Quirico testified as the sole defense witness. He stated that he did not give his consent to the officers to enter his apartment. He also stated that he had been a regular marijuana smoker for approximately 14 years, that he had recently begun smoking crack cocaine, which he mixed together with the marijuana, and that the drugs in his apartment were solely for his own use. Defense counsel did not renew his motion to suppress following Quirico's testimony.

(13) In her closing argument, the prosecutor used the pronoun "I" on seven separate occasions, with no objection from defense counsel. She stated as follows: "What I ask you to do is to look at the totality of the circumstances and really consider the testimony of Sergeant Sapp . . . . " "[W]hy would anyone have 50 . . . little baggies . . . .? I think that's something that you need to consider." "I don't know how much food you'd get on that scale." "I think what you have to think about is to assess what you heard from the two officers and then assess what you heard from Mr. Quirico . . . ." "I think what you have here is the drugs were in the apartment." "[The officers'] actions, I believe, were within the law, and they did not do anything beyond proper police procedure." " . . . I ask you to find Mr. Quirico guilty . . . ."

(14) Quirico's first claim is that the trial judge's questioning of Sergeant Sapp was improper. While it is not per se improper for a trial judge to question a witness in front of the jury, the judge must use extreme caution in doing so.[3] "The need for a judge to exercise self-restraint and preserve an atmosphere of impartiality in the questioning of an expert witness arises from the judge's absolute duty of neutrality. Departure from that rule may be grounds for reversal on the basis of plain error."[4] We have reviewed carefully the transcript of the trial, including the judge's questioning of Sergeant Sapp. We find no compromise of the principles of self-restraint and impartiality on the part of the judge and, therefore, find no error, plain or otherwise, in his questioning of Sergeant Sapp.

(15) Quirico's second claim is that Sergeant Sapp should not have been permitted to offer an expert opinion concerning whether the drugs were for sale or for personal use because that opinion encompassed an ultimate issue to be decided by the trier of fact. Opinion testimony by an expert "is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact."[5] Even though Sergeant Sapp's opinion that the drugs were for sale rather than for personal use embraced an ultimate issue to be decided by the jury, its admission

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[3] *Price v. Blood Bank of Delaware, Inc.*, 790 A.2d 1203, 1210-11 (Del. 2001).

[4] *Id.*

[5] D.R.E. 704.

did not improperly invade the province of the jury. We, therefore, find no error, plain or otherwise, in the admission of this testimony.

(16) Quirico's third claim is that the prosecutor improperly injected a personal opinion into her closing argument by continually using the pronoun "I." A prosecutor should avoid using the pronoun "I" during closing argument because "it serves to emphasize for the jury that the prosecutor . . . personally believes the point that is being submitted to the jury."[6] Improper vouching occurs when a prosecutor implies that he or she has superior knowledge, beyond that logically inferable from the evidence, that a witness has testified truthfully.[7]

(17) We have reviewed the carefully the transcript of trial, including the prosecutor's closing argument and find no improper vouching except for the statement expressing the prosecutor's belief that the officer's actions were "within the law" and in accordance with "proper police procedure." While this statement clearly was improper, we do not find that it, standing alone, was so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[8]

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[6] *Williams v. State*, 796 A.2d 1281, 1291 (Del. 2002) (quoting *Brokenbrough v. State*, 522 A.2d 851, 859 (Del. 1987).

[7] *Saunders v. State*, 602 A.2d 623, 624 (Del. 1984).

[8] *Wainwright v. State*, 504 A.2d at 1100.

(18) Quirico's fourth claim is that the State failed to turn over pretrial discovery, which prejudiced his case. While Quirico's argument is not entirely clear, he appears to complain that the State never turned over a witness statement indicating that drug activity was taking place in his apartment. Quirico's argument is without merit because the State is not required to turn over witness statements to the defense prior to trial.[9] To the extent Quirico argues that he suffered prejudice because of an alleged discovery violation by the State, he offers no factual support for that argument. We, therefore, find no error, plain or otherwise, in connection with this claim.

(19) Quirico's next claim is that his counsel provided ineffective assistance of counsel by failing to provide him with copies of various documents to assist him in his appeal. It is settled law, however, that this Court will not consider a claim of ineffective assistance of counsel for the first time on direct appeal.[10] Accordingly, we will not review Quirico's ineffective assistance of counsel claim in this appeal. It does not appear that there is any merit to this particular claim in any case, since Quirico provides no evidence supporting the proposition that the absence of certain

[9] Super. Ct. Crim. R. 16(a)(2).

[10] *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

documents such as the arrest warrant for Chanel Harris, the search warrant and the affidavit of probable cause has hampered his ability to present his claims.[11]

(20) Quirico's final claim is that the evidence of drug activity seized from his apartment should have been suppressed. When a search by law enforcement officers is necessary for reasons of safety, the permissible scope of such a search is determined by balancing the competing interests of the officers' safety and the degree of intrusion upon a person's privacy rights.[12] Warrantless seizures of items in plain view are legitimate when law enforcement officers are lawfully in a position to observe the items and the items' evidentiary value is immediately apparent.[13] We review the Superior Court's denial of a motion to suppress evidence seized under such circumstances for abuse of discretion.[14]

(21) In this case, the officers' testimony supported the judge's finding of consent to enter the apartment, at which point the drugs could be seen in plain view on the kitchen table. The testimony also supported the judge's finding that the officers acted reasonably to pat down Quirico and canvass the apartment in the

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[11] Quirico also claimed that counsel had not sent him a copy of the complete trial transcript. The record reflects that counsel initially sent Quirico only those portions of the transcript relevant to his appeal. On December 24, 2003, counsel sent him the remaining portions of the transcript.

[12] *Morrow v. State*, 603 A.2d 835, 837 (Del. 1992).

[13] *Williamson v. State*, 707 A.2d 350, 358 (Del. 1998).

[14] *Virdin v. State*, 780 A.2d 1024, 1030 (Del. 2001).

interest of their safety, which yielded additional evidence of drug activity, and, ultimately, resulted in the obtaining of a search warrant. Under these circumstances, we find no abuse of discretion on the part of the Superior Court in denying defense counsel's motion to suppress.

(22) This Court has reviewed the record carefully and has concluded that Quirico's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Quirico's counsel has made a conscientious effort to examine the record and has properly determined that Quirico 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