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Case Number 102,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEREK HOPKINS,	)	
	)	
Appellant,	)	
	)	No. 102, 2022
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY
DUC 2001012867

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Appellant was convicted after a jury trial of several offenses stemming from a police pursuit during which drugs were located: felony drug dealing in cocaine, disregarding a police signal, conspiracy third degree, resisting arrest, misdemeanor illegal possession of cocaine, misdemeanor illegal possession of heroin, civil possession of marijuana, and various moving violations. This is Appellant's direct appeal of those convictions. Appellant prays this Honorable Court **VACATE** Appellant's convictions and remand the matter to the Superior Court for entry of **JUDGMENT OF ACQUITTAL** as to Count 1.

SUMMARY OF THE ARGUMENT

I. The Superior Court abused its discretion by refusing to accept a plea Agreement and so the convictions must be vacated and remanded to the Superior Court to impose the plea agreement.

II. The Superior Court erred as a matter of law by denying Appellant's Motion for Judgment of Acquittal because evidence in this case was insufficient to support a conviction by a reasonable jury on the charge of Drug Dealing (Count 1) – requiring that Appellant's conviction thereon be vacated and that the State be precluded from further prosecution.

III. As a result of both of the foregoing errors, the cumulative effect of the error prejudiced Appellant's substantial rights and eliminated the fairness and integrity of the trial – requiring the convictions to be vacated and that the State be precluded from further prosecution as to Count 1.

STATEMENT OF FACTS

Kent County Superior Court's Post-COVID Re-Opening

Derek Hopkins (Appellant) was prosecuted for this matter during the Kent County Superior Court's "Grand Re-Opening" as the COVID restrictions were beginning to be lifted in the Fall of 2021. At this stage, the Superior Court was conducting small numbers of jury trials using masks and courtrooms equipped with plastic barriers. The court set plea by appointment deadlines the Thursday prior to trial each week – after which a plea would not be accepted.[1] The practice was to conduct pre-trial zoom conferences the Friday before trial to set a batting order for the trial calendar to occur Monday morning.[2]

As the trial judge described: "we do things differently now, at least in this county, with exhibits. You're used to approaching the clerk with your documents and approaching the witness with documents…everything is now handled through the bailiff or court security officer."[3] "If there is anything you wish to discuss with opposing counsel, I'd like you to ask the Court's permission before you do that."[4] "As far as objections, we do have the headphones now…so we use headphones now instead of having sidebars."[5]

[1] A-177
[2] A-180
[3] A-255
[4] A-255
[5] A-256

Superior Court Rejects the Plea Agreement

Applying the plea by appointment and pre-trial zoom conference procedure, *supra*, the State tendered a plea offer to resolve all three of Appellant's then pending matters[6] with a recommendation that Appellant serve three years at Level V before any of his time would be suspended.[7] This plea was not accepted by the Thursday plea by appointment deadline. At the Friday pre-trial zoom conference, the matter was given priority to begin trial the following Monday.[8]

Over the weekend and with trial to commence on Monday, October 18, 2021, the State made what the trial calendar judge described as a "marked change from the State" in the plea offer.[9] For the first time, the State offered to recommend a probation sentence and to resolve the case on for trial only.[10] When this was presented to the trial calendar judge, the court held that the plea was past the plea by appointment deadline, that the court had to manage its docket in light of COVID safety concerns, and that there had been no changed circumstances since the deadline had expired.[11] The new offer was communicated to Appellant

[6] At the time, Appellant was charged with unrelated offenses in two other DUC numbers. Those two DUC numbered cases ultimately resolved by plea.
[7] A-177
[8] A-178
[9] A-177
[10] A-179 and A-214
[11] A-182

Monday morning at the courthouse in the downstairs lockup[12] – the first available opportunity - after the court rejected the proposed plea agreement.[13]

The case was assigned to a different judge to conduct the trial.[14] In turn, the trial judge held a standard pre-trial conference in chambers prior to jury selection.[15] There, the parties re-argued the plea rejection issue to the trial judge.[16] Ultimately, the plea remained rejected[17] and the matter proceeded to jury selection.[18] Again, the trial court identified the need to manage its docket during COVID and found that there were no changed circumstances to justify the late plea agreement.[19]

The trial judge said that it is "committed to the discretion of the court whether a plea is accepted, in particular, after final case review."[20] "We allow pleas to be entered up until the plea by appointment deadline, which was this past Thursday, close of business."[21] "But it is up to the discretion of the court whether a plea is accepted after that time, and if a plea is to be considered after that time, a change of circumstances must be shown."[22] "If the court begins to allow that

[12] A-183
[13] A-181
[14] A-183
[15] A-169
[16] A-169 through A-170
[17] A-170
[18] A-172
[19] A-170
[20] A-169
[21] A-169
[22] A-169

deadline just to be disregarded, and then plea negotiations to continue after the plea by appointment deadline, then the court loses control over its docket."[23]

Further, the trial judge said, "I understand that there was another plea offer made by the State, so maybe I should be hearing from the State."[24] "So I realize, [defense counsel], in a sense, you did not have this offer before this weekend. So again, I look to the State, and unless it can be shown to the court that there was some change in circumstances that prevented the State from making this offer before the plea by appointment deadline, I don't see any basis to reconsider [trial calendar judge]'s decision."[25]

Trial Evidence

Appellant was alleged to have been found in possession of three controlled substances: crack cocaine, heroin, and marijuana. Appellant was charged with Drug Dealing as to the cocaine only. He was not accused of intending to deliver any other substance.[26]

Trooper Holl of the Delaware State Police testified for the State.[27] In January 2020, Trooper Holl was assigned to patrol conducting traffic stops and conducting criminal investigations generally. He testified that he was assigned to

[23] A-169
[24] A-169
[25] A-170
[26] A-33
[27] A-272

the Governor's Task Force, and he also described himself as a "road officer."[28] He said that his drug investigations mostly stem from traffic stops.[29] He attended training in drug investigations through the State Police and the DEA.[30]

On January 21, 2020, at approximately 10:00 PM,[31] Trooper Holl was operating an unmarked vehicle on patrol in the area of Frederica, Delaware.[32] He observed Appellant's vehicle on Bowers Beach Road and observed that the vehicle was subject to a registration violation.[33] Based upon the registration violation, Trooper Holl conducted a traffic stop.[34] Appellant did not stop his vehicle and instead led the police on a chase until he eventually lost control and crashed.[35] Defendant continued to resist until taken into custody.[36] Lauren Melton, Appellant's passenger was also taken into custody.[37] Trooper Holl believed that Melton had also been charged with possessing drugs but was not sure.[38] Later, Officer McCann would testify that she was charged with possessing heroin located in Trooper Holl's car after her arrest and transport.[39]

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[28] A-272
[29] A-272
[30] A-273
[31] A-274
[32] A-273
[33] A-273
[34] A-273
[35] A-273
[36] A-274
[37] A-274
[38] A-275
[39] A-281

Officer Lloyd McCann, who was working with Trooper Holl that night, also testified for the State.[40] He also received drug training through his police work. McCann said that he confirmed that Appellant had failed to transfer the registration on the vehicle which was a violation.[41] McCann said it was approximately 10:30 PM and he described the traffic stop consistently with Holl.[42]

Then, McCann testified that he discovered a pill bottle in Appellant's pocket.[43] Inside the pill bottle he found crack cocaine.[44] Also on Appellant's person were two bags of marijuana.[45] Heroin was in the vehicle on the floor in the back seat[46] - but not on Appellant's person.[47] The heroin was packaged together as a single bundle (between 9 and 13 bags).[48] In Appellant's pants pocket was $573.00.[49]

[40] A-275
[41] A-275
[42] A-276
[43] A-277
[44] A-278
[45] A-278
[46] A-280
[47] A-278
[48] A-280
[49] A-279

The State entered the Controlled Substances Lab Report (also known as the Medical Examiner Report) into evidence as Exhibit 7 reflecting all un-tiered quantities.[50] The court determined that the marijuana offense was a civil violation as charged.[51]

Over objection, the trial judge admitted into evidence a Notice of Forfeiture Form pertaining to the money.[52] The jury was told that, on the form, Appellant indicated that the money was seized from him but did not belong to him.[53]

McCann testified that crack cocaine is usually ingested by inhalation.[54] He said you can attach it to a cigarette or use a pipe.[55] He said that he found no drug paraphernalia in the car and that he would expect a drug user to have paraphernalia.[56] Further, he testified that drug paraphernalia (used to ingest) is not normally found on dealers, that dealers sometimes have more than one type of drug, and that dealers have scales and money and that users do not.[57]

[50] A-282
[51] A-284
[52] A-279
[53] A-280
[54] A-281
[55] A-281
[56] A-280 through A-281
[57] A-281

On cross examination, McCann described Bowers Beach Road, the location where the arrest occurred, as having not much along it apart from residential houses.[58] At the end of the road in the Town of Bowers, there is a restaurant/bar.[59] The arrest occurred prior to the COVID shutdown.[60] When McCann observed the vehicle, it was headed in the direction of the restaurant/bar.[61] He testified that he did not know what Appellant's intent was with the drugs. Instead, he was drawing an inference. "I mean I'm not in his head. But the totality of the circumstances with drugs, money, and him fleeing from the police, you could conclude that there was drug sales."[62] "Without him stating, yes, I'm a drug dealer, yes, I do not know."[63] Referring to the Medical Examiner's Officer Report admitted as State's Exhibit 7, the total weight of the cocaine was 1.3124 grams.[64] He testified that all of the drugs in this case, the cocaine, heroin, and marijuana, were all in un-tiered quantities as defined by Title 16 of the Delaware Code.[65] He did not know how

[58] A-284 through A-285
[59] A-284 through A-285
[60] A-284
[61] A-285
[62] A-287
[63] A-287
[64] A-287 and A-325
[65] A-287 through A-288

much 1.3 grams of cocaine costs to purchase.[66] He did not know how much cocaine he could by with $50.00.[67] There were no scales.[68]

Denial of Motion for Judgment of Acquittal

Prior to submission of the case to the jury, Appellant made an oral application for judgment of acquittal pursuant to Superior Court Criminal Rule 29(a).[69] The motion was directed at Count 1 (Drug Dealing) only, arguing that the State had failed to meet its *prima facie* burden as to the elements of "intent to deliver."[70] It was argued that the facts and data the officer applied to infer intent to deliver were so insufficient that no reasonable juror would draw the same inference.[71] The trial court denied the motion, comparing the facts to those in *Laws v. State*, 840 A.2d 641 (Del. 2003).[72]

[66] A-289
[67] A-289
[68] A-286
[69] A-297
[70] A-297
[71] A-297
[72] A-297 through A-298

ARGUMENT

I. TRIAL COURT ABUSED ITS DISCRETION BY REJECTING THE PLEA AGREEMENT WHEN IT WAS NOT OFFERED BY THE STATE TO APPELLANT UNTIL AFTER THE PLEA BY APPOINTMENT DEADLINE AND THE STATE'S DELAY CONSTITUTED GOOD CAUSE

QUESTION PRESENTED

Did the trial court abuse its discretion by refusing to accept a plea agreement after the plea by appointment deadline when the State did not make any probation offer prior to the plea by appointment deadline? (*Error preserved in the record at A-168 through A-170 and A-175 through A-184)*

STANDARD OF REVIEW

The Delaware Supreme Court reviews the trial court's rejection of a plea agreement for an abuse of discretion.[73] "This appeal presents issues relating to the trial court's case management and the acceptance or rejection of a plea offer, issues that this Court reviews for an abuse of discretion."[74]

[73] *Slade v. State*, 746 A.2d 277 (Del. 2000).
[74] *Washington v. State*, 844 A.2d 293 (Del. 2003).

MERITS OF THE ARGUMENT

Superior Court Rule 11(e)(3) states that "except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court."[75]

The rule calls for a showing of good cause. The Superior Court looked for a showing of changed circumstances. From Appellant's perspective, there certainly was a major change in circumstance between the time of the plea by appointment deadline and the morning of trial. A brand-new option to accept a probation sentence is a changed circumstance from the State's previous offers requiring Level V time in a package deal. That significant change in circumstance was no fault of Appellant's. It was the State's delay in making a probation offer.

This development in the case also created good cause. Even the trial court recognized that the new and improved plea offer itself is a "marked change in the plea offer." That is a changed circumstance for Appellant – the person serving the sentence. Further, even the trial court recognized that the new plea offer was not available to Appellant in time to comply with the plea by appointment deadline. His inability to comply with the deadline is good cause to accept the plea after the deadline. The trial court looked to the State to indicate what changed that prevented the State from making the offer previously.

[75] *Slade v. State*, 746 A.2d 277 (Del. 2000).

Even if nothing changed for the State, it did for Appellant. Appellant had good cause to enter the plea because the plea offer was not available to him soon enough to have complied with the plea by appointment deadline. There were no other reasons cited by the court to reject the plea except for the deadline.

In *Howard v. State*,[76] this Court, while considering the rejection of a *Robinson* Plea,[77] identified some circumstances the rejection of a proffered guilty plea may constitute an abuse of discretion. The Court did not create an exhaustive list of possible scenarios that could create good cause – as each situation is fact specific and weighs competing interests.[78]

In *Howard*, the Court ruled that the trial court's rejection of a *Robinson* plea was not an abuse of discretion because of the unique nature of a plea of *nolo contender* and because the State was opposed to a *Robinson* plea. In *Slade v. State*,[79] there was no abuse of discretion where the defendant had previously rejected the same offer that he sought to accept after trial began and there was no change in circumstance. In *Washington v. State*,[80] there was no abuse of discretion where a late plea was rejected by the trial court because the defendant rejected the

[76] 458 A.2d 1180 (Del. 1983).
[77] *Robinson v. State*, 458 A.2d 1180 (Del. 1972).
[78] See, e.g., *Unites States v. Hecht*, 683 F.2d 651 (3rd Cir. 1981); *Unites States v. Adams*, 634 F.2d 830 (5th Cir. 1981); *United States v. Davis*, 516 F.2d 574 (7th Cir. 1975); *United States v. Navedo*, 516 F.2d 293 (2nd Cir. 1975).
[79] 746 A.2d 277 (Del. 2000).
[80] 844 A.2d 293 (Del. 2003).

plea prior to trial and then sought to accept the plea after trial. The *Washington* Court said "to allow a defendant to accept a plea offer after he or she has been convicted and sentenced would create significant problems for judicial economy and would interfere with trial court's control over their dockets and scheduling."[81]

In addition to the good cause created by the previously unavailable plea offer, which was a significant change in circumstance, other considerations should have led the trial court to accept the plea. Both the State and the Appellant wanted to plea the case. Trial had not yet begun. The offer Appellant sought to accept had never been made before. The Court was concerned with COVID precautions; however, as argued to the trial court by the State, the jurors could have been sent home after a plea rather than sit through a trial – which would have been safer for the jurors considering the COVID concerns.[82]

The trial court wanted to manage its docket to reduce jurors coming to the courthouse and to work through a backlog of cases. However, that was being achieved anyway. As trial counsel told the court: "We are all trying here. I must have had a half dozen cases on that final case review calendar that were mooted early by resolving them early. This was the only one. And this guy was on absconder status for a long period of time, and these court dates were scheduled in

[81] 844 A.2d 293 HN 3 (Del. 2003)
[82] A-169

pretty quick succession. So, we are ready to go, but we do not want to. We want to plea it."[83]

Other jurisdictions have addressed the issue of plea rejection based on timing (post-deadline pleas) with varying results. In *United States v. Ellis*,[84] the United States Circuit Court of Appeals found no abuse of discretion rejecting a plea based on tardiness alone. In *United States v. Gamboa*,[85] the United States Circuit Court of Appeals found no abused of discretion in rejected a plea agreement because it did not adequately reflect the serious nature of the offense and because it came after the plea deadline.

This Court should reject that analysis and instead adopt the holding in *State v. Hager*.[86] In *Hager*, the Iowa Supreme Court held that it is an abuse of discretion to reject a plea agreement simply because it comes after a court-imposed plea deadline.[87] The *Hager* court said that the trial court's strict adherence to a plea by appointment deadline in this case was no exercise in discretion at all. Courts abuse it discretion by failing to exercise any discretion.[88] "While deadlines are imposed as a means to eliminate the expense and time of assembling witnesses, jurors and others for a trial that never occurs because the defendant pleads guilty on the

[83] A-170
[84] 547 F.2d 863 (5th Cir. 1977)
[85] 166 F.3d 1327 (11th Cir. 1999)
[86] 630 N.W.2d 828 (Iowa 2001).
[87] *State v. Hager*, 630 N.W.2d 828 HN 13 (Iowa 2001).
[88] *State v. Hager*, 630 N.W.2d 828 HN 12 (Iowa 2001).

morning of trial, the refusal to accept such a plea on the morning of trial only compounds the time and expense when the parties are forced to try the case."[89]

Other appellate courts have also held that it is an abuse of discretion to reject a plea simply because it is presented after a court-imposed deadline.[90] In *United States v. Robertson*,[91] the 10th Circuit Court held that "while there is no doubt a district court has considerable authority in managing its docket, scheduling concerns alone are not of sufficient importance to justify infringement of prosecutorial discretion resulting here (plea rejection by court)."

In *State v. Sears*,[92] the Supreme Court of Appeals of West Virginia held that a trial judge did not utilize discretion when he "divested himself of his entrusted discretion with respect to the merits of the plea agreement, and adhered to a 'local rule' of his own making prohibiting plea agreements after pretrial hearings were concluded." As in the case at the bar, the West Virginia court noted that adherence to the strict deadline without considering other factors does not control the docket.[93]

[89] *State v. Hager*, 630 N.W.2d 828 HN 12 (Iowa 2001).
[90] *State v. Hager*, 630 N.W.2d 828 HN 5 (Iowa 2001).
[91] 45 F.3d 1423 (10th Cir. 1995).
[92] 208 W.Va. 700 HN 9 (W.Va. Supr. Ct. App. 2000).
[93] 208 W.Va. 700 HN 9 (W.Va. Supr. Ct. App. 2000)

Here, the trial court ignored every reason the parties presented to accept the plea and instead prioritized control of its docket over the fundamental fairness to the Appellant. In fact, the competing interest in this case justified accepting the late plea considering all the circumstances. The jury would not have been forced to proceed with a trial and could have been sent home or assigned to a different case. Other matters on trial counsel's case load had resolved by plea. As indicated by trial counsel, this trial was scheduled quickly and in the midst of the COVID re-opening after Appellant had been missing on absconder status. Both parties wanted to resolve by plea. For the reasons discussed, *infra*, the probation plea was reasonable way to resolve the case given the specific facts. The trial court impermissibly infringed on prosecutorial discretion to offer a plea. The trial court denied Appellant a fundamentally fair proceeding. Appellant suffered prejudice because he was convicted on all counts and sentenced to six years at Level V.[94]

[94] Exhibit 1 (Sentence Order)

II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE NO REASONABLE JUROR COULD HAVE CONVICTED APPELLANT BEYOND A REASONABLE DOUBT.

QUESTION PRESENTED

Did the trial court abuse its discretion or commit error of law when it denied Appellant's motion for judgment of acquittal? *(Error Preserved in the Record at A-298 through A-299).*

STANDARD OF REVIEW

The Court reviews the sufficiency of the evidence in the record *de novo*.[95] "The standard of review in assessing an insufficiency of evidence claim is 'whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt.'"[96]

MERITS OF THE ARGUMENT

In any prosecution for an offense, a *prima facie* case for the State consists of some credible evidence tending to prove the existence of each element of the offense. No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.[97] The beyond a reasonable doubt

[95] *Grayson v. State*, 210 A.3d 724 (Del. 2109).
[96] *Jones v. State*, 227 A3d 1097 (Del. 2020).
[97] 11 *Del. C.* § 301.

standard is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I § 8 of the Delaware Constitution.[98]

In this case, no rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt of Count 1 – Drug Dealing.[99] That is because there is no evidence to support a finding that Appellant had the requisite state of mind – ***intent*** to deliver the cocaine found in his possession.[100]

Erroneously, the trial court relied upon *Laws v. State*[101] in denying the Motion for Judgment of Acquittal.[102] In *Laws*, plain-clothed police officers were investigating suspected drug activity in a Wilmington neighborhood. Officers observed *Laws*, near North Tatnall and Twentieth Streets, with two other individuals. Based on their training and experience, officers observed an apparent drug transaction between Mr. Laws' companions. Officers then observed Laws interacting with another individual around the corner. When officers approached him, Laws fled. During the chase, Laws threw a gun into some bushes. On Laws' person, officers located a pill bottle containing six individually wrapped bags of

[98] See *In Re Winship*, 397 U.S. 358 (1970).
[99] *Jones v. State*, 227 A3d 1097 (Del. 2020).
[100] The Motion for Judgment of Acquittal pertains to Count 1 only.
[101] 840 A.2d 641 (Del. 2003).
[102] A-299

crack cocaine. When officers asked him what he was doing with the drugs, Laws replied "that he needed some extra money."[103]

Applying *Cline v. State*,[104] the *Laws* Court stated: "here the additional element is satisfied by Laws' admission to the officers that he possessed the drugs because he needed extra money. Further, the fact that Laws possessed a gun, but no drug paraphernalia, at the time of his arrest is sufficient credible evidence of intent to deliver the drugs. Thus, while the packaging and quantity of the cocaine, the location of the incident, and Laws' flight might be equal indicators of either possession for personal use or intent to deliver, his admission, his possession of a gun, and his lack of drug paraphernalia sufficiently form a basis from which a reasonable person could infer an intent to deliver."[105]

In *Cline v. State*,[106] the Delaware Supreme Court held that an "intent to distribute" a controlled substance may be established through evidence of an additional element beyond mere possession. This additional element may include an admission by the defendant that the drugs were not for personal use, expert testimony about the amount of the type of packaging generally used by sellers versus users, or some other credible evidence.[107] In *Cline*, the Supreme Court said

[103] *Laws v. State*, 840 A.2d 641 (Del. 2003)
[104] 720 A.2d 891 (Del. 1998)
[105] *Laws v. State*, 840 A.2d 641 at HN 1 (Del. 2003)
[106] 720 A.2d 891 (Del. 1998)
[107] *Laws v. State*, 840 A.2d 641 (Del. 2003) citing *Cline v. State*, 720 A.2d 891 (Del. 1998)

that there was insufficient evidence to prove intent to deliver beyond a reasonable doubt. There, the State failed to produce any expert testimony distinguishing between mere possession and possession with intent to deliver.

The *Cline* Court reasserted its holdings in previous cases[108] that possession, quantity and packaging of drugs are not necessarily sufficient, standing alone, to prove intent to deliver. In *Redden v. State*, as in Appellant's case, there was no direct evidence of intent to deliver. In *Redden* and in Appellant's case, the State asked the jury to draw an inference regarding state of mind based on circumstantial evidence. The *Redden* Court held that the circumstantial evidence rule did not save the conviction because "intent to sell is not the only reasonable hypothesis to be drawn from the possession of the quantities here involved."[109]

Even considering the evidence in a light most favorable to the State, no reasonable juror could have found beyond a reasonable doubt that Appellant possessed cocaine with the intent to deliver. Quantity and packaging alone are insufficient to infer intent to deliver without more. Here, the State's expert testimony was grossly insufficient to be "more" enough.

[108] *Redden v. State*, 281 A.2d 490 (Del. 1971); *Farren v. State*, 285 A.2d 411 (Del. 1971); *Perry v. State*, 303 A.2d 658 (Del. 1973).
[109] *Redden v. State*, 281 A.2d 490, 491 (Del. 1971)

McCann did not reasonably apply the facts of the case to his training and experience. Instead, his testimony was an attempt to contort the facts to match his bias opinion. There were no tiered amounts of drugs at all. All three of the substances were less than a Tier 1 Quantity as defined by Title 16 Chapter 47 of the Delaware Code. There is no evidence that the cocaine was in multiple bags. There were no scales. Even if crack cocaine is "chipped off" when sold, that fact remains neutral because it would have to be "chipped off" to be used, too. On cross, the officer could not even testify to how much 1.3 grams of cocaine costs. He didn't know how much cocaine he could buy with $50.00. There were no observations of drug sales. There was no admission of intent to deliver – only mere possession of the marijuana and the cocaine. Appellant was not accused of intending to deliver any other drugs. The marijuana was a civil violation. It matters not that Appellant fled from the police – it is still illegal to merely possess the cocaine which he knew that he had.

In *Farren v. State*,[110] this Court found intent to deliver to be the only reasonable inference where officers observed sales activity and the defendant possessed 20 individual "nickle bags" of marijuana which was about two ounces in weight and sufficient for 80 cigarettes). In *Perry v. State*, this Court found intent to deliver to be the only reasonable inference where defendant possessed twelve

[110] 285 A.2d 411 (Del. 1971)

containers comprising a total quantity of 7.33 pounds in his car which was enough for approximately fifteen thousand cigarettes.[111]

However, in Appellant's case, as in *Redden*, there is an equally, if not more, reasonable hypothesis to the possession of the quantities of drugs here involved. Appellant was driving down a road in a residential area that was not described as a high crime area known for drug activity. It was prior to COVID and it was 10:30 PM. He and his companion, Lauren Melton, were driving in the direction of the restaurant/bar in the Town of Bowers. It is reasonable to believe that a couple out at night to a bar would have money to spend at the bar and drugs to use themselves but not to sell. It is reasonable to infer that Appellant and Ms. Melton were out for the night to party and nothing more.

Because no reasonable juror could have found Appellant guilty beyond a reasonable doubt of Drug Dealing, his conviction as to Count 1 must be vacated and further prosecution must be precluded pursuant to 11 *Del. C.* § 207 because there would be a determination by the Court that there is insufficient evidence. The Court need not consider a lesser included offense of that charge because Appellant was also convicted of mere possession of that same quantity of cocaine further down in the Indictment.

[111] 303 A.2d 658 (Del. 1973)

III. THE CUMULATIVE EFFECT OF THE ERRORS IN THE TRIAL COMBINE TO PREJUDICE APPELLANT'S SUBSTANTIAL RIGHTS REQUIRING THE CONVICTIONS TO BE VACATED

QUESTION PRESENTED

Did the cumulative effect of the errors prejudice substantial rights and jeopardize the fairness and integrity of the trial process? *(Errors preserved as noted, supra).*

STANDARD OF REVIEW

The Court utilizes a plain error standard of review to assess cumulative error.[112] "When there are multiple errors in a trial, this Court weighs their cumulative effect to determine if, combined, they are 'prejudicial to substantial rights so as to jeopardize the fairness and integrity of the trial process.'"[113]

MERITS OF THE ARGUMENT

"When there are multiple errors in a trial, this Court weighs their cumulative effect to determine if, combined, they are 'prejudicial to substantial rights so as to jeopardize the fairness and integrity of the trial process.'"[114] The Court utilizes a plain error standard of review to assess cumulative error.[115]

[112] *Hoskins v. State*, 102 A.3d 724 (Del. 2014).
[113] *Crump v. State*, 204 A.3d 114 (Del. 2019).
[114] *Crump v. State*, 204 A.3d 114 (Del. 2019).
[115] *Hoskins v. State*, 102 A.3d 724 (Del. 2014).

Here, the assignments of error have merit. Their combined effect was prejudicial to Appellant's substantial trial rights, eliminated the integrity of the trial and the trial was not fair. Appellant was accused of intending to deliver the cocaine in his possession. Despite that allegation, Appellant was aware of the facts of the case as they are outlined herein. It was entirely reasonable for Appellant to desire a probation sentence – commonly associated with misdemeanor drug possession offenses - because the facts of the case do not evidence intent to deliver. However, by the time the State would come to that realization and offer probation, the deadline to enter the plea in the Superior Court had passed. It was no fault of Appellant's that the State made such a delay. It was no fault of Appellant's that the Superior Court was engaged in a rigid and aggressive re-opening plan.

As a result of being forced to go to trial, he was convicted of Drug Dealing even though no reasonable juror could have found him guilty beyond a reasonable doubt. He should have only been convicted of mere possession – a sentence for which he would have received the probation sentence offered to him too late.

CONCLUSION

Wherefore, Appellant prays this Honorable Court **VACATE** Appellant's convictions for the reasons stated herein. Upon the Court finding insufficient evidence to sustain the convictions, Appellant prays that this Court **REMAND FOR ENTRY OF JUDGMENT OF AQUITTAL** as to Count 1 pursuant to Appellant's constitutional double jeopardy rights and 11 *Del. C.* § 207. As to the remaining charges in the case, Appellant prays that the Court **REMAND FOR ACCEPTANCE OF A PLEA AGREEMENT** consistent with 11 *Del. C.* § 207 and with the probation recommendation that was previously rejected by the Superior Court.

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