

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE :
 :
 v. : ID 0911008358
 :
 LESLIE D. SMALL, :
 a/k/a KENNY WILLIAMS, :
 :
 Defendant. :

MEMORANDUM OPINION

*Upon Defendant's Motion in Limine Seeking an Order that the State
May Not Proceed Against Him as a Capital Defendant. Denied.*

Submitted Date: August 17, 2010
Decided Date: January 20, 2011

Peggy Marshall, Esquire and David Hume, IV, Esquire, Deputy Attorneys General,
Department of Justice, Georgetown, Delaware, attorneys for the State.

E. Stephen Callaway, Esquire and John P. Daniello, Esquire, attorneys for the
Defendant.

STOKES, J.

Pending before the Court is Defendant Leslie Small's motion in limine asking for an order directing the State that it may not proceed in this matter as a capital case and may not seek the death penalty for Leslie Small. The motion is denied.

Defendant premises his argument on Art. I, § 12 of the Delaware Constitution and 11 *Del. C.* § 2103. He argues that because the State had no objection to the Court setting bail in this case, thereby eliminating a need for a proof positive hearing under § 2103, the State is now precluded from proceeding with this matter as a capital murder.

Art. I, § 12 of our Constitution provides in part as follows: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is positive or the presumption great. . . ." Title 11 *Del. C.* § 2103 provides in part as follows:

- (a) A capital crime shall not be bailable, and a person so charged shall be held in custody without bail. . . or except as provided in subsection (b) of this section.
- (b) The Superior Court may admit to bail a person charged with a capital crime if, after full inquiry, the Superior shall determine that there is good ground to doubt the truth of the accusation, and the burden of demonstrating such doubt shall be on the accused.

On February 15, 2010, Defendant was indicted on one count of Felony Murder First Degree, one count of Possession of a Deadly Weapon During the Commission a Felony (the murder), one count of Robbery First Degree, one count of Possession of a Deadly Weapon

During the Commission of a Felony (the robbery) one count of Burglary Second Degree and one count of Possession of a Deadly Weapon by a Person Prohibited.

On April 29, 2010, the State advised the Court that it would proceed in this matter as a capital case. On May 13, 2010, the defense filed a Motion for a Hearing pursuant to § 2103. Prior to the scheduled hearing, the State informed the Court that it had no objection to the Court setting bond and that the hearing was not necessary.

On June 7, 2010, this Court set bond for Defendant at \$2 million cash only. Defendant did not post bond and remains in custody.

Defendant argues that because the State did not object to bail being set, it may not proceed on the capital murder charge.

The Delaware Supreme Court has held that the hearing requirement of 11 *Del.C.* § 2103 is a “proper definition of the constitutional provision” set forth in Art. I, § 12.¹ In *Foraker v. State*,² the State consented to a capital defendant’s bail without a formal bail hearing, and the trial court released him when he made bail. The defendant then argued that because the State agreed to bail, the State impliedly dismissed the capital charge, based on § 2103. The Supreme Court rejected this argument, stating that the defendant made bail and was released without having to meet the rigorous requirements of § 2103. The Court concluded that there was no basis for estopping the State from proceeding on the first degree

¹*In re Steigler*, 250 A.2d 379, 382 (Del. 1969).

²394 A.2d 208 (Del.1978).

murder charge.³

The only difference in the facts of this case is that Defendant Small did not make bail and therefore was not released. The pertinent facts are the same, and the *Foraker* holding governs here. The State is not estopped from proceeding on the first degree murder charge.

Furthermore, 11 *Del. C.* § 2103 does not establish eligibility for the death penalty. The purpose of § 2103 is to determine questions regarding bail in capital cases. Eligibility for the death penalty is governed by 11 *Del.C.* § 4209.

Defendant's motion for an order precluding the State from pursuing a capital conviction is therefore **DENIED.**

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary

³*Id.*