EFiled: Jun 12 2018 11:49AM EDT
Filing ID 62127824
Case Number 558,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAKEEM MILES,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 558, 2017**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT

OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On April 17, 2017, a New Castle County grand jury indicted Hakeem Miles ("Miles") for one count of Possession of a Firearm By a Person Prohibited ("PFBPP") under 11 *Del. C.* § 1448(a)(9). A1. Miles filed a motion to suppress on June 5, 2017. A2. After a hearing, the Superior Court denied Miles' motion. A2. On July 14, 2017, Miles filed a motion to dismiss the indictment, arguing that the legislature's decriminalization of possession of a small amount of marijuana for personal use rendered 11 *Del. C.* § 1448(a)(9) ambiguous, requiring dismissal of his case. A3. The Superior Court denied Miles' motion to dismiss. A3. The matter proceeded to a jury trial and, at the close of the State's evidence, Miles moved for a judgment of acquittal, which the Superior Court denied. A4. The jury convicted Miles, and the Superior Court sentenced him two years at Level V supervision, suspended for 1 year of Level 2 probation. A4, Exhibit A to *Op. Brf.* Miles appealed. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court did not abuse its discretion when it denied Miles' suppression motion. Connections possessed the actual authority to consent to police entry into 7 Mary Ella Drive and Miles did not object to the police entry. Alternatively, Miles did not possess standing to object or countermand Connections' consent to a police entry.

II. Appellant's argument is denied. The Superior Court correctly denied Miles' motion to dismiss. The language of 11 *Del. C.* § 1448(a)(9) is unambiguous – a person who is in possession of a personal use quantity of marijuana is prohibited from possessing a handgun at the same time.

III. Appellant's argument is denied. The Superior Court properly instructed the jury as to the definition of "possession" under section 1448(a)(9). The court's instruction provided a correct statement of the law consistent with this Court's prior decisions.

STATEMENT OF FACTS

Rosemarie McDonald ("McDonald"), a housing specialist with the Connections Community Support team, assisted Chad Sturgis ("Sturgis), a Connections client, with maintaining an apartment within the Chestnut Run housing complex in Wilmington. A32-33. As part of the services provided to its clients, Connections uses housing vouchers to assist its clients in locating, obtaining, and maintaining a residence. A32. In Sturgis' case, Connections and Sturgis signed a lease agreement for 7 Mary Ella Drive. A34; State's Exhibit 5, Supp. Hrg. The residents listed on the lease for that address are Chad Sturgis, Connections, ESP, Inc. A36; State's Exhibit 5, Supp. Hrg. The tenants on the lease are Chad Sturgis, Connections, ESP. A36; State's Exhibit 5, Supp. Hrg. The Tenants/Occupants listed on the lease are Chad Sturgis, Connections, ESP. A36-37; State's Exhibit 5, Supp. Hrg. McDonald had a key to the apartment, and Connections staff could (and did) enter the apartment without Sturgis' permission. A37, A39.

According to McDonald, Sturgis was on the "2-2-3 regime," meaning a Connections staffer would see him twice a day at least three times a week. A38-39. On May 2, 2017, a Connections staffer spoke to Sturgis and learned that he was not staying in his apartment, there were people in his apartment, and he was scared to go back home. A41. The staffer called 911 and reported that the

landlord contacted Connections, informed them that there were people coming in and out of the apartment, and that neighbors were complaining. State's Exhibit 2, Supp. Hrg.

As a result of the 911 call, officers from the New Castle County Police ("NCCPD") were dispatched to 7 Mary Ella Drive for a burglary-in-progress complaint. A55. When Officer James Daly ("Officer Daly") attempted to make contact with the occupants of the residence, an unknown male inside the apartment spoke with him through the door and asked what he wanted. A56. Officer Daly identified himself as a police officer told the person inside to open the door. A56. The person in the apartment identified himself only as "Mr.," and did not open the door. A57. He attempted to delay police entry into the residence, claiming he had just come out of the bathroom and telling police to "hold on a minute." A57.

Another NCCPD officer spoke with a representative from Connections who was on the scene, and determined that Sturgis was not in the apartment and the people inside the residence did not have permission from Connections to be there. A58. The Connections representative gave the officers permission to enter the apartment and provided them with a key. A58. Prior to entering the apartment with the key, officers advised the occupants that they were going to enter. A59. The officers received no response to their warning and entered the apartment. A59. Once inside the apartment, officers saw Miles in the main living area. A140.

Miles was wearing a gun holster on his hip. A141. The officers ultimately discovered a loaded 9-millimeter handgun on the kitchen counter. A147. When Officer Daly patted-down Miles, he discovered a bag of marijuana inside the front left pocket of Miles' pants. A143.

Police arrested Miles and interviewed him at NCCPD headquarters. A59. Miles told police he knew Sturgis, and he had been in the apartment for a few hours. State's Exhibit 4, Supp. Hrg. He repeatedly denied having stayed in the apartment and maintained that he had only been in the apartment for a few hours on May 2, 2017. State's Exhibit 4, Supp. Hrg.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED MILES' SUPPRESSION MOTION.

Question Presented

Whether a co-lessee can consent to police entry into the apartment that they lease, possess keys to and regularly visit.

Standard and Scope of Review

This Court reviews the grant or denial of a motion to suppress for an abuse of discretion. "To the extent questions of law are implicated, [this Court's review is] *de novo.* To the extent the trial judge's decision is based on factual findings, this Court review[s] for whether the trial judge abused his or her discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous."[1]

Merits of the Argument

Miles argues the Superior Court abused its discretion when it denied his suppression motion, claiming "Connections, Inc. did not have the actual authority to consent to the warrantless entry and search of the apartment because they did

[1] *McVaugh v. State*, 2014 WL 1117722, at *1 (Del. Mar. 19, 2014) (citations and internal quotations omitted).

not live in or use anything in the apartment."[2] He contends that despite Connections appearing on the lease, possessing a key, and regularly accessing the apartment, their uncustomary use of the apartment rendered their consent invalid.[3] Miles is mistaken.

"The United States and Delaware Constitutions protect the right of persons to be secure from 'unreasonable searches and seizures.'"[4] Warrantless searches are *per se* unreasonable, and therefore unconstitutional, unless they fall into one of the recognized and well-defined exceptions to the general rule.[5] Valid consent is one of the exceptions to the warrant requirement.[6] Consequently, a warrantless search violates no state or federal constitutional right or protection if conducted pursuant to valid consent.[7] However, "[c]onsent to a search must be voluntary and the person giving such consent must have the authority to do so."[8]

As the United States Supreme Court explained in *United States v. Matlock*, "when the prosecution seeks to justify a warrantless search by proof of voluntary

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[2] Op. Brf. at 11.
[3] Op. Brf. at 16.
[4] *Scott v. State*, 672 A.2d 550, 552 (Del. 1996) (quoting U.S. Const. amend. IV; Del. Const. art. I, § 6)).
[5] *Id.*
[6] *Id.*
[7] *See Ledda v. State*, 564 A.2d 1125, 1127 (Del. 1989) (stating "[i]t is well settled law that a warrantless search may be justified by valid consent," citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222(1973)).
[8] *Id*. at 1127-28 (citing *United States v. Matlock*, 415 U.S. 164, 171 (1974)).

consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."[9] In other words, consent to search may be obtained from a third party with common authority over the premises to be searched.[10] The *Matlock* court clarified the meaning of "common authority" in the consent context, stating:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.[11]

Delaware Courts have recognized valid third party consent as an exception to the warrant requirement.[12]

Here, the Superior Court determined that Connections staff members possessed the authority to consent to police entry into 7 Mary Ella Drive. In reaching its conclusion, the court found the following facts:

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[9] *Matlock*, 415 U.S. at 171.
[10] *Illinois v. Rodriquez*, 497 U.S. 177 (1990).
[11] *Matlock*, 415 U.S. at 171, n.7 (citations omitted).
[12] *See, e.g., Cannon v. State*, 2002 WL 188328, at *2 (Del. Jan. 31, 2002); *Scott*, 672 A.2d at 552; *Ledda*, 564 A.2d at 1127; *Deshields v. State*, 534 A.2d 630, 643 (Del. 1987).

> [T]he police arrive based upon a phone call they had received from Connections that a client of theirs had called them and told them that there were people in the apartment that he had not given permission to be there, that he was scared to go back and he couldn't get them out of his apartment.
>
> * * * *
>
> So Connections called the police saying there are people in the apartment where there's not permission to be there. The client has not given them permission to be there, and they have not given them permission to be there. And, although . . . they didn't see the lease at the time, it appears based upon the information that had been provided, it was a fair inference that they had some authority in regards to the apartment and, in fact, they did. They were a tenant on the agreement. They were liable for the apartment and for damages that would be associated with the others living in the apartment. It appears that the only person, by the voucher that they provided to Mr. Sturgis to allow him to have the apartment, would limit the people who were allowed to be there to him. Perhaps he could have a guest, but they were certainly not somebody who could stay there for a long period of time, which, according to the Defendant's friends, they were there for several weeks.
>
> So under those circumstances, I certainly believe that Connections had the authority to give the key to the police to allow them and could consent to the entry into the apartment.[13]

The Superior Court did not abuse its discretion in reaching the above conclusion.

On appeal, Miles contends that Connections did not possess the actual authority to consent to police entry because Connections staff members "did not use the apartment in the customary ways a tenant or resident would." He claims that the Superior Court "erred by giving more weight to the lease enumerating

[13] A80-82.

Connections' relationship to the property rather that to their actual use of the property."[14] His contention lacks merit.

Under Miles' novel theory, a co-lessee, who has unfettered access to an apartment and enjoys the same rights and bears the same responsibilities of a fellow co-lessee, must use the apartment in a "customary" manner in order to possess actual authority to consent to entry into the apartment. Not so. The common authority doctrine set forth in *Matlock* and espoused by this Court has no such requirement. Common authority is defined as the "mutual use of the property by those generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk" that a search of common areas might be permitted.[15] While "[t]hird party authority to consent to a search must include both possession and equal or greater control, *vis-a-vis* the owner, over the area to be searched,"[16] there is no mention of a "customary use" requirement in *Matlock* or any of the Delaware cases that adopted and implemented its analysis.

Here, Connections possessed common authority over 7 Mary Ella Drive because they were a tenant, lessee, and resident of the apartment. Connections

[14] Op. Brf. at 17.
[15] *Matlock*, 415 U.S. at 171, n. 7.
[16] *Scott*, 672 A.2d at 552 (citing *Ledda*, 564 A.2d at 1128).

possessed the keys, visited Sturgis twice a day, three times per week, were responsible for the upkeep of the apartment and could access the apartment at will. The fact that Connections did not make "customary use" of the apartment has no bearing on whether Connections had the authority to consent to a police entry into the apartment. Connections had at least equal control over the apartment under the terms of the lease agreement and in practice as demonstrated by their staffers' unfettered ability to access the apartment and their regular presence in the apartment.

And, Miles cannot demonstrate that the Superior Court committed error by relying on the lease agreement for 7 Mary Ella Drive. The terms of the lease agreement list Connections as a "resident" and a "tenant," and clearly describe Connections as having the identical rights and responsibilities as Sturgis.[17] Indeed, the documents are directly responsive to the common authority inquiry under *Matlock*. Miles would have this Court disregard the documents that defined Connections' and Sturgis' relationship to 7 Mary Ella Drive in favor of a "customary use" inquiry that is inconsistent with controlling law. Applying *Matlock* in this case, Connections and Sturgis had joint access to and control of the apartment for most purposes, so that it is reasonable to recognize that either had the

[17] A85-98.

right to consent to police entry permit and that Sturgis had assumed the risk that Connections might permit the police entry.

Miles additionally argues that even if Connections possessed the actual authority to consent to police entry into the apartment, he did not consent to police entry into the apartment.[18] He is wrong. Police officers must "stop a warrantless search based upon the consent of a co-occupant when another co-occupant of the home *expressly* objects to the search."[19]

"[W]hen a person with equal or greater authority to consent to a search is present, if a search is authorized by a third party, there is a duty to object."[20] A person may impliedly consent to a search through their silence or inaction.[21] Such was the case here. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness - what would the typical reasonable person have understood by the exchange between the

[18] This argument assumes Miles had standing to object to police entry into the apartment. The Superior Court was doubtful, but assumed *arguendo* that Miles possessed standing in order to address the underlying argument. A79-80. The State does not concede that Miles had standing to object to the police entry.
[19] *Donald v. State*, 903 A.2d 315, 321 (Del. 2006) (emphasis added).
[20] *Scott*, 672 A.2d at 553.
[21] *See id.* (defendant's failure to object constituted his implied consent to search authorized by a third party); *Ledda*, 564 A.2d at 1128 (stating "because Ledda never objected to the officers' searching of the vehicle pursuant to Morzella's consent, the trial court held that Ledda impliedly consented to the search through this silence. We agree.").

officer and the suspect?"[22] The Superior Court rejected Miles' contention that he objected to the police entry, and found: "when the police went to the apartment, they knocked on the door, they got no response from any of the people who were inside the apartment, including the Defendant."[23] A reasonable person would have understood that Miles' failed to expressly object to the police entry by his inaction. As a result, his claim fails.

Even if this Court were to determine that Miles expressly objected to the police entry, the Court may, in the alternative, affirm on the basis that Miles did not possess standing.[24] "In order to prove standing, [Miles] was required to show that he had a reasonable expectation of privacy in the apartment. . . . It is not necessary to prove an ownership or property right in the apartment, but only an expectation of privacy that society recognizes as reasonable.[25] Here, Miles seeks to place himself on equal footing as Sturgis (and Connections), even though the Superior Court found:

> [T]he police arrive based upon a phone call they had received from Connections that a client of theirs had called them and told them that there were people in the apartment that he had not given permission to

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[22] *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (citations omitted).
[23] A82.
[24] *See Unitrin, Inc. v. American General Corp*., 651 A.2d 1361, 1390 (Del. 1995) (stating, "[w]e recognize that this Court may affirm on the basis of a different rationale than that which was articulated by the trial court").
[25] *Nave v. State*, 1993 WL 65099, at *1 (Del. Mar. 8, 1993) (citing *Hanna v. State*, 591 A.2d 158, 163 (Del. 1991); *Rakas v. Illinois*, 439 U.S. 128 (1978)).

> be there, that he was scared to go back and he couldn't get them out of his apartment.
>
> * * * *
>
> So Connections called the police saying there are people in the apartment where there's not permission to be there. The client has not given them permission to be there, and they have not given them permission to be there.
>
> * * * *
>
> And certainly at the time that the police entered the apartment, as far as the information that had been provided to them, [there] were people in the apartment who had no authority to be in the apartment and were there illegally.[26]

The record, at best, is unclear as to Miles' contention that he was Sturgis' overnight guest. Indeed, much of the record, including Miles' own statement, tends to show otherwise. Sturgis called and told a Connections staffer that he did not want Miles in the apartment and that he was scared, thus his absence from the apartment. When questioned by the police, Miles claimed that he had been at the apartment for only a few hours prior to the police arriving. When police responded to the burglary-in-progress complaint, Miles was an unwanted intruder – not an overnight guest. And, while overnight guests may possess standing in certain situations, unwanted guests certainly do not.[27] Based upon the record, Miles failed to demonstrate that he had a reasonable expectation of privacy in 7 Mary Ella

[26] A80; A82.

[27] *Howell v. State*, 1993 WL 65103, at *2 (Del. Mar. 3, 1993) (citing *Skyers v. State*, 1992 WL 21140, at *3 (Del. Jan 16, 1992)).

Drive that society was prepared to recognize. As a result, Miles did not prove that he possessed standing to object to the police entry.[28]

[28] Even if this Court were to find that Miles possessed standing, the State maintains its position that Miles did not object to the police entry.

II. THE SUPERIOR COURT CORRECTLY DENIED MILES' MOTION TO DISMISS.

Question Presented

Whether possessing marijuana and a handgun at the same time violates 11 *Del. C.* § 1448(a)(9).

Standard and Scope of Review

Generally, this Court reviews a trial court's denial of a motion to dismiss counts of an indictment for abuse of discretion.[29] However, a trial judge's determinations of statutory construction are reviewed *de novo.*[30]

Merits of the Argument

On appeal, Miles contends the Superior Court erred when it did not grant his motion to dismiss the "unreasonable felony indictment" because the legislature never intended to felonize possession of a handgun and marijuana at the same time.[31] Miles appears to concede 11 *Del. C.* § 1448(a)(9) is facially unambiguous, however, he claims that "the statute is ambiguous in its application."[32] He is mistaken; the statute is neither facially ambiguous nor ambiguous in its application.

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[29] *Wilson v. State*, 2017 WL 1535147, at *2 (Del. Apr. 27, 2017) (citation omitted).
[30] *Vincent v. State*, 996 A.2d 777, 779 (Del. 2010).
[31] Op. Brf. at
[32] Op. Brf. at 22.

Section 1448(a)(9) reads:

> (a) Except as otherwise provided in this section, the following persons are prohibited from purchasing, owning, possessing, or controlling a deadly weapon or ammunition for a firearm within the State:
>
> * * * *
>
> (9) Any person, if the deadly weapon is a semi-automatic or automatic firearm, or a handgun, who, at the same time, possesses a controlled substance in violation of § 4763, or § 4764 of Title 16.[33]

Section 4764 of Title 16 makes it illegal to possess marijuana – in any quantity. Miles makes much of the legislature's 2015 decision to *decriminalize* possession of personal use quantities of marijuana, however, it is nonetheless *illegal* to possess personal use quantities of marijuana. Section 1448(a)(9) is clear – it is illegal to possess a handgun and any controlled substance, including marijuana, at the same time, as was the case here.

Miles argues that when the legislature decriminalized possession of personal use quantities of marijuana in 2015, "the General Assembly never intended to create a felony from possession of a personal use quantity of marijuana and simultaneous legal firearm possession."[34] He is incorrect. The General Assembly did not "create a felony" when it decriminalized possession of personal use quantities of marijuana. That felony was extant (11 *Del. C.* § 1448(a)(9)) in 2015 when the legislature amended section 4764, decriminalizing possession of personal

[33] 11 *Del. C.* § 1448(a)(9).
[34] Op. Brf. at 27.

use quantities of marijuana. After the 2015 amendment to section 4764, possession of personal use quantities of marijuana is still illegal, and it is still illegal to possess a handgun (lawfully owned or otherwise) and a personal use quantity of marijuana at the same time.[35]

The Superior Court considered the same challenge to section 1448(a)(9) in *State v. Murray.*[36] In *Murray*, the defendant was charged with a violation of section 1448(a)(9) for possessing a loaded semi-automatic firearm and less than an ounce of marijuana.[37] Murray moved to dismiss the indictment against him alleging, *inter alia*, that possession of a personal use quantity of marijuana could not render him a person prohibited under section 1448(a)(9) because of the recent decriminalization of possession of a personal use quantity of marijuana.[38] The court rejected Murray's argument, finding section 1448(a)(9) is unambiguous, thus requiring literal application of the words of the statute to the facts of the case.[39] The court determined that literal application of "[t]he plain language of the statute requires only simple (but illicit) possession of a controlled substance."[40]

The *Murray* court also looked beyond the plain meaning of the statute. The court found that section 1448(a)(9) was extant when the General Assembly

[35] 11 *Del. C.* § 1448(a)(9).
[36] *State v. Murray*, 158 A.3d 476 (Del. Super. 2017).
[37] *Id.* at 479.
[38] *Id.* at 482.
[39] *Id.*
[40] *Id.* at 483.

decriminalized possession of personal use amounts of marijuana, and concluded "[i]f the General Assembly wanted to exclude the newly-minted civil offense of possessing a 'personal use quantity' of marijuana from triggering that recent PFBPP provision, it could have easily done so. It did not."[41] In sum, the court held:

> The unambiguous current language of §1448(a)(9), the other clues one might use (if needed) to understand that language, and the easily discerned policy behind that language leaves the reader to conclude that language means precisely what it says—in Delaware one is prohibited from possessing a handgun and even a small amount of marijuana at the same time.[42]

The ruling in *Murray* provided the basis for the Superior Court's denial of Miles' motion to dismiss.[43] In his case, the court determined that section 1448(a)(9) is "clear and unambiguous," and if the General Assembly wanted to amend the statute to exclude possession of personal use amounts of marijuana as a prohibiting factor, legislators were free to do so.[44] That holding was correct. Because the statute is unambiguous, its plain meaning controls.[45] The language of section 1448(a)(9) is clear – a person is prohibited from possessing a handgun and an illegal controlled substance at the same time.

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[41] *Id*.
[42] *Id.* at 485.
[43] A120.
[44] A120.
[45] *Hoover v. State*, 958 A.2d 816, 820 (Del. 2008) (citations omitted).

Even if this Court were to examine the General Assembly's intent, it becomes clear that no changes to section 1448(a)(9) were intended when the penalties for possession of personal use marijuana were reduced in 2015. At that time, section 1448(a)(9) had been extant for more than four years. The "General Assembly is presumed to be aware of extant statutes relating to the same subject matter when it enacts a new provision."[46] If, as part of the 2015 amendment to section 4764 of Title 16, the General Assembly wanted to amend section 1448(a)(9) to exclude possession of personal use of marijuana, it could have done so. However, the General Assembly did not. And, while Miles argues that a bill was introduced in the wake of *Murray* to amend section 1448(a)(9), that bill was not enacted, and section 1448(a)(9) remains unchanged. With no legislative change to the statute, Miles seeks a judicial amendment. This Court should decline Miles' invitation to "sit as an überlegislature to eviscerate proper legislative enactments."[47]

[46] *Murray*, 158 A.3d at 483 (citing *Del. Dep't of Labor v. Minner*, 448 A.2d 227, 229 (Del. 1982) (other citations omitted)).
[47] *Id.* at 482 (quoting *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1259 (Del. 2011)

III. THE PFBPP INSTRUCTION GIVEN TO THE JURY WAS A CORRECT STATEMENT OF THE LAW.

Question Presented

Whether the PFBPP instruction was a correct and reasonably informative statement of the law.

Standard and Scope of Review

When a defendant lodges a timely objection to a jury instruction, "[t]he standard and scope of review is whether the instruction, considered as a whole, was a correct statement of the present substantive law."[48]

Merits of the Argument

"Implicit in every jury instruction is the fundamental principle that the instruction applies to the specific facts in that particular case and contains an accurate statement of the law."[49] Moreover, a "charge to the jury will not serve as grounds for reversible error if it is 'reasonably informative and not misleading judged by common practices and standards of verbal communication.'"[50]

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[48] *Shackleford v. State*, 1993 WL 65100, at *2 (Del. Mar. 4,1993) (citing *Claudio v. State*, 585 A.2d 1278, 1282 (Del. 1991)).
[49] *Bullock v. State*, 775 A.2d 1043, 1053 (Del. 2001).
[50] *Probst v. State*, 547 A.2d 114, 120 (Del. 1988) (quoting *Baker v. Reid*, 57 A.2d 103, 109 (Del. 1947)).

Miles argues that the Superior Court abused its discretion when it failed to instruct the jury on a "narrower definition of possession."[51] He contends that the instruction should have included a temporal element, "similar to the charge of Possession of a Firearm During the Commission of a Felony ('PFDCF')."[52] Miles misapprehends the instruction given by the Superior Court, which included the temporal element.

Prior to the court instructing the jury, Miles requested that the trial judge instruct the jury on the definition of "possession" as it applies to a PFDCF charge. Much as he argues here, Miles claimed that the definition of "possession" in the 1448(a)(9) context should be narrower to account for the "temporal" element within the statute.[53] After considering Miles' argument, the Superior Court determined that:

> the general domain, control, and authority definition of possession used in drug cases and possession by a person prohibited is unchanged by section (a)(9) of Title 11, section 1448. Possession of the contraband, either actual or constructive, is the crux of the matter. In this section, both must occur at the same time. This section does not add the elements of availability or accessibility.[54]

The court instructed the jury as follows:

> The defendant is charged with Possession of a Firearm by a Person Prohibited.

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[51] Op. Brf. at 31.
[52] Op. Brf. at 31.
[53] A171.
[54] A178.

> Hakeem Miles, on or about March 2nd, 2017, in New Castle County, Delaware, did knowingly and unlawfully possess or control a handgun, a deadly weapon, at the same time did possess marijuana, a controlled substance.
>
> In order to find the defendant guilty of Possession of a Firearm by a Person Prohibited, you must find that each of the following elements have been established beyond a reasonable doubt:
>
> One, the defendant knowingly possessed the firearm, and;
> Two, *at the same time* the defendant possessed marijuana.
>
> * * * *
>
> The term "possession" includes actual possession, and constructive possession. Actual possession means that the defendant knowingly had direct physical control over the firearm. Constructive possession means that the firearm was within the defendant's reasonable control; that is, in or about his person, premises, belongings, or vehicle. In other words, the defendant had constructive possession over the firearm of he had both the power and intention at a given time to exercise control over the firearm either directly or through another person.[55]

Miles urges this Court to require the Superior Court to give the PFDCF definition of "possession" instruction when a defendant is charged with violating section 1448(a)(9). This Court has addressed the inherent differences in the PFDCF and PFBPP statutes and explained why juries are instructed differently as to each offense. "The difference in the PFDCF instruction and the PFBPP instruction is based on well settled law that PFBPP is a broader standard of

[55] A182-84 (emphasis added).

possession."[56] The two statutes are analyzed differently. This Court explained the different analyses as follows: "we apply a more limited definition of possession to P[F]DCF than P[FB]PP because, unlike establishing P[FB]PP, establishing P[F]DCF requires evidence of physical availability and accessibility."[57] Indeed, P[FB]PP is analyzed "under the same standard as drug possession," and "[t]he more limited P[F]DCF possession definition (requiring physical availability and accessibility) does not apply to P[FB]PP."[58] It is evident that the Superior Court instructed the jury based on the guidance provided by this Court in *Lecates* and *Elmore*.[59]

Miles' claim that the PFDCF instruction definition of "possession" should have been given instead of the PFBPP instruction definition of the same term because the PFDCF definition accounts for the "temporal possession" requirement lack merit. His argument contravenes well-established caselaw and fails to address the fact that the court instructed the jury on the temporal possession requirement as part of the elements of the offense. The Superior Court's determination that the PFDCF definition of "possession" did not apply to section 1448(a)(9) was correct,

[56] *State v. Grayson*, 2017 WL 1093939, at *2 (Del. Super. March 22, 2017) (citing *Elmore v. State*, 2015 WL 3613557, at *2 (Del. June 9, 2015)).
[57] *Lecates v. State*, 987 A.2d 413, 418 (Del. 2009).
[58] *Id.* at 418-18.
[59] A178.

and the instruction given to the jury was a correct statement of the law that included the temporal element contained within the statute.

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be affirmed.

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DATE: June 12, 2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAKEEM MILES,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 558, 2017**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT

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1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using MS Word.

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STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
Deputy Attorney General
ID No. 3549

DATE: June 12, 2018

CERTIFICATION OF SERVICE

The undersigned, being a member of the Bar of the State of Delaware, hereby certifies that on this 12th day of June, 2018, he caused the attached *State's Answering Brief* to be delivered electronically via File&Serve to the following persons:

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