# SUPERIOR COURT
# OF THE STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

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| STATE OF DELAWARE | ) | |
| | ) | |
| v. | ) | ID No.: 0403006285 |
| | ) | |
| LUIS BULTRON, | ) | |
| | ) | |
| Defendant. | ) | |

## POST-TRIAL AND SENTENCING MEMORANDUM

Stephen Walther, Deputy Attorney General. Department of Justice, Carvel State Office Building, 820 N. French Street, 7th Floor, Wilmington, DE 19801. Deputy Attorney General for the State

Luis Bultron, Delaware Correctional Center, Smyrna, Delaware. *Pro Se* Defendant.

**SILVERMAN, J.**

At the court's insistence and over Bultron's objection, the court required Bultron to represent himself at trial. This was despite the fact that Defendant was eligible for sentencing as a habitual offender. The court's uncharacteristic decision and the drastic circumstances leading up to it justify formal discussion, beyond the contemporaneous record. Therefore, this summarizes and supplements the extensive bench rulings made before and during the jury trial on October 5 - 6, 2004 and at sentencing on January 7, 2005.

In summary, the court forced Defendant to stand trial *pro se* because Defendant mistreated his court-appointed attorney to the point that the attorney, one of Delaware's most seasoned criminal defense lawyers, asked to withdraw. During extensive hearings on September 21, 2004 and after jury selection on October 5, 2004, the court determined that Defendant's misconduct amounted to a waiver or forfeiture of his right to court-appointed counsel. Based on that finding, the court forced Defendant, against his expressed desires, to represent himself at his jury trial.

**I.**

The New Castle County Grand Jury indicted Defendant on April 5, 2004 for Burglary second degree, Theft misdemeanor, and Unlawfully obtaining possession of a controlled substance. Before trial, the State dropped the drug offense. Even before the indictment was handed up, while the case was pending in the Court of

Common Pleas, the Public Defender was appointed to represent Mr. Bultron. And before the indictment, the Public Defender assigned one of his most experienced Assistant Public Defenders, Edmund Hillis, Esquire.

Almost immediately after he was assigned, Hillis filed a motion for reduction of bail; the case had moved to Superior Court by then. Meanwhile, on April 5, 2004, the State served Hillis with the discovery called for by Superior Court Criminal Rule 16(d)(4).

Consistent with the New Castle County Criminal Case Management Plan, Defendant and Hillis appeared for arraignment and first case review on May 3, 2004. Because the case was not resolved during the first case review, the court scheduled a second and final case review for May 24, 2004. During the final case review, the State offered a plea agreement calling for Bultron to admit that he was subject to sentencing as a habitual offender under 11 *Del. C. §* 4214(a), and the State promised to recommend eight years in prison under the habitual offender statute.

The court has determined that Bultron was willing to plead guilty to Burglary second degree as the State demanded, but Bultron insisted that the State should, in effect, waive sentencing under the habitual offender statute and recommend no more than three years in prison. Otherwise, had Defendant pleaded guilty to the burglary and if the State filed a petition, as it intended, the court would have been

obligated by law to sentence Defendant to no less than eight years in prison and, perhaps, as much as life.[1]

The State's position was not lenient, but taking the case and Bultron's record into account, it was understandable. In any event, the State would not come down. It insisted on an eight year sentence, and the final case review left the case unresolved. Accordingly, after the parties announced at the final case review that there would be no plea agreement, the court issued an order scheduling trial for September 2, 2004.

Apparently, sometime before the scheduled trial date, Hillis suggested to Bultron that accepting the State's plea offer was in Bultron's best interest. In part, to explain his recommendation, Hillis told Bultron that the State's evidence was strong, which it was; and that it was likely Bultron would be convicted, which was a reasonable assessment. Instead of taking Hillis's views as sound advice from an experienced lawyer, Bultron took it as a sign that Hillis believed Bultron was guilty and that Hillis would not extend his best effort on Bultron's behalf at trial. On several occasions, some of them on the record, Hillis assured Bultron that Hillis had no opinion about Bultron's guilt or innocence and Bultron's guilt or innocence was "irrelevant" to Hillis. Hillis tried to assure Bultron that Hillis would carry out his

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[1] 11 *Del. C.* § 4214(a); 11 *Del. C.* § 825.

duty to represent Bultron to the best of his ability. Bultron, for whatever reason, remained unconvinced.

For unknown and unimportant reasons, the trial was rescheduled from September 2, 2004 until September 21, 2004. Most likely, the rescheduling had to do with the attorneys' schedules or the court's crowded docket. In any event, the case was rescheduled.

As it turned out, on September 21, 2004, the court held a hearing, rather than the scheduled trial. Bultron announced his dissatisfaction with Hillis. In the process, Bultron complained that Hillis had not subpoenaed witnesses Bultron believed would help his defense. Although the court expressed willingness to force the matter to trial on September 21, 2004, the State demurred to the defense request for more time. Accordingly, the court rescheduled the trial for October 5, 2004.

On October 5, 2004, as a matter of course, the court summoned a petit jury panel. When the court arrived for jury selection at 10:05 a.m., Hillis asked to approach the bench. At sidebar, Hillis advised the court that Bultron was dissatisfied with Hillis and that Bultron wanted other legal representation. The court denied the request, holding that it was untimely and disruptive. The court stated that jury selection would proceed, but the court would hear Bultron immediately after jury selection.

The court selected a jury without incident. Hillis participated in *voir dire* at sidebar. As the jury was drawn, Hillis and Bultron quietly conferred. Hillis exercised five of Defendant's six, preemptory challenges. The defense also struck an alternate. After the jury was seated and sworn, the court sent the jury out and asked Bultron about his dissatisfaction with Hillis.

While the jury waited, the court carefully reviewed Bultron's complaints about Hillis. Basically, Bultron was dissatisfied because Hillis was unable to convince the State to recommend three years in prison, rather than eight years. And Bultron was upset because, as discussed above, Bultron believed Hillis thought Bultron was guilty. Bultron also told the court that he disagreed with Hillis's refusing to bring to the jury's attention Bultron's questionable mental state when Bultron was arrested.

During an extensive colloquy, including Bultron, Hillis and the prosecutor, the court insisted that the prosecutor explain why the State was adamant about its plea offer. Although the court's insistence was overreaching, the State complied without protest. The court and Hillis also addressed Bultron's belief that Hillis thought Bultron was guilty and the court explained, with some help from Hillis, why it would be unwise to put Bultron's mental condition in front of a jury. Bultron remained unmoved. He insisted that Hillis was unacceptable and Bultron demanded

new counsel.

During the hearing, Hillis advised the court that Bultron had been abusive. Hillis said that Bultron had called Hillis offensive names and Bultron had "cross examined" Hillis rudely. For example, Bultron wrongly suggested that Hillis had once been committed to a mental institution. Bultron did not deny what Hillis told the court.

On that note it is appropriate to reiterate that Hillis is one of the most senior attorneys in the Public Defender's Office and one of Delaware's most experienced defense attorneys. The Delaware Bar is relatively small and the criminal defense bar is even smaller. Hillis is well known to the court and he is highly regarded. He not only is considered by most to be experienced and aggressive, he is effective. While Hillis's clients occasionally find his direct style off-putting, Hillis is notoriously tenacious and his loyalty to his clients is beyond question.

In any event, abusive clients are *scènes à faire* for public defenders. And Hillis initially took Bultron's abuse in stride. The court, for its part, tried to soften Bultron's hard feelings. The court also made it clear to Bultron that if Hillis was unacceptable to Bultron, the court would consider allowing Bultron to represent himself or it would force Bultron to represent himself. The court, however, was firm that it would not attempt to appoint counsel more to Bultron's liking. The court also

was emphatic that it would not continue the trial a second time, after a jury had been selected.

As the jury continued waiting, the court finally encouraged Bultron and Hillis to meet privately in the holding area outside the assigned courtroom. After several minutes, the court reconvened and Hillis announced that Bultron continued to be abusive and that for the first time in twenty-five years, Hillis was asking to be relieved of his duty to represent a client. The court told Hillis that it would allow him to withdraw. At the same time, the court again warned Bultron that if Hillis withdrew, the court would not appoint a new attorney for Bultron. Nor would the court continue the trial, again. Accordingly, if Hillis withdrew, Bultron would be forced to represent himself. Again, the court suggested that Bultron meet with Hillis to see if they could work things out. Bultron ignored the court's entreaty, continuing to insist that he had a right to counsel, and so on. In response, the court made good on its word and it excused Hillis from further participation in the trial. Hillis left the courtroom. Bultron did not ask that Hillis remain as stand-by counsel. And considering their history, that request would have been surprising and senseless.

Thereafter, Bultron behaved civilly in front of the jury.[2] Out of the jury's

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[2] During the original dust-up over legal representation, the court held Bultron in contempt, and sentenced him for disruptive behavior. That all happened out of the jury's presence. In light of the subsequent

(continued...)

presence, however, Bultron continued to argue that the court had deprived him of legal representation, against his wishes. Until the court saw no point to it and gave up, the court continued to remind Bultron that the reason why he was not represented by court-appointed counsel was because he had intimidated and abused his court-appointed counsel to the point where, for the first time in his long career, the lawyer had asked to be relieved. The court continued to remind Bultron that having browbeat one court-appointed attorney, the court was unwilling to appoint another one. Bultron was on his own, but he had no one to blame for that but himself.

The trial went as expected. Bultron was unable to cross-examine the State's witnesses effectively. When the time came for Bultron to decide whether he would testify, the court laboriously explained Bultron's rights. Bultron continued to pursue the tack that he could make no decisions except on the advice of counsel, which the court had denied. Bultron persisted in his refusal to acknowledge that the court had appointed competent counsel, but due to his abusive behavior Bultron had forfeited his right.

Eventually, when Bultron refused to tell the court whether he elected to testify or not, the court cautioned him that unless he announced that he wished to

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[2](...continued)
conviction and Bultron's improved behavior, the court has vacated the actual sentence.

testify, the court would take it that Bultron had waived the right. Bultron did not testify. He gave a brief closing argument. Bultron asked the jury to consider whether the evidence established that he intended to commit a crime, theft, while he was in the dwelling and, therefore, he should be found guilty of the lesser-included crime, Criminal trespass first degree, a misdemeanor. The jury, however, found Defendant guilty as charged.

As mentioned, Bultron was sentenced as a habitual offender to eight years in prison, the minimum allowed. To ensure that Bultron's predicament does not jeopardize his important appeal rights, the court temporarily re-appointed the Public Defender for the limited purpose of perfecting an appeal. Of course, the Supreme Court will address further representation there.

**II.**

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy a right ... to have the Assistance of Counsel for his defense."[3] It is well-settled that an indigent has no right to choose his appointed counsel; appointment rests solely with the trial judge.[4] An accused should have "a fair

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[3] U.S. Const. amend. VI; *see also Gideon v. Wainwright*, 372 U.S. 335 (1963).

[4] WAYNE R. LAFAVE, JEROLD H. ISRAEL AND NANCY J. KING, CRIMINAL PROCEDURE § 11.4(a) (2d. Ed. 1999).

opportunity to secure counsel of his choice."[5] The indigent defendant, however, must accept the lawyer appointed by the trial court, provided that the lawyer is "a qualified member of the Bar" and will "act diligently in the defendant's behalf."[6]

Defendants may motion to replace appointed counsel. A last minute request, bad faith on the defendant's part, or maneuvers intended to cause delay are grounds for denying a continuance.[7] A court may properly deny a request for new counsel made immediately before trial.[8] Here, Bultron elected to wait until the day of trial, moments before jury selection, to voice his concerns about Hillis. Furthermore, he disobeyed the court's order not to address the issue until after jury selection, which resulted in the court's holding him in contempt, out of the jury's presence.

Once counsel has been appointed, defendant has a right to substitute new counsel only upon a showing of "good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which [could] lead ... to an

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[5] *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

[6] *See e.g. Burgos v. Murphy*, 692 F.Supp. 1571 (S.D.N.Y. 1988)(holding " although the Sixth Amendment guarantees an indigent the right to counsel, it does not guarantee counsel of his choice."); *Muto v. State*, 843 A.2d 696 (Del. 2004).

[7] *United States v. Rankin*, 779 F.2d 956, 959 (3d Cir. 1986).

[8] *United States v. Laura*, 607 F.2d 52, 57 (3d Cir. 1979).

apparently unjust verdict."[9] Good cause does not include a loss of confidence in the attorney.[10] Bultron expressed concern because he believed Hillis thought he was guilty. Hillis replied to the court that it did not matter what he believed, and suggested that Bultron was upset because he had been candid with Bultron when discussing the case and the likelihood of conviction. Simply put, Bultron was not entitled to a new attorney merely because Hillis opined candidly that Bultron's chances were slim. "That a criminal defendant views ... [such] frank advice as [a] prejudgement of guilt does not thereby convert good representation into good cause."[11]

This exception for good cause has another important caveat: the defendant cannot create "good cause" by abusive and uncooperative behavior.[12] In these situations, the Third Circuit Court of Appeals has affirmed where counsel withdrew, and the trial court required defendant to proceed *pro se,* on the ground that he forfeited

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[9] *McKee v. Harris*, 649 F.2d 927 (2d Cir. 1981).

[10] *See United States v. Young*, 482 F.2d 993 (5th Cir. 1973).

[11] *McKee*, 649 F.2d at 927.

[12] *See Douglas v. Warden*, 591 A.2d 399, 405 (Conn. 1991)(holding: " Our courts are not, however, constitutionally required to comply with a demand for the appointment of replacement counsel on the basis of a purported conflict that arises from the unreasonable conduct of the accused himself"); *United States v. McLeod*, 53 F.3d 322, 325 (11th Cir. 1995)(" a defendant who is abusive toward his attorney may forfeit his right to counsel").

or "waived by conduct" his right to counsel.[13] *United States v. Goldberg* carefully distinguishes between "waiver," "waiver by conduct," and "forfeiture."[14]

Since 1982,[15] if not sooner,[16] an evolving body of federal law has developed concerning waiver or forfeiture of the constitutional right to counsel. The latest case from the Third Circuit Court of Appeals, Delaware's circuit, is *Fischetti v.*

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[13] *Fischetti v. Johnson,* 384 F.3d 140, 146 (3d Cir. 2004); *United States v. Thomas,* 357 F.3d 357, 362-63 (3d Cir. 2004); *United States v. Leggett,* 162 F.3d 237, 249 (3d Cir. 1998); *United States v. Goldberg*, 67 F.3d 1092, 1100-01 (3d Cir. 1995), *holding*:

> " Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel ... In many situations there will be defendants who engage in dilatory conduct but who vehemently object to being forced to proceed *pro se.* These defendants cannot truly be said to be " waiving" their Sixth Amendment rights because although they are voluntarily engaging in misconduct knowing what they stand to lose, they are not affirmatively requesting to proceed *pro se.* Thus, instead of " waiver by conduct," this situation more appropriately might be termed " forfeiture with knowledge."
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> (citations omitted); *United States v. Jennings*, 855 F.Supp. 1427 (M.D. Pa. 1994), *aff' d*, 61 F.3d 897 (3d Cir. 1995).

[14] *Goldberg,* 67 F.3d at 1100-02*; But cf. United States v. Oreye,* 263 F.3d 669, 670 (7th Cir. 2001); Jennifer Elizabeth Parker, *Constitutional Law – United States v. Goldberg: The Third Circuit' s Nontraditional Approach to Waiver of the Sixth Amendment Right to Counsel*, 41 VILL. L. REV. 1173 (1996).

[15] *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982).

[16] *Faretta v. California*, 422 U.S. 806, 835 (1975); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

*Johnson*.[17]

"Waiver" requires that defendant knowingly, voluntarily, and intelligently relinquish his right to counsel.[18] In order for waiver to be effective, the court must engage defendant in a colloquy and explain the difficulties and dangers of proceeding *pro se*.[19] This is not a "waiver" case.

"Waiver by conduct" occurs when defendant has been warned that he will lose his attorney if he engages in further misconduct, and defendant ignores the warning. "Any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel."[20] *Goldberg* and its progeny have developed waiver by conduct. Those cases have bearing on this case's facts. In *United States v. Thomas*, the Third Circuit articulated the consequences of continued misconduct following the court's warning.[21] *Thomas* explained, "The purpose of a *Faretta/Welty* colloquy is to provide the defendant with notice that continued

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[17] 384 F.3d 140 (3d Cir. 2004).

[18] *United States v. Salemo*, 61 F.3d 214, 218 (3d Cir. 1995); *Briscoe v. State*, 606 A.2d 103 (Del. 1992).

[19] *Faretta v. California*, 422 U.S. 806, 835 (1975); *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982); *Watson v. State*, 564 A.2d 1107 (Del. 1989).

[20] *Goldberg*, 67 F.3d at 1100.

[21] *United States v. Thomas*, 357 F.3d 357, 363 (3d Cir. 2004).

misconduct may result in the waiver of one's right to counsel; thus, we focus on whether [defendant] was warned of the possible consequences, not whether the warning immediately preceded the [trial court's] order that the defendant must proceed *pro se.*"[22]

"Forfeiture" does not require that defendant knowingly and intentionally relinquish his right to counsel; rather, it results when defendant "engage[s] in 'extremely serious misconduct,'" such as physically assaulting his appointed counsel.[23] No warning is necessary to trigger forfeiture.[24]

The court remains satisfied that Bultron waived by his conduct and forfeited his right to counsel. After hearing Bultron and Hillis on the record, the problem between Bultron and Hillis was solely attributable to Bultron's unreasonable expectations. No good cause existed for replacing Hillis. And Bultron was warned repeatedly about the consequences of his behavior. Moreover, Bultron's bad behavior toward Hillis escalated to the point where it amounted to serious misconduct. Bultron's behavior fell short of violence or threats, but only just. Bultron's behavior was insulting and unacceptable. In effect, Bultron forced Hillis to withdraw. And the

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[22] *Id.* at 363.

[23] *Leggett*, 162 F.3d at 250, *citing Goldberg*, 67 F.3d at 1102.

[24] *Goldberg*, 67 F.3d at 1101.

court believes Bultron probably intended that result. In any event, Bultron undeniably acted after the court warned him.

## III.

By Delaware's temperate standards, Bultron's trial was a spectacle. Bultron's meager efforts did not amount to a defense. Even so, the court strained to give Bultron an opportunity for a fair trial. The court was stymied solely by Bultron's insistence that the State, the Public Defender and the court, in turn, must meet his terms.

If Luis Bultron did not receive a fair trial on October 5, 2004, he has no one but himself to blame. The court appointed experienced counsel who tried to reason with the State and Bultron. He did what he could. The court also tried to reason with Bultron. The court rescheduled Bultron's trial once and delayed the trial after it finally began, all to give Bultron time to come to his senses. Only when it became clear that Bultron, in effect, was determined to interfere with the administration of justice did the court press on. Bultron's trial was not what is should

have been, but it was the best the court could do. The court hopes it never sees another trial like Bultron's. But if another defendant, like Bultron, tries to hold his right to a fair trial hostage to unreasonable demands, the court cannot yield.

Date

Judge

oc: Prothonotary (Criminal Division)
pc: Edmund Hillis, Esquire