



## 02/17/95 STATE DELAWARE v. VICKY CHARO

1995 | Cited 0 times | Superior Court of Delaware | February 17, 1995

### MEMORANDUM OPINION

GEBELEIN, Judge

Defendant's motion for a new trial on the ground that the State's primary witness committed perjury at her trial is GRANTED.

On August 14, 1989, defendant Vicky Chao was found guilty of all counts of an indictment, including multiple counts of murder in the first degree and related offenses. After a penalty hearing at which the jury was unable to reach a unanimous verdict, she was sentenced to life imprisonment on May 24, 1990. Defendant appealed the convictions and they were affirmed by the Supreme Court on January 29, 1992. Her co-defendant also named in the same indictment, Tze-Poong Liu, was subsequently tried for these murders. At the co-defendant's trial, a material State witness, William Chen, testified and admitted that he had previously lied under oath at defendant's trial.

Defendant now moves for postconviction relief pursuant to Superior Court Criminal Rule 61 on the ground of ineffective assistance of trial counsel. Defendant also moves for a new trial on the basis that one of the State's primary witnesses, Mr. Chen, perjured himself at defendant's trial. This Court held two evidentiary hearings on defendant's motions and has received extensive post-hearing briefing on these motions.

#### I. INEFFECTIVE ASSISTANCE OF COUNSEL PRE-TRIAL

In support of her motion for postconviction relief, defendant alleges three bases of ineffective assistance of counsel during the pre-trial stage: (1) that trial counsel failed to request an interpreter for her at her suppression hearing; (2) that defendant was denied an opportunity to testify at her suppression hearing; and (3) that trial counsel's pre-trial preparation was constitutionally inadequate. To succeed on a claim of ineffective assistance of counsel, defendant needs to show that her "counsel's representation fell below an objective standard of reasonableness," and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Under Delaware law, the test is whether under the totality of the circumstances, "counsel was so incompetent that the accused was not afforded genuine and effective legal representation." *Renai v. State*, Del.Supr., 450 A.2d 382 (1982). The Renai Court noted that a defendant's burden in establishing a claim for ineffective assistance of counsel is difficult to meet:



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"A retrospective examination of a lawyer's representation to determine whether it was free from any error would exact a higher measure of competency than the prevailing standard. Perfection is hardly attainable and certainly is not the general rule, especially in professional work where intuitive judgments and spontaneous decisions are often required in varying circumstances . . . . What is required is normal and not exceptional representation . . . .

450 A.2d at 384, quoting *Moore v. United States*, 432 F.2d 730, 736 (3d Cir. 1970).

The Court need not reach the issues raised by defendant with respect to the adequacies of representation by Court-appointed counsel as its decision on defendant's motion for a new trial renders those issues moot.

### II. PERJURED TESTIMONY

#### A. The Applicable Standard

A review of case law reveals that U.S. courts are applying a choice of two standards in deciding a motion for a new trial based on "newly discovered" evidence. Under the so-called "Berry" standard, the requirements are: (1) the evidence must have been discovered after the trial; (2) the failure to learn of the evidence must not have been caused by defendant's lack of diligence; (3) the new evidence must not be merely cumulative or impeaching; (4) it must be material to the principal issues involved; and (5) it must be of such a nature that in a new trial it would probably produce an acquittal. *Berry v. State*, 10 Ga. 511 (1851). In contrast, other courts distinguish witness recantations from "newly discovered" evidence and apply the so-called "Larrison" test which requires: (a) the Court is reasonably well satisfied that the testimony given by a material witness is false; (b) that without it, the jury might have reached a different Conclusion; (c) that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial. (emphasis in original). *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928). The application of these tests by State Courts have not been uniform.

It appears to this Court that, in the case of admittedly perjured testimony, the Larrison test is the standard appropriate in Delaware. The State argues that "it is well-settled that a motion for a new trial based on the perjury of a State's witness is to be treated as a motion for a new trial based on newly discovered evidence. Such a motion shall not be granted if the new evidence is 'merely cumulative or impeaching.'" In support of its argument, it directs the Court's attention to *Lloyd v. State*, Del.Supr. 534 A.2d 1262 (1987), and *Gov't of Virgin Islands v. Lima*, 774 F.2d 1245 (3d Cir. 1985), both of which used the Berry approach in denying the defendants' motion for new trial.

Lloyd may be distinguished from the instant case because that case does not involve a motion for a new trial based on a material State witness who committed perjury at trial. Rather, Lloyd dealt with whether the availability of a new witness to testify who had earlier refused to do so by invoking her



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Fifth Amendment privilege against self-incrimination. The Court held that such proffered testimony was "newly discovered" evidence. Lima may also be distinguished from the present case. That case does involve a motion for a new trial challenging a State's witness' credibility. But, that court reasoned that Larrison did not apply to its facts because the court below had found that the witness had not, in fact, committed perjury; not the situation here where the witness admits to the untruth of his prior testimony. See, Lloyd, *supra* at 1251, n.4. In other words, because the trial court answered the threshold question of whether the new evidence showed the original witness' testimony was false in the negative, Larrison did not apply. *Id.* at 1251.

In the present case, however, the new evidence clearly demonstrates that one of the State's primary witnesses committed perjury at defendant's trial. Moreover, the State concedes in its reply brief that the witness perjured himself. Furthermore, the Delaware Supreme Court observed that it had chosen to adopt the Larrison standard in a case involving a new trial motion based on a witness' post-trial recantation. *Blankenship v. State*, Del. Supr., 447 A.2d 428 (1982). It appears, therefore, that the Supreme Court has decided to apply the Larrison test where defendant bases his new trial motion on perjured testimony. Therefore, this Court must apply the Larrison standard in this case.

### B. False Testimony

After reviewing the record, the Court is satisfied that the State's primary witness, Mr. Chen, committed perjury at defendant's trial. Defendant claims that Mr. Chen falsely testified about the frequency of visits and the length of his stay at apartment 2C in New York in the fall of 1987. She points out that while he testified at her trial that he only went to New York on occasion, he testified at Liu's trial that he lived in apartment 2C for as much as two months at a time. Defendant also argues that Mr. Chen himself admitted to lying under oath. The State contends that a fair reading of Mr. Chen's testimony regarding apartment 2C does not establish that perjury occurred as to length of stay. Moreover, the State argues that Mr. Chen admitted to committing perjury only as to the nature and extent of his relationship with defendant and nothing else.

It is a disingenuous argument to claim that defendant has not satisfied her burden because her specific allegation does not technically establish that Mr. Chen committed perjury on one issue when it is clear perjury was committed on another issue. To the contrary, the record clearly shows that a material State witness perjured himself on a highly relevant issue in the case, motive.

Mr. Chen himself admitted that he lied under oath about the nature of his relationship with the defendant when he testified at trial that he did not have sexual relations with defendant in 1985, 1986 or 1987. The State does not dispute that, as to this area of testimony, he committed perjury at her trial. Given Mr. Chen's admission, the Court cannot treat lightly defendant's allegation of perjury as to his testimony regarding the length of his stay in apartment 2C. That testimony is pertinent to the same issue of whether their love affair had continued and existed after Mr. Chen became married.



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In this case the State clearly made motive a substantive issue. In the State's summation, the prosecutor noted,

In this trial it is easy to understand who and it's easy to understand how if you first ask yourself this question. Why?

The State then went onto note that the victim, William Chen, had "at one time loved the defendant." Indeed, the theme of the State's case beginning with the opening statement was that the defendant was a woman scorned and that the case was one of her "fatal attraction". The truth of the matter was (as William Chen admitted at the co-defendant's trial) he continued his relationship with Ms. Chao unabated spending significant periods of time with her in New York City.

The Court finds that the record clearly supports that the State's primary witness gave perjured testimony on a substantive issue in the case.

### C. A Different Result

The Court finds that the jury "might" have reached a different result if Mr. Chen's false testimony were corrected. At trial, the State advanced the theory of the existence of a "love triangle" involving defendant, Mr. Chen and Mr. Liu. The State hypothesized that defendant and Mr. Liu were lovers and that Mr. Liu was jealous of Mr. Chen and considered the latter a rival for defendant's affections.

The lynchpin of the State's case, however, was the theory that after Mr. Chen's marriage, defendant became a woman scorned, obsessed with the idea of having Mr. Chen and that if she could not have him then no woman would. This "fatal attraction" theory was the framework in which the facts and evidence were presented to the jury in its opening and closing arguments. The State presented the following picture to the jury: after arriving in the United States, Mr. Chen became involved with defendant in New York, an older woman and fifteen years senior to Mr. Chen's deceased wife, one victim in this case. The affair lasted about six years during which time defendant taught him English and helped him start his business by lending him a substantial amount of money. But, in 1985, Mr. Chen married and began a life with his wife, daughter and his mother in a clean, comfortable suburban home in Wilmington. This setting was compared to the dirty New York apartment that "stank". Despite defendant's pleading to stay with her in New York, Mr. Chen refused to leave his family and instead stayed in his suburban New Castle County home. The prosecution continued that defendant confronted William Chen in his Delaware home in front of his family where she again demanded that he leave his family for her. Mr. Chen refused whereupon defendant then threatened to cause "big trouble." Nine days later, Mr. Chen's home burned to the ground and his family perished in the fire.

The State's theory of the case advanced a powerful motive of murder and revenge on the part of defendant against Mr. Chen and his family. The State based its argument in the case on the jury



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finding who had the best motive to commit the crimes.<sup>1</sup> The deputy attorneys general repeatedly emphasized to the jury that defendant had that motive to commit murder. The State pointed out that Mr. Liu became defendant's co-conspirator because he, too, had a motive: to rid himself of a rival. Under the State's framework of the case, only Mr. Chen had no motive for setting fire to his house or murdering his family.

This question of motive being the crux of the State's case against defendant, the prosecutors argued that the jury resolve all inconsistencies in witness' testimonies and credibility problems in Mr. Chen's favor by arguing that he was believable because he alone had no motive to do away with his family. The State characterized him as the innocent, though not too wise or strong-willed, family man who became embroiled in a turbulent relationship with an older woman and had ended that relationship leaving the defendant alone in New York with her "fatal attraction".

Given that the State has made much of motive in this case, if Mr. Chen's perjured testimony had been corrected, then he might also have a motive for committing the crimes. The jury would have heard his true testimony that the love affair which he had maintained ended after his marriage had not truly ended. Rather, he would have testified that they continued to have sexual relations in 1985, 1986 and 1987. In addition, he would have stated that instead of occasional trips to New York, he stayed at apartment 2C for as long as two months as late as the Fall of 1987.

The significance of his true testimony is that the jury would have heard evidence of the continued existence of an affair between defendant and Mr. Chen after his marriage. His other testimony would have been subject to additional attack because the jury could have discerned a possible motive on the part of Mr. Chen to be rid of his family. The jury certainly would not have seen him as the innocent family man desperately trying to end a stormy adulterous relationship as the State proffered. Ultimately, the jury could not have found the State's theory of defendant's motive for murder and revenge as powerful. The jury would indeed have seen the defendant as a woman capable of pulling Mr. Chen to New York in spite of his young wife and nice suburban house. Thus, with Mr. Chen's true testimony, the jury could well have found a different result in a case where the State acknowledged "it is easy to know who ... if you (know) ... why?".

### D. Defendant's Knowledge of the Falsity of the Testimony

The State argues that defendant could not have been surprised by Mr. Chen's testimony at trial. The State claims that she would have known immediately had he lied on the stand about the length of his stay in apartment 2C because she was his "de facto" landlord and also when Mr. Chen lied about the nature of their relationship after his marriage. The State contends that since he testified almost two weeks before defendant, she had ample time to refute his testimony.

Even if defendant knew immediately that Mr. Chen had perjured himself at trial, she would still have been surprised. Defendant might well have anticipated what Mr. Chen would probably answer to



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questions about the two issues had they been answered truthfully. When Mr. Chen denied having any sexual relations with her after his marriage and downplayed his involvement with her, she could not have been but surprised by his answers.

It is difficult to see how defendant could meet this surprise at trial because of the particular theory of the case chosen by each party. The State in its opening introduced the idea of a "fatal attraction" love-triangle theory which motivated defendant to commit the crimes. Defendant, on the other hand, had committed to minimizing that theory of the State.

While it is true that defendant knew or should have known that William Chen was committing perjury at the trial, her ability to attack that testimony was to place her credibility as the defendant charged with murder against that of a victim whose family had been brutally murdered and for whose credibility the State vouched. Indeed, the credibility of Mr. Chen on other important issues was bolstered by the State's argument that he had no motive to testify falsely.

The Court concludes that while defendant knew of the falsity of William Chen's testimony, she was not in a position to effectively counter that false testimony.

### IV. CONCLUSION

Because the Court finds that substantially all of the elements required under the Larrison test have been satisfied, defendant's motion for a new trial is GRANTED.

IT IS SO ORDERED.

The Honorable Richard S. Gebelein

1. A few specific examples are: "... interwoven with this question of who was criminally responsible is the question why. And although the State does not have the burden to prove motive, it will indeed establish a motive which, in turn, will establish who was criminally responsible." (State's Opening, 19); "In this trial it is easy to understand who and it's easy to understand how if you first ask yourself this question. Why?" (State's Closing, 109); "... Chao had the motive. Both she and Tze Poong Liu had the opportunity and we know that Liu had the means, motive, opportunity and means equals guilt." (State's Closing, 210).

