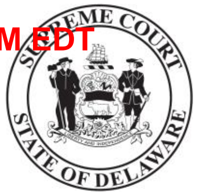
EFiled: Jul 01 2020 02:23PM EDT
Filing ID 65739670
Case Number 12,2020



IN THE SUPREME COURT OF THE STATE OF DELAWARE

NAIFECE HOUSTON,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	No. 12, 2020
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF

DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

THE LAW OFFICE OF
BENJAMIN S. GIFFORD IV

BENJAMIN S. GIFFORD IV, ID No. 5983
14 Ashley Place
Wilmington, DE 19804
(302) 304-8544

Attorney for Defendant Below - Appellant

DATED: July 1, 2020

TABLE OF CONTENTS

TABLE OF CITATIONS ii

NATURE OF THE PROCEEDINGS 1

SUMMARY OF THE ARGUMENT 6

STATEMENT OF FACTS 7

ARGUMENT 11

I. **THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED A POLICE OFFICER TO TESTIFY AS A LAY WITNESS BASED ON HIS TRAINING AND EXPERIENCE AS TO HIS IDENTIFICATION OF COCAINE IN CLEAR CONTRAVENTION OF THE RULES OF EVIDENCE AND PRECEDENT OF THIS COURT, THUS LEADING TO THE IMPROPER DENIAL OF MR. HOUSTON'S MOTION TO SUPPRESS** 11

A. Question Presented 11

B. Standard and Scope of Review 11

C. Merits of Argument 12

CONCLUSION 39

SENTENCING ORDER, CASE NUMBER 1901017650 .... Exhibit A

TABLE OF CITATIONS

Cases

Arizona v. Johnson, 555 U.S. 323 (2009).....15
Caldwell v. State, 780 A.2d 1037 (Del. 2001).....13
Com. v. Corniel, 2005 WL 1668448 (Mass. Super. June 23, 2005).....30-32
Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).....1
Downs v. State, 570 A.3d 1142 (Del. 1990).....12-13
Hardwick v. State, 971 A.2d 130 (Del. 2009).....12
Harris v. State, 806 A.2d 119 (Del. 2002).....37
Illinois v. Caballes, 543 U.S. 405 (2005).....14
Illinois v. Wardlow, 528 U.S. 119 (2000).....12
Jones v. State, 745 A.2d 856 (Del. 1999).....12-13
Loper v. State, 8 A.3d 1169 (Del. 2010).....17
Michigan v. Chesternut, 486 U.S. 567 (1988).....13
Murray v. State, 45 A.3d 670 (Del. 2012).....13-16
Norman v. State, 968 A.2d 27 (Del. 2009).....22, 24-26, 29
Rodriguez v. United States, 575 U.S. 348 (2015).....16-17, 20
Seward v. State, 723 A.2d 365 (Del. 1999).....22-24
State v. Chandler, 132 A.3d 133 (Del. Super. 2015).....34, 37
State v. Dillard, 2018 WL 1382394 (Del. Super. Ct. Mar. 16, 2018).....18-21
State v. Dillard, 2019 WL 1076869 (Del. Supr. Mar. 7, 2019).....18
State v. Huntley, 777 A.2d 2499 (Del. 2000).....37
State v. Roberts, 2001 WL 34083579 (Del. Super. Ct. Sep. 27, 2001).....13
State v. Stanley, 2015 WL 9010669 (Del. Super. Ct. Dec. 9, 2015).....33
Terry v. Ohio, 392 U.S. 1 (1968).....12-13
United States v. Rodriguez, 741 F.3d 905 (8th Cir. 2014).....16
Valentine v. State, 207 A.3d 566 (Del. 2019).....11
Wright v. State, 953 A.2d 188 (Del. 2008).....24-25

Rules and Statutes

D.R.E. 701.....21, 28, 32
D.R.E. 702.....22, 29, 32

Constitutional Provisions

Del. Const. Art. I; § 6.....12
U.S. Const. amend. IV.....12

NATURE OF THE PROCEEDINGS

On April 15, 2019, the Grand Jury returned an Indictment against Naifece Houston, charging him with one count each of Tier 5 Possession of a Controlled Substance, Drug Dealing in a Tier 4 Quantity, felony Resisting Arrest, and Failure to Maintain Lane.[1]

On September 27, Mr. Houston, by and through counsel, filed a Motion to Suppress, seeking to exclude evidence that was seized during the traffic stop that led to his arrest.[2] Mr. Houston raised three arguments: (1) the police lacked reasonable articulable suspicion to stop Appellant's vehicle; (2) the authorities impermissibly extended the scope of the traffic stop by informing Mr. Houston that he would have to wait for a K-9 unit to arrive at the scene; and (3) the search warrant for Mr. Houston's cell phone failed to establish a specific nexus between any crime and the electronic device.[3] Within the Motion to Suppress, Mr. Houston also requested a *Daubert*[4] hearing stemming from the arresting officer's claim that he could detect an odor of cocaine emanating from Appellant's vehicle.[5] Mr.

---

[1] A001; A007-08.

[2] A003; A009-40.

[3] A010-30.

[4] *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

[5] A022-23.

Houston requested the Superior Court to conduct such hearing "to ascertain the officer's training and experience in drug detection, as well as the ability for any human being to detect an odor of cocaine."[6]

The State filed a response to the Motion to Suppress on October 25, 2019.[7] The State contended that the police properly stopped Mr. Houston's vehicle and did not unreasonably extend the duration of the stop.[8] Within its Response, the State agreed "not to enter any evidence obtained from the Defendant's cell phone during its case-in-chief," thus mooting Appellant's third suppression argument.[9] Finally, the State opposed Mr. Houston's request for a *Daubert* hearing, contending that a police officer may "testify as to the odor of contraband . . . based on his training and experience . . . as a lay witness."[10]

The parties appeared in the Superior Court for a hearing on Mr. Houston's Motion to Suppress on December 9, 2019, as well as the Appellant's previously-scheduled Final Case Review.[11] Before commencing with the suppression hearing,

---

[6] A023.

[7] A004; A041-53.

[8] A045-48.

[9] A049.

[10] A049.

[11] A005; A054-190.

the Court engaged in a colloquy with Mr. Houston to ensure that he was knowingly, intelligently, and voluntarily rejecting the State's most recent plea offer.[12] Then, after hearing testimony from the arresting officer and argument from the parties, The Honorable Richard R. Cooch, Jr. orally denied Appellant's Motion to Suppress.[13]

Mr. Houston appeared for trial the following day, December 10, 2019.[14] Mr. Houston informed the trial court that he wished to waive his right to a jury trial and proceed with a stipulated bench trial.[15] The Superior Court engaged in a colloquy with Appellant to ensure that he was knowingly, intelligently, and voluntarily waiving his right to a jury trial.[16] Mr. Houston also confirmed to the trial court that he was aware that the sole evidence the State would be presenting against him was a stipulation of facts agreed upon by the parties, and that he was waiving his right to confront witnesses and present a defense by proceeding with a stipulated trial.[17]

---

[12] A056-62.

[13] A005; A179-87.

[14] A005; A191-213.

[15] A193-94.

[16] A194-200.

[17] A200-01.

Before the trial began, the State entered a *nolle prosequi* as to the charge of Drug Dealing in a Tier 4 Quantity.[18] Additionally, the Department of Justice amended the Resisting Arrest charge from a felony to a misdemeanor.[19]

The State entered the stipulation of facts into evidence once trial commenced, and immediately rested its case-in-chief.[20] The defense presented no evidence.[21] After a short closing argument from the State[22], the Superior Court found Mr. Houston guilty of all charges.[23]

The matter proceeded immediately to sentencing.[24] As to the offense of Drug Dealing, the court imposed a sentence of ten years of Level V incarceration, suspended after serving a mandatory period of two years for one year of Level III probation.[25] As to misdemeanor Resisting Arrest, Mr. Houston was sentenced to one year of Level V incarceration, suspended immediately for one year of Level III

---

[18] A193.

[19] A193.

[20] A201-05; A214.

[21] A205.

[22] Mr. Houston waived closing argument. A205.

[23] A205-06.

[24] A206-11.

[25] A210; A217.

probation.[26] Finally, the trial court imposed and suspended a twenty-five dollar fine related to the traffic violation.[27]

Mr. Houston filed a timely notice of appeal. This is Mr. Houston's Opening Brief.

---

[26] A212; A217-18.

[27] A212; A218.

SUMMARY OF ARGUMENT

The Superior Court erred in allowing a police officer to testify as a lay witness that, based on his training and experience, he identified the presence of cocaine by its "chemically" odor. The Delaware Uniform Rules of Evidence specifically state that lay opinions may not be based on specialized knowledge derived from one's training and experience; instead, such evidence must be presented via a properly-qualified expert. This Court has analyzed the difference between lay and expert testimony, specifically holding that police officers may not testify about identification of controlled substances as lay witnesses based on their training and experience. The trial court's admission of this testimony led to the improper denial of Mr. Houston's Motion to Suppress, as it was the only purported evidence the police observed that was indicative of criminality. Had the Superior Court excluded the opinion evidence, it would have had no choice but to hold that the authorities impermissibly extended the scope of the traffic stop to conduct a second, unrelated investigation absent any reasonable articulable suspicion that criminal activity was afoot.

STATEMENT OF FACTS

Naifece Houston was pulled over by Detective Matthew Radcliffe and Corporal Eric Saccomanno—both officers with the Governor's Task Force—on January 29, 2019 for failure to maintain a lane.[28] Once the vehicle pulled over, both officers approached the automobile on the passenger side.[29] Corporal Saccomanno interacted with the driver, requesting his license, rental agreement and insurance.[30] Although Corporal Saccomanno was at the window speaking with Mr. Houston, Detective Radcliffe purportedly observed the driver exhibiting signs he associated with nervousness.[31] The corporal returned back to the officers' vehicle while Detective Radcliffe remained with Mr. Houston.[32] The detective asked Mr. Houston whether he had been drinking, and Appellant stated that he had not been.[33] The officer asked the driver why he was nervous, but the driver disagreed with Detective Radcliffe's assessment, stating that he was "fine" or

---

[28] A065-68.

[29] A068.

[30] A069; A138.

[31] A069.

[32] A140.

[33] A141.

"okay."[34] Mr. Houston also informed the police that he had previously been arrested and was currently on probation.[35]

Detective Radcliffe then returned back to his vehicle to check to see whether Mr. Houston had any active warrants out for his arrest.[36] Despite that he was concerned that Mr. Houston was exhibiting "preflight indicators"—suggesting to the officer that Appellant may attempt to flee the scene before the traffic stop had concluded—Detective Radcliffe left Mr. Houston in his automobile with the vehicle still running and in possession of the car keys.[37] Additionally, Detective Radcliffe was aware that Corporal Saccomanno was already searching NCIC to determine whether Mr. Houston had any outstanding warrants; nevertheless, he left the driver alone in his idling vehicle.[38]

Detective Radcliffe testified that prior to ever approaching Mr. Houston's vehicle, he sent a radio transmission over an unrecorded frequency to a K-9 unit on the Governor's Task Force advising of the stop so that the animal could respond to

---

[34] A141.

[35] A141.

[36] A146.

[37] A141-46.

[38] *See* A070.

the scene to do a sniff of the vehicle.[39] Knowing the K-9 officer was on his way, Detective Radcliffe returned back to Mr. Houston's vehicle with the intent to remove the driver from his vehicle and ask him for permission to search the automobile.[40]

As Detective Radcliffe approached the driver-side door, Mr. Houston rolled down his window.[41] At this time, the officer purported to detect a "chemically" smell he associated with bulk quantities of cocaine.[42] The detective had not previously noticed any odor emanating from the vehicle, despite having been next to the open passenger-side window only minutes before.[43]

Detective Radcliffe asked Mr. Houston to step out of his vehicle and the driver complied.[44] Because Mr. Houston was looking around the area, the officer asked him to lean against the vehicle and cross his legs.[45] Appellant complied, but

---

[39] A152; A155.

[40] A164.

[41] A072.

[42] A072; A090.

[43] A072. There is no indication in the record that Corporal Saccomanno, who was purportedly closer to the vehicle during the officers' initial approach, detected any odor throughout the entirety of the authorities encounter with Mr. Houston that evening.

[44] A118.

[45] A118.

would occasionally uncross his legs, prompting the officer to ask again.[46] Although Detective Radcliffe was concerned that this behavior signaled the driver may run, he never placed Mr. Houston in handcuffs.[47]

Detective Radcliffe, still cognizant that the K-9 officer was en route, attempted to "stall" until the dog arrived.[48] Another officer, Detective McAndrew, arrived on scene, and looked into the backseat of Mr. Houston's vehicle.[49] Inside, he saw a plastic bag underneath a "void" below the console.[50] As Detective McAndrew approached Detective Radcliffe and Mr. Houston, the Appellant fled the scene on foot.[51] Police chased him, eventually tasing the defendant before handcuffing him.[52]

The authorities ultimately searched the vehicle and found an open plastic bag, inside of which was cocaine.[53]

---

[46] A149-51.

[47] A151.

[48] A152.

[49] A120.

[50] A120.

[51] A121.

[52] A122-23.

[53] A124.

ARGUMENT

CLAIM I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED A POLICE OFFICER TO TESTIFY AS A LAY WITNESS BASED ON HIS TRAINING AND EXPERIENCE AS TO HIS IDENTIFICATION OF COCAINE IN CLEAR CONTRAVENTION OF THE RULES OF EVIDENCE AND PRECEDENT OF THIS COURT, THUS LEADING TO THE IMPROPER DENIAL OF MR. HOUSTON'S MOTION TO SUPPRESS.

A. Question Presented

Whether the trial court abused its discretion in allowing a police officer to testify as to his identification of cocaine based on his training and experience, despite that both the Delaware Uniform Rules of Evidence and this Court prohibit lay testimony based upon a witness's training and experience, thus leading to the denial of Mr. Houston's suppression motion stemming solely from impermissible opinion evidence. This issue was preserved via the filing of a Motion to Suppress and argument during the suppression hearing.[54]

B. Standard and Scope of Review

This Court reviews a trial court's decision to grant or deny a motion to suppress for an abuse of discretion.[55] Legal conclusions are reviewed *de novo* for

[54] A009-40; A072-89; A111-17.

[55] *Valentine v. State*, 207 A.3d 566, 570 (Del. 2019).

errors in formulating or applying legal precepts.[56] Evidentiary ruling are reviewed for abuse of discretion.[57]

C. Merits of Argument

1. Applicable Legal Precepts

The Fourth Amendment to the United States Constitution and Article I, Section 6 of the Delaware Constitution protect citizens from unlawful searches and seizures.[58] Under *Terry v. Ohio*,[59] a police officer is permitted to conduct a brief investigatory seizure of an individual if the officer possesses "reasonable articulable suspicion that criminal activity is afoot."[60] Law enforcement officials seize an individual when they make a "show of official authority" that would "have communicated to a reasonable person that he was not at liberty to ignore the police

---

[56] *Downs v. State*, 570 A.3d 1142, 1144 (Del. 1990).

[57] *Hardwick v. State*, 971 A.2d 130, 133 (Del. 2009).

[58] U.S. Const. amend. IV (The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); Del. Const. Art. I; § 6 ("The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.").

[59] 392 U.S. 1 (1968).

[60] *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

presence and go about his business."[61] In justifying such a seizure, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[62]

Delaware courts have held that, in the context of a traffic stop, a seizure occurs once a police officer activates his emergency lights, signaling to the operator of the vehicle in front of the squad car that he is to stop his vehicle.[63] However, the "duration and execution of a traffic stop is necessarily limited by the initial purpose of the stop."[64] This Court has held that "any investigation of the vehicle or its occupants beyond that required to complete the purpose of the traffic stop constitutes a separate seizure that must be supported by independent facts sufficient to justify the additional intrusion."[65]

Even if the traffic stop does not formally terminate with the issuance of a citation or warning, "the legitimating *raison d'etre* [of the stop may] evaporate if

---

[61] *Jones v. State*, 745 A.2d 856, 862 (Del. 1999) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).

[62] *Terry*, 392 U.S. at 21l; *see also Downs v. State*, 570 A.2d 1142, 1145 (Del. 1990).

[63] *See, e.g.*, *State v. Roberts*, 2001 WL 34083579 at *3 (Del. Super. Ct. Sep. 27, 2001) ("In this case, Roberts would have been in violation of the law had he left once the officer activated the emergency lights. Thus, under these circumstances and following the law as set forth above, Roberts was seized once [the officer] activated her emergency lights.").

[64] *Murray v. State*, 45 A.3d 670, 673 (Del. 2012) (quoting *Caldwell v. State*, 780 A.2d 1037, 1047 (Del. 2001)).

[65] *Caldwell*, 780 A.2d at 1047 (other citations omitted).

its pursuit is unreasonably attenuated or allowed to lapse into a state of suspended animation."[66] Stated differently, the mission of the traffic stop may not be put on hold by a separate investigation while the traffic stop is ongoing. Further investigatory detention is a separate seizure that must be supported by independent facts justifying it.[67]

The issue of drug canine sniffs has been addressed by the Supreme Court of the United States. The use of a well-trained narcotics detention dog during a lawful traffic stop does not in and of itself raise Fourth Amendment concerns.[68] In *Illinois v. Caballes*, an officer pulled over a vehicle and a K-9 officer who overheard the dispatch transmission showed up unprompted at the scene to have his dog sniff the automobile.[69] While the officer who initiated the stop was writing a ticket, the K-9 officer had his dog walk around the car.[70] The *Caballes* Court affirmed the lower court's decision that the stop was not extended by the K-9 officer's actions.[71]

---

[66] *Murray,* 45 A.3d at 674 (*citing Caldwell* at 1047.)

[67] *Murray*, 45 A.3d at 674.

[68] *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

[69] *Id.* at 406.

[70] *Id*.

[71] *Id*. at 408.

Four years later, the Supreme Court had occasion to determine at what point constitutional questions are implicated when a traffic stop becomes something more. In *Arizona v. Johnson*, an officer wanted to question one of the occupants of a vehicle during a routine traffic stop about unrelated gang and criminal activity.[72] A different officer was handling the traffic infraction.[73] The questioning officer ordered the suspect out of the vehicle and patted him down for weapons, suspecting that he may be armed.[74] Although this activity was not related to investigation of the car's expired registration, it did not measurable extend the stop.[75] The Supreme Court held that such inquiries do not convert the stop into an unlawful seizure "so long as those inquiries do not measurably extend the duration of the stop."[76]

This Court applied *Johnson* when deciding *Murray v. State*, holding:

> For something to be measurable, it need not be large; the [*Johnson*] Court could have used the terms "significantly" or "substantially" if they intended to proscribe only an extension for a comparatively large period of time. But the United States Supreme Court attached

[72] 555 U.S. 323, 328 (2009).

[73] *Id*.

[74] *Id*.

[75] *Id*. at 333.

[76] *Id*.

> important to the question of whether the additional extension lengthened the stop at all.[77]

The Supreme Court of the United States applied the measurable extension standard to drug dog sniffs in the 2015 case of *Rodriguez v. United States*.[78] There, the officer who conducted a traffic stop happened to be a K-9 officer who had a dog with him.[79] The animal stayed inside the police car, however, while the officer handled all the activities related to giving the driver a written warning.[80] Only after the initial purpose of the stop had concluded did the officer ask for permission to walk his dog around the car.[81] Despite that the driver refused to consent, the officer conducted a walkaround and the dog alerted, leading to search of the vehicle and the driver's arrest.[82]

The Eighth Circuit had previously held that dog sniffs are an acceptable de minimis intrusion on personal liberty.[83] On that basis, the Circuit Court had

---

[77] *Murray v. State*, 45 A.3d 670, 675 (Del. 2012).

[78] 575 U.S. 348 (2015).

[79] *Id*. at 351.

[80] *Id*.

[81] *Id*. at 352.

[82] *Id*.

[83] *United States v. Rodriguez*, 741 F.3d 905, 907 (8th Cir. 2014), *rev'd*, *Rodriguez v. United States*, 575 U.S. 348 (2015).

previously upheld extensions of traffic stops of up to ten minutes.[84] The Supreme Court explained there is no *de minimis* exception for dog sniffs.[85] Traffic stops, the Court explained, contain certain incidental activities included in the mission of the stop, such as checking the validity of the license and insurance.[86] A dog sniff, however, departs from that mission because it is done to detect criminal wrongdoing.[87] It is not an ordinary incidental activity of a traffic stop nor is it "part of the officer's traffic mission."[88] The Court went on to distinguish such incidental activities as ordering the occupants out of the car due to officer safety concerns as being related to the traffic mission, as opposed to K-9 sniffs, which is a criminal investigative activity.[89] Ultimately, the *Rodriguez* Court held that "the critical question is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff prolongs—*i.e.*, adds time to—the stop."[90]

---

[84] *Rodriguez*, 575 U.S. at 353.

[85] *Rodriguez*, 575 U.S. at 356-57.

[86] *Rodriguez*, 575 U.S. at 355.

[87] *Id*.

[88] *Id*. at 349.

[89] *Id*. at 356-57. This Court has similarly held that ordering the occupants out of a vehicle during a traffic stop does not amount to a second detention requiring independent factual support. *See Loper v. State*, 8 A.3d 1169, 1174 (Del. 2010).

[90] *Id*. at 357 (internal citations omitted).

Delaware has also addressed the question of whether police may extend the duration of a stop via dog sniff. In *State v. Dillard*, police conducted a traffic stop of a minivan after observing the vehicle had improper window tint.[91] The driver, upon request of the police, produced his license and registration.[92] After finding no issues with the documentation, the authorities asked the driver to step out of the vehicle.[93] The police then asked the driver who owned the vehicle[94], where the driver was coming from, and whether there was "anything illegal" in the car.[95] The driver responded negative and refused the officer's request to give consent to search the minivan.[96]

The officers ordered the driver to step away from the vehicle and remain on the curb, at which point other officers arrived on the scene "to assist."[97] The

---

[91] *State v. Dillard*, 2018 WL 1382394 at *1 (Del. Super. Ct. Mar. 16, 2018), *aff'd*, *State v. Dillard*, 2019 WL 1076869 (Del. Supr. Mar. 7, 2019) ("[W]e affirm the judgment of the Superior Court on the basis of its opinion dated March 16, 2018 and its order denying the State's motion for reargument dated May 17, 2018.").

[92] *Dillard*, 2018 WL 1382394 at *1.

[93] *Id*.

[94] The officer had already searched for the vehicle's registration and knew the registered owner of the minivan. *Id*. The driver confirmed what the officer had already learned when answering the question. *Id*.

[95] *Id*.

[96] *Id*.

[97] *Id*.

officer who initiated the stop returned to his vehicle to write a citation for the improper window tint.[98] While writing the ticket, the officer radioed for a K-9 unit to respond to the scene.[99] The K-9 officer arrived within minutes and, after the dog performed an open air sniff, it alerted to the passenger door handle of the minivan.[100]

The *Dillard* defendant moved to suppress the contraband eventually seized from the resulting search of the minivan, contending that the authorities impermissibly extended the scope of the traffic stop to conduct a drug investigation without reasonable suspicion to support a second detention.[101] The Superior Court agreed with the defendant, and suppressed the evidence.[102]

The trial court in *Dillard* noted that it was permissible for the authorities to ask the driver to step out of the vehicle, ask about the ownership of the minivan, and inquire as to where the defendant was travelling.[103] The Superior Court took issue with the question about the presence of "anything illegal" in the vehicle,

---

[98] *Id*.

[99] *Id*. at *2.

[100] *Id*.

[101] *Id*.

[102] *Id*. at *9.

[103] *Id*. at *4.

however, observing that while questions related to officer safety are appropriate—such as inquiries related to weapons—a broad question "ask[ing] about the universe of illegal things that may be contained in the vehicle" was not necessarily "acceptable as part of a routine traffic stop."[104]

The crux of the Superior Court's decision, however, rested in the ticketing officer's request for a K-9 unit to come to the scene.[105] The trial court observed that although the canine officer was only several minutes away, the police who initiated the stop still "ha[d] to wait for the K-9 unit."[106] The Superior Court also noted that the arrival of a drug dog to conduct an open-air sniff is not part of a routine stop.[107]

The *Dillard* Court rejected the State's contention that the extension was minimal, citing the Supreme Court of the United State's decision in *Rodriguez v. United States*.[108] Because the length of the extension "need not be large," the

---

[104] *Id*. at *4-5.

[105] *See id*. at *5-9.

[106] *Id*. at *6.

[107] *Id*.

[108] *Id*. at *5 (citing *Rodriguez v. United States*, 575 U.S. 348 (2015)).

Dillard Court held that any measurable extension of a traffic stop, absent reasonable suspicion, was violative of a defendant's rights.[109]

2. The trial court erred in allowing the arresting officer to testify as to the "odor of cocaine" as a lay witness.

The Superior Court failed in its role as gatekeeper when it allowed Detective Radcliffe to testify that he purportedly detected the "odor of cocaine," despite the officer's testimony that such ability was solely based on his training and experience and therefore expert in nature. Such failure allowed the State to introduce improper opinion testimony, but for which the police would have lacked reasonable suspicion to extend the duration of the traffic stop.

Delaware Uniform Rule of Evidence 701 governs the admission into evidence of lay testimony:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.[110]

---

[109] *Id.* at *5-9.

[110] D.R.E. 701(a)-(c).

In contrast, Rule 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.[111]

This Court previously addressed what evidence the State may enter into evidence through a lay police officer and what evidence need come through an expert in *Seward v. State*[112] and *Norman v. State*.[113]

In *Seward*, the defendant was convicted after trial of various drug offenses and Conspiracy in the Second Degree, all related to his possession of cocaine.[114] Five days before trial, the State notified the defense that it intended to call one of

---

[111] D.R.E. 702(a)-(d).

[112] 723 A.2d 365 (Del. 1999).

[113] 968 A.2d 27 (Del. 2009).

[114] *Seward*, 723 A.2d at 367.

its police officer witnesses as an expert regarding his knowledge of drugs.[115] The trial court denied the request due to the untimely nature of the disclosure.[116] At trial, the officer "testified about his police background and . . . [was] permitted to testify that the substance [he] saw looked like crack cocaine."[117] The Superior Court overruled defense counsel's objection to this testimony, finding that "a police officer could testify what cocaine looked like because it was in the common knowledge of a police officer and did not rise to the level of expert testimony."[118] This Court disagreed, however, holding that "it was improper to allow the officer[ ] to express [his] opinion that the substance was crack cocaine."[119] Such holding was unsurprising, however, in light of the State's concession at oral argument that the officer's ability to identify "the substance as crack cocaine was not within the common knowledge of a lay person and therefore the officer improperly testified as an expert."[120] Although this Court ruled that the officer's testimony was improper expert testimony, it found the error to be harmless based on a curative

[115] *Id*. at 371.

[116] *Id*.

[117] *Id*.

[118] *Id*. at 372-73.

[119] *Id*. at 373.

[120] *Id*.

instruction given by the trial court that it was specifically up to the jury to determine what the substance was.[121]

Ten years later, this Court reaffirmed its holding in *Seward*, once again ruling in *Norman* that police officers "should not have been allowed to identify the marijuana they seized" as lay witnesses because "[t]he police officers' familiarity with controlled substances [. . .] comes from their training and their specialized experience in apprehending criminals who are involved in drugs."[122] The underpinnings of the *Norman* defendant's claim was similar to that in *Seward*: that the police improperly testified, without being offered as expert witnesses and without the trial court ruling they were qualified as expert witnesses to identify the controlled substance.[123] Although the State conceded error in *Seward*, they took a different position when arguing against the *Norman* defendant's claim, relying upon this Court's 2008 decision in *Wright v. State*.[124]

In *Wright*, this Court "analyzed the *corpus dilecti* rule to determine whether the State had provided sufficient evidence, beyond the defendant's confession, to

---

[121] *Id*. at 373-74.

[122] *Norman*, 968 A.2d at 31.

[123] *Id*. at 30.

[124] *Id*. at 31 (discussing *Wright v. State*, 953 A.2d 188 (Del. 2008).

support a delivery of cocaine."[125] Although the authorities did not recover cocaine, the Department of Justice offered another drug dealer immunity to testify about a drug transaction with the *Wright* defendant.[126] The dealer testified that the substance he provided to the defendant was cocaine.[127] "He based that statement on the fact that he had been selling cocaine for two years; he knew the texture and smell of cocaine; and his customers never complained that they had been sold fake goods."[128]

The *Wright* Court "recognized the general principle that a 'lay witness with familiarity and experience with the drug in question may testify and establish the drug's identity . . . ."[129] Nevertheless, this Court soundly rejected the State's argument that *Wright* allowed its police officer witnesses to testify as laypersons in the *Norman* defendant's trial, clarifying that "[t]he Court never held, or suggested, that anyone who is familiar with drugs may give lay opinions."[130] Although the Court agreed with the *Norman* defendant that the police impermissibly offered

---

[125] *Norman*, 968 A.2d at 31.

[126] *Id*.

[127] *Id*.

[128] *Id*.

[129] *Id*. (quoting *Wright*, 953 A.2d at 195).

[130] *Id*.

expert testimony under the guise of lay witnesses, it ultimately found that the error was harmless beyond a reasonable doubt based on other circumstantial evidence offered during trial.[131]

The trial court ignored the precedent of this Court—and the plain language of the Delaware Uniform Rules of Evidence—when it permitted Detective Radcliffe to testify as to the "odor of cocaine" as a lay witness. Detective Radcliffe testified that he was able to detect such odor due to his "experience of numerous unrelated cases . . . , there's a specific chemical odor that is consistent to [him] to be associated with cocaine."[132] The officer testified that "every case" with which he was ever involved that included "large quantities" of cocaine had "the same chemical smell consistent with cocaine with the large quantity."[133] Detective Radcliffe clarified that his ability to detect the odor of cocaine resulted from the "hundreds of drug investigations" he has conducted and that without his field experience, he would not be able to do so.[134] The officer also spoke to the length of his time on the job as contributing to this ability:

> Fortunately, I have been doing this for many years, and with that experience brings experiences of other search warrants and car stops

---

[131] *Id*. at 31-32.

[132] A090.

[133] A091.

[134] A106.

> and seizures and . . . I mean, you've -- I have been involved in things such as upwards of 10-kilo grams or bricks of cocaine, and that same smell is the same as 100-plus grams of cocaine off those bricks.[135]

In the event the trial court was left with any doubt as to whether Detective Radcliffe's ability to identify cocaine by scent alone was based on his training and experience, the State resolved any lingering ambiguity. In its written response to Mr. Houston's Motion to Suppress—wherein he requested a *Daubert* hearing to "ascertain the officer's training and experience in drug detection, as well as the ability for any human being to detect an odor of cocaine"[136]—the Department of Justice argued such hearing was unnecessary, as "*Daubert* has always been applied with regards to *expert* testimony" and that "an officer, based on his training and experience, can [testify as to the identification of narcotics] as a lay witness."[137] During the suppression hearing, the State argued that "[t]his officer, as a lay witness, based on his training and experience has smelled cocaine before and can testify as to what that smell is and can testify as to the experience he has previously smelling that contraband."[138]

---

[135] A106-07.

[136] A022-23.

[137] A049.

[138] A088.

The Superior Court ultimately allowed the officer to testify as a lay witness, ruling:

> In looking at Rule 701, it provides, as we all know, that if a witness is not testifying as an expert, as Detective Radcliffe is not in this issue or any issue, is limited to one that's rationally based on the witness's perception. Among other things, the Detective testified that hundreds if not thousands of what he in his law enforcement career thought was the chemical smell associated with cocaine; in fact, resulted in cocaine and a large amount being located wherever the smelling was taken place.
>
> I think the opinion testimony is helpful to clearly understand the witness's testimony or to determine a fact in issue. And, importantly, I don't think it's based on scientific, technical or other specialized knowledge within the scope of Rule 702.[139]

The trial court inaccurately interpreted Delaware Rule of Evidence 701, however, thus rendering its decision legal error.

First, the Superior Court acknowledged in its ruling that Detective Radcliffe's ability to detect the odor of cocaine was based on the "hundreds if not thousands" of cases in which he detected the odor of cocaine. The ruling thus contemplated that the officer's ability to identify cocaine was based on his training and experience. This should have served to disqualify the testimony as a lay opinion under Rule 701(c) since such an opinion may not be "based on scientific, technical, or *other specialized knowledge* within the scope of Rule 702."[140] The

---

[139] A116.

[140] D.R.E. 701(c) (emphasis added).

trial court failed to consider the specific language of Rule 702 when rendering its decision, however, as that Rule contemplates expertise based on "knowledge, skill, *experience*, *training*, or education."[141] The very factors the trial court relied upon in finding that the detective's opinion was that of a layperson are those that the Rules specifically state render them expert in nature.

Moreover, the Superior Court did not address this Court's holding in *Seward* and *Norman* when issuing its ruling beyond cursorily stating that "[t]here is no case in Delaware that says that an expert testimony is required for testimony about an odor, chemical odor associated with cocaine."[142] Not so. The offensive testimony in *Norman* specifically dealt, in part, with the odor of marijuana, as the officer in that case testified that "the substance in the two bags looked and *smelled like marijuana*."[143] That testimony was precisely what this Court said was impermissible from a lay witness.[144]

The trial court's decision to allow the officer to testify as a lay witness as to his identification of cocaine based on its odor was especially problematic in light

---

[141] D.R.E. 702 (emphasis added).

[142] A114.

[143] *Norman*, 968 A.2d at 29 (emphasis added).

[144] *Id*. at 30 ("Three police officers testified that the seized substances were either were marijuana or *had the characteristics of marijuana*." Odor is a characteristic of marijuana.).

of other jurisdictions' discussion of the issue. In its response to Mr. Houston's Motion to Suppress, the State relied primarily upon *Commonwealth v. Corniel*, a case out of the Superior Court of Massachusetts.[145] *Corniel* is a trial court decision ruling upon the defendant's motion to suppress evidence.[146] During the suppression hearing, the prosecution called State Trooper Masterson as an expert witness on "cocaines [*sic*] characteristic odor."[147] After the defense objected to the officer's ability to testify as an expert, the *Corniel* Court decided to hear the evidence and rule on the objection later.[148] The Massachusetts court summarized the officer's testimony as follows:

> He is a nine-year veteran and was assigned to the Suffolk County Drug Task Force. Previously, he served as a member of the Essex County Drug Task Force. He received his training in narcotics investigation from federal law enforcement agencies and from other states including Massachusetts. His Curie Vitae was offered into evidence. He testified as to the following: officers in the drug task force are trained to smell the distinct odor of cocaine because in their undercover capacity they have to be able to distinguish between real and counterfeit cocaine. Masterson is trained to identify drugs by sight, smell and touch. Cocaine comes to Lawrence via Mexico from South America. Cocaine is extracted from the coca leaf by harsh chemicals such as gasoline, ether or ethanol. The leaves are crushed and mixed into a paste which is then processed and turned into powder where it is packaged and

---

[145] *See* A048-49 (relying upon *Com. v. Corniel*, 2005 WL 1668448 (Mass. Super. June 23, 2005)).

[146] *Corniel*, 2005 WL 1668448 at *1.

[147] *Id*. at *2.

[148] *Id*.

> shipped to the United States. It is then diluted multiple times with a variety of substances including lidocaine, acetone, baby powder, rat poison and other white or off-white powders. These dilutants may affect cocaines [*sic*] characteristic odor but regardless of the process, the odor of cocaine is fairly constant. Larger quantities of cocaine emit stronger odors and more pure cocaine also emits stronger odors. However, he also said that pure cocaine is odorless. The odor is the result of the chemical breakdown of the coca leaf but he admitted that he had no knowledge of the specific chemical reaction that results from processing cocaine. Trooper Masterson has previously used his sense of smell to locate cocaine hidden in vehicles. The cocaine that was in evidence in this case still had the distinctive odor that he associated with cocaine. In his opinion, [the arresting officer] could detect the odor of cocaine that had been in the car for only a few minutes, while standing outside the vehicle, even though it was tightly wrapped inside several plastic bags. Trooper Masterson had not conducted any experiments to confirm his view about the distinctive odor of cocaine, nor were the result of any other experiments offered into evidence.[149]

The *Corniel* Court found State Trooper Masterson to be an expert in narcotics and qualified to testify "as to how cocaine is processed, packaged, stored and sold on the street."[150] The court also found the officer able to testify as an expert as to "how to identify a substance as cocaine *from its appearance* and the price of typical amounts of cocaine used for personal consumption."[151] Despite those qualifications, the *Corniel* Court determined that the officer was "not, however, qualified [to] testify as to cocaine's distinct odor because the

[149] *Id*.

[150] *Id*. at *5.

[151] *Id*. (emphasis added).

Commonwealth did not sufficiently establish that the scientific underpinnings that support the view that cocaine has a distinct odor that humans can detect."[152] Consistent with its holding, the Massachusetts court cautioned future judicial officers that "[i]n the future, when officers are offered to testify that cocaine has a distinct odor, courts should require reliable scientific testimony as to whether cocaine has such an odor, and the bases for believing it can be detected by the human sense of smell."[153]

The trial court failed to properly apply Delaware Rule of Evidence 701 and the precedent of this Court when rendering its decision as to whether Detective Radcliffe could testify as a lay witness that he was able to identify cocaine based on a "chemically" odor.[154] Despite that Rule 702 specifically encompasses testimony based upon training and experience, the Superior Court held that the officer's training and experience was exactly what permitted him to testify as a lay witness. Such ruling was an abuse of discretion.

---

[152] *Id*.

[153] *Id*. at *8.

[154] *See* A102 ("The chemical smell is a chemically smell like to that type odor [*sic*].").

2. The trial court's error in allowing Detective Radcliffe's impermissible testimony about the alleged "odor of cocaine" resulted in an improper finding that the traffic stop was not unreasonably extended.

Had the trial court properly excluded Detective Radcliffe's testimony that he purportedly detected the odor of cocaine emanating from the vehicle, it would have found that the authorities lacked the reasonable suspicion necessary to extend the traffic stop beyond its original scope. Thus, the Superior Court's erroneous evidentiary ruling resulted in the improper denial of Mr. Houston's Motion to Suppress and warrants reversal.

In *State v. Stanley,* an officer stopped a driver for a cracked windshield and loose muffler. The officer decided to give a warning, but while doing so, took the driver out of the car so a canine sniff could be conducted.[155] The Superior Court held that, per *Murray,* the appropriate inquiry is whether the extension of the stop for a purpose unrelated to the initial investigation is measurable; it need not be significant or substantial.[156] The *Stanley* court found that the canine sniff was a measurable extension of the stop beyond what was required for its initial purpose, and suppressed the evidence.[157]

---

[155] *State v. Stanley,* 2015 WL 9010669 at *1-2 (Del. Super. Ct. Dec. 9, 2015).

[156] *Id*. at *3.

[157] *Id*. at *5.

Similarly, in *State v. Chandler*, police stopped a car for speeding; the driver was visibly nervous and had an extensive criminal history.[158] The officers continued to question him, primarily about an alias he had once used and his destination in Virginia. Chandler refused consent to search.[159] The police summoned a K-9 officer and the drug dog hit on the car's trunk.[160] The *Chandler* Court held that the additional investigation into Chandler beyond the issuance of a speeding ticket was a "second detention," which required an objective suspicion of criminal behavior.[161] The Superior Court held that the calling of the K-9 was part of that second detention, which was not justified by facts known to the officers before the second investigation began.[162] Instead, such facts amounted only to a hunch and not the appropriate level of articulable suspicion, resulting in the suppression of the evidence seized pursuant to the search.[163]

Detective Radcliffe's testimony at the suppression hearing confirms that the traffic stop was measurably extended. After stopping Mr. Houston's vehicle, the

---

[158] *State v. Chandler*, 132 A.3d 133, 137 (Del. Super. 2015)

[159] *Id.* at 138.

[160] *Id*. at 139.

[161] *Id*. at 140-41.

[162] *Id*. at 144.

[163] *Id*. at 149.

officers engaged in initial questioning of the driver related to the initial purpose of the stop: inquiring about license, registration and insurance; and asking from where Appellant was coming and his destination.[164] Corporal Saccomanno returned to the police vehicle to verify Mr. Houston's information while Detective Radcliffe stayed behind to talk to the driver.[165] After questioning Appellant as to whether he had been drinking, why he was nervous, and whether he had been arrested or was on probation, the detective walked to the unmarked squad car to check on his partner and to determine whether Mr. Houston had any outstanding warrants.[166]

After learning that Appellant was not wanted, Detective Radcliffe began to walk back to Mr. Houston's vehicle.[167] Prior to returning to the vehicle, the officer decided that he was going to ask Mr. Houston to step out of the automobile and that he was going to seek consent to search the car.[168] Importantly, the officer knew that a K-9 unit was en route to the scene of the car stop—Detective Radcliffe testified that he radioed the K-9 officer that he was "stopping a vehicle at 9 and

---

[164] A138.

[165] A140.

[166] A141-46.

[167] A164.

[168] A164.

Memorial Drive" prior to commencing the stop.[169] The officer also confirmed that he wanted to "stall" Mr. Houston because he knew that the dog was on its way.[170]

By the time Mr. Houston was removed from his vehicle, Detective Radcliffe had already determined that he was conducting an investigation independent from the initial traffic stop.[171] The officer confirmed that when he was speaking with Appellant, he was "on a different conversation at that point" and had "launched into a second location."[172]

It is also clear from Detective Radcliffe's testimony that beyond the purported "odor of cocaine," he had no basis to reasonably believe criminal activity was afoot. The officer testified that other than the alleged scent, there was no factor to which he could point that was indicative of criminal behavior.[173]

Detective Radcliffe placed considerable emphasis upon Mr. Houston's alleged nervousness during his interactions with the police.[174] However, "[c]ourts that have cited nervousness, criminal history, and/or use of a rental vehicle, 'as

---

[169] A152.

[170] A152.

[171] *See* A158.

[172] A158.

[173] A161.

[174] *See, e.g.,* A069.

factors supporting a finding of reasonable suspicion have done so only in conjunction with other more tangible, objectively articulable indicators of criminality."[175] This Court has held that it is "possible for factors, although insufficient individually, to add up to reasonable suspicion, but it is impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation."[176] The State did not present any admissible evidence during the suppression hearing other than "wholly innocent factors" that cannot give rise to reasonable suspicion.

Detective Radcliffe candidly stated that he had moved on from the initial traffic stop while waiting for the K-9 officer to arrive at his location. He also confirmed that "under no circumstances [was he] going to simply issue Mr. Houston a ticket and let him go before the K-9 officer arrived."[177] No objective facts existed to prolong Mr. Houston's traffic stop so that the K-9 unit could make its way to the scene. As in *Murray*, *Stanley*, *Chandler*, and *Dillard*, the police impermissibly extended the scope of the traffic stop and initiated a second investigation into other wrongdoing. But for the impermissible testimony about

---

[175] *State v. Chandler*, 132 A.3d 133, 146 (Del. Super. 2015) (quoting *State v. Huntley*, 777 A.2d 249, 256 (Del. 2000)).

[176] *Harris v. State*, 806 A.2d 119, 128 (Del. 2002).

[177] A155.

Detective Radcliffe's identification of cocaine vis-à-vis its scent, the record was barren of any facts that supported a finding of reasonable suspicion to extend the stop. Accordingly, this Court must reverse the judgment of the Superior Court.

CONCLUSION

For the reasons stated herein, Mr. Houston respectfully requests that this Honorable Court reverse the judgment of the Superior Court.

THE LAW OFFICE OF
BENJAMIN S. GIFFORD IV

/s/ *Benjamin S. Gifford IV*___________
Benjamin S. Gifford IV, ID No. 5983
14 Ashley Place
Wilmington, DE 19804
(302) 304-8544

Attorney for Defendant Below - Appellant

Dated: July 1, 2020