EFiled: Aug 21 2020 03:47PM EDT
Filing ID 65868559
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 REPLY BRIEF

THE LAW OFFICE OF
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DATED: August 21, 2020

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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.

The State invokes Delaware Uniform Rule of Evidence 1101 for the first time on appeal to support the trial court's erroneous decision to consider Detective Radcliffe's testimony that he was able to detect the "odor of cocaine" emanating from Mr. Houston's vehicle.[1] The State's belated attempt to utilize Rule 1101 to sidestep the Rules of Evidence fails, however, as Appellee fails to consider the procedural history of the case wherein the trial court *chose* to apply the Rules of Evidence during the suppression hearing.

Rule 1101(b)(1) as it exists today—and as it existed at the time of the suppression hearing in this case—is identical to Federal Rule of Evidence 1101(d)(1), as both Rules state that the collective Rules of Evidence "do not apply to . . . the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility."[2] So too is DRE Rule 104(a) identical to FRE 104(a), both of which state that where a court is deciding "whether a witness is

[1] Ans. Br. at 6-8.

[2] *Compare* D.R.E. 1101(b)(1) *with* F.R.E. 1101(d)(1).

qualified, a privilege exists, or evidence is admissible," a judge need not be bound by the evidentiary rules.[3] Where a Delaware court rule is virtually identical to its federal counterpart, "the reasoning in the federal cases must be given great weight in interpreting the rule."[4]

The Rules of Evidence are not automatically and immediately inapplicable in hearings seeking to suppress evidence, however, as it is ultimately up to the trial court whether to apply the Rules. Federal courts have recognized that Rule 104 is "*discretionary* in nature" and "grant[s] the court the discretion to dispense with the rules of evidence (except as to privileges) when the Court considers *preliminary* questions concerning the admissibility of evidence."[5] Here, the trial court used its discretion to analyze whether Detective Radcliffe's testimony was permissible under Rule 701 or whether it was specialized knowledge governed by Rule 702.[6]

Moreover, Appellant contends the extent to which Rules 1101 and 104 apply in hearings addressing whether evidence was illegally seized is a question that this Court has not yet addressed head-on. DRE 104 states that a court is not bound by

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[3] *Compare* D.R.E. 104(a) *with* F.R.E. 104(a).

[4] *Hoffman v. Cohen*, 538 A.2d 1096, 1098 (Del. 1988) (quoting *Tiffany v. O'Toole Realty Co.*, 153 A.2d 195, 199 (Del. Super. 1959)).

[5] *United States v. Waldron*, 2007 WL 2080520 at *4 (D.S.D. July 17, 2007) (citing *United States v. Matlock*, 415 U.S. 164, 172-77 (1974) (emphases in original)).

[6] *See, e.g.,* A116.

the rules of evidence when deciding whether evidence is admissible. A hearing on a motion to suppress illegally obtained evidence, however, does not raise a question of admissibility, but rather one of constitutionality. Other jurisdictions, recognizing that distinction, have held that "[m]otions to suppress . . . raise issues not of admissibility under the rules of evidence, but of illegality under the Fourth Amendment of the U.S. Constitution" and refused to apply the relaxed rules of evidence contemplated by Rule 104(a).[7] In fact, the Ninth Circuit has expressly held that the "Rules of Evidence *apply* in pretrial suppression proceedings pursuant to Rule 1101(d)[8] because such evidentiary hearings are not expressly excluded under Rule 1101(d)(2) and Rule 1101(d)(3)."[9]

The State next relies upon this Court's recent decision in *State v. Murray* for the proposition that testimony based on the specialized training and experience of a police officer during a suppression hearing does not fall within the ambit of rule 702.[10] Like its argument related to Rules 1101 and 1104, the State did not argue

[7] *State v. Schwetz*, 1986 WL 3671 at *3 (Ohio Ct. App. Mar. 14, 1986).

[8] FRE 1101(d)(1) is identical to DRE 1101(b)(1).

[9] *United States v. Brewer*, 947 F.2d 404, 410 (9th Cir. 1991) (emphasis added).

[10] Ans. Br at 10-11 (discussing *State v. Murray*, 213 A.3d 571 (Del. 2019)).

Murray to the trial court.[11] The issue in *Murray*, however difference not in degree, but in kind from the issue in this case, and is not helpful to this Court's analysis.

In *Murray*, police observed an individual "swinging his left arm naturally while holding his right arm close to his body, behavior which [the officer] explained was consistent with an armed individual."[12] The individual was walking "with his right arm canted and pinned against the right side of his body," a characteristic the officer testified was "one of the telltale signs of . . . somebody who is armed with a handgun."[13] The officer testified during a suppression hearing that he had received training on "characteristics of armed gunmen at the Wilmington Police Academy and at sessions hosted by the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives and the U.S. Department of Justice."[14] The authorities stopped the individual based, in large part, on observing those characteristics.[15]

The trial court found that the testimony regarding the signs of an "armed gunman" was not a lay opinion under DRE 701, but rather "'based on scientific,

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[11] *See generally* A042-50; A054-190.

[12] *Murray*, 213 A.3d at 574.

[13] *Id*.

[14] *Id*. At 575.

[15] *Id*.

technical, or other specialized knowledge,' and therefore, [was] within the scope of DRE 702."[16] The trial court reasoned that since testimony under Rule 702 must be "'based on sufficient facts or data' and 'the product of reliable principles and methods' that have been 'reliably applied' to the facts"—and since none of those criteria had been met—the testimony was not scientific and could not be given any significant weight.[17]

This Court reversed the trial court's granting of the motion to suppress.[18] It also rejected the Superior Court's analysis under Rule 702, holding that "[w]hen an officer testifies about something he has learned though his police training or through his police experience, however, a court cannot expect the testimony to be supported by a statistical analysis or a scientific study where there is no evidence that such an analysis or study exists."[19] Because the characteristics described by the officer are the type that cannot be tested or analyzed in a controlled setting, this Court found that it was unreasonable for the Superior Court to expect such materials.[20]

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[16] *Id*. at 576 (quoting *State v. Murray*, 2018 WL 1611268 at *3 (Del. Super. Ct. Apr. 2, 2018)).

[17] *Id*.

[18] *Id*. at 580.

[19] *Id*. (citing *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000)).

[20] *Id*. at 580.

What can be tested or analyzed in a controlled setting however, is whether cocaine emits any odor. Numerous courts have found, after testimony from police officers and experts alike, that cocaine itself has no odor.[21] The Superior Court of Massachusetts detailed the scientific method one officer described in attempting to justify his claim that he could detect an odor emanating from cocaine:

> 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 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.[22]

Whether a substance emits an odor—and the characteristics of any odor emitted—is a question only answerable by chemistry. Unlike in *Murray*, the question at

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[21] *See United States v. Cruz-Roman*, 312 F.Supp.2d 1355, 1358 (W.D. Wash. 2004) ("The Court finds that cocaine itself has no odor. What the officers may have been smelling was one of the solvents or cutting agents used in the processing of cocaine, such as acetone. Thus, some of the smells that were described were innocuous smells. For example, acetone has many legal commercial uses, such as paint thinner or fingernail polish remover, and therefore is not necessarily associated with cocaine."); *see also, e.g., United States v. Samuels*, 741 F.2d 570, 574 n.7 (3d Cir. 1984) (quoting testimony from a narcotics detective who described cocaine as "an odorless drug").

[22] *Com. v. Corniel*, 2005 WL 1668448 at *2 (Mass. Super. June 23, 2005)

issue in this case *was* one of clinical, textbook science. The State's attempt to analogize this issue to that discussed in *Murray* is wholly unavailing.

The State tries to sidestep this Court's holdings in *Seward v. State*[23] and *Norman v. State*[24] by claiming they were only decided in the context of trial testimony and that the improper opinions were "used to establish an element of an offense at trial."[25] The State offers no supporting language from the two cases or analysis of its own to support its conclusory argument, however, as it is wholly unsupported from a fair reading of this Court's precedent. Nor does the State address why its position in this case differs from *Seward*, where Appellee conceded during oral argument that an officer's ability to identify a "substance as crack cocaine was not within the common knowledge of a lay person and therefore the officer improperly testified as an expert."[26] Detective Radcliffe testified based on his alleged "training and experience" that he could detect the odor of cocaine. As in *Seward* and *Norman*, that testimony should have been analyzed under DRE 702 and excluded due to the officer's deficient qualifications.[27]

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[23] 723 A.2d 365 (Del. 1999).

[24] 968 A.2d 27 (Del. 2009).

[25] Ans. Br. at 13.

[26] 723 A.2d at 373.

[27] The officer has no recollection of ever taking a chemistry course, with the caveat that he believes he must have taken one in high school because he "think[s] your have to take" such a

The State contends that the entirety of Detective Radcliffe's interactions with Mr. Houston occurred while Corporal Saccomanno was searching for Appellant in NCIC.[28] The record is silent, however, as to when the NCIC results came back. What the officer made clear, however, was that he was not going to allow Mr. Houston to simply leave with a ticket prior to the arrival of the K-9 unit and a dog-sniff of the exterior of the driver's vehicle. The State does not address Detective Radcliffe's candid testimony at all in its Answering Brief.

The State would have this Court decide that a trial court is required to give full weight to any testimony offered by a police officer so long as such evidence is cushioned by the phrase "training and experience," regardless of whether the officer's claim is scientifically sound or even humanly possible. Numerous jurisdictions have held that cocaine is an odorless substance undetectable by the human nose. Detective Radcliffe's recitation of his "qualifications" to detect such an odor are scant, at best. Affirming the trial court's decision in this case will have

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course. A095. Detective Radcliffe has not participated in any specialized training dealing with chemistry since becoming a police officer. A096. The witness was unaware of the chemical components that make up cocaine. A098. The officer, when testifying as to where cocaine originates, stated that it started off in "brick form." A098. When pressed on the issue, Detective Radcliffe testified that drug cartels in Mexico "create cocaine in fields or however they do their business, for lack of better terms." A100. Such testimony does not give rise to the inference that Detective Radcliffe would have properly qualified as an expert were the trial court to have properly applied DRE 702.

[28] Ans. Br. at 14.

the unintended consequence of giving police *carte blanche* to search a citizen's person or property without reasonable articulable suspicion or probable cause so long as they can fall back on vague "training and experience" when challenged later. In a time when too many police officers are not equipped with body cameras, in-car cameras, or even radios that allow transmissions to be recorded for later review[29], some checks must exist to ensure that the rights of Delaware citizens are not being wantonly violated. Requiring a police officer to satisfy the requirements of Rule 702 when he testifies based on "training and experience" in areas that are able to be analyzed, assessed, and measured by scientific principles is not unreasonable, and should be the principle followed by all Courts in this State. The Delaware Way prescribes preeminent standards by which Delaware attorneys and politicians must abide—the same should be true of its law enforcement officers. Mr. Houston's matter must be reversed.

[29] A153-54.

CONCLUSION

For the reasons stated herein and in his Opening Brief, Mr. Houston respectfully requests that this Honorable Court reverse the judgment of the Superior Court.

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