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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARNELL MARTIN, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	)	No. 301, 2024

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: September 17, 2024

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NATURE OF THE PROCEEDINGS

On April 17, 2018, the Grand Jury returned an Indictment against Darnell Martin, charging him with one count each of Drug Dealing, Aggravated Possession, Conspiracy in the Second Degree, and Failure to Use a Turn Signal.[1] Mr. Martin was initially represented by Philip Finestrauss, Esquire, but Patrick Collins, Esquire (hereinafter "Trial Counsel"), substituted his appearance for Mr. Finestrauss on September 1, 2017.[2]

On October 4, 2017, Trial Counsel filed a Motion to Suppress Evidence on behalf of Mr. Martin.[3] Therein, the defense contended that the police impermissibly extended the traffic stop of Mr. Martin's automobile and lacked probable cause to search the vehicle.

The parties appeared for a hearing in the Superior Court on Mr. Martin's Motion to Suppress on December 21, 2017.[4] Upon conclusion of the hearing, the trial court denied Mr. Martin's motion.[5]

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[1] A012-19.

[2] A001-03.

[3] A003; A019-43.

[4] A004; A044-114.

[5] A113.

On January 8, 2018, Mr. Martin appeared for Final Case Review.[6] On that date, the Superior Court engaged in a colloquy with the defendant to ensure that Mr. Martin was knowingly, intelligently, and voluntarily rejecting a plea offer that the State had extended.[7] During that proceeding, Mr. Martin also waived his right to a jury trial after a colloquy with the trial court, opting instead to proceed to a stipulated bench trial.[8]

That trial took place the following day before The Honorable Paul R. Wallace.[9] Prior to trial, the State entered a *nolle prosequi* as to the single count of Conspiracy in the Second Degree.[10] After the testimony of one witness, the trial court found Mr. Martin guilty of both Drug Dealing and Aggravated Possession.[11] The Superior Court acquitted the defendant of the traffic violation.[12]

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[6] A005; A115-124.

[7] A119-20.

[8] A120-23.

[9] A005; A125-34.

[10] A126.

[11] A132.

[12] A132.

After rendering its verdict, the Superior Court moved immediately to sentencing.[13] The trial judge imposed a sentence as to the count of Drug Dealing of twenty-five years of incarceration, suspended after serving two years for eighteen months at supervision Level III.[14] The two-year sentence was a minimum-mandatory period of incarceration.[15] The judge imposed no separate sentence for the Aggravated Possession conviction, as that offense merged with the Drug Dealing for the purpose of sentencing.[16]

Trial Counsel filed a timely Notice of Appeal in this Court, ultimately filing an Opening brief on behalf of Mr. Martin on April 9, 2018.[17] The State filed an Answering Brief on May 11, 2018,[18] and Trial Counsel filed a Reply Brief on June 4, 2018.[19] The Court affirmed Appellant's conviction on October 12, 2018.[20] The

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[13] A132-34.

[14] A134; A135.

[15] A134.

[16] A134.

[17] A139.

[18] A333.

[19] A355.

[20] A369; *see also Martin v. State* ("*Martin I*"), 2018 WL 4959037 (Del. Supr. Oct. 12, 2018).

Supreme Court filed its Mandate with the Superior Court on October 30, 2018, which was subsequently docketed the following day.[21]

Mr. Martin filed a timely *pro se* Motion for Postconviction Relief on December 6, 2018.[22] The same day, the defendant filed a Motion for Appointment of Counsel.[23] The Superior Court ordered the appointment of Counsel on January 2, 2019, and postconviction counsel was appointed on March 28, 2019.[24]

Mr. Martin filed an Amended Motion for Postconviction Relief on December 3, 2019, raising one claim of ineffective assistance of counsel.[25] Trial Counsel filed an Affidavit responding to Appellant's postconviction claim on January 22, 2020.[26] On April 24, 2020, the State filed a response to Mr. Martin's Amended Motion.[27] Mr. Martin filed a Reply in Support of his Amended Motion on August 13, 2020.[28]

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[21] A006; A372.

[22] A006; A376-79.

[23] A006.

[24] A006-07.

[25] A011; A380-423.

[26] A011A; A424-28.

[27] A011A; A429-41.

[28] A011A; A442-58.

On November 30, 2020, the Superior Court asked for supplemental briefing regarding procedural bars and the effect of this Court's recent decision in *Green v. State*[29] on Mr. Martin's pending postconviction motion.[30] Both the State and Appellant filed letters in response to the trial court's inquiry on December 31, 2020.[31]

On February 24, 2021, the Superior Court discharged Mr. Martin from probation at the request of Probation and Parole.[32] Three weeks later, on March 17, 2021, the trial court issued an Order dismissing Appellant's Motion for Postconviction Relief on the basis that, because he was no longer on probation, Mr. Martin was no longer "in custody" as required by Superior Court Rule of Criminal Procedure 61 and, consequently, did not have standing to collaterally attack his conviction.[33] The Superior Court issued its decision without asking for additional

[29] 238 A.3d 160 (Del. 2020).

[30] A011A; A459-60.

[31] A011B; A461-66.

[32] A011B.

[33] A011B; A467-71; *State v. Martin* ("*Martin II*"), 2021 WL 1030348 (Del. Super. Ct. Mar. 17, 2021).

briefing from the parties as to whether Mr. Martin had standing to pursue postconviction relief, instead raising and deciding the issue *sua sponte*.[34]

Mr. Martin filed an Opening Brief challenging the denial of his Amended Motion for Postconviction Relief in this Court on June 4, 2021. The State filed an Answering Brief on July 7, 2021. Appellant thereafter filed a Reply Brief on July 26, 2021.

On October 28, 2021, this Court issued an Order remanding the matter back to allow the Superior Court to address two issues upon which it had not received briefing: (1) whether a person convicted of a felony for the first time faces collateral consequences under this Court's holding in *Gural v. State*;[35] and (2) whether a person who has received a pardon must be treated the same as a first-time felon for purposes of analyzing the collateral consequences rule in connection with resolving a motion for postconviction relief.[36]

Upon remand, the Superior Court convened a status conference on November 12, 2021, at which the trial court requested briefing from both parties.[37] Mr. Martin filed his Opening Supplemental Memorandum on December 13,

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[34] *See generally* A011B.

[35] 251 A.2d 344 (Del. 1969).

[36] A476.

[37] A011C.

2021.[38] The State filed its Response on January 25, 2022.[39] Appellant had the last word, filing his Reply on February 9, 2022.[40] Following the conclusion of briefing, the Superior Court requested oral argument, which occurred on May 24, 2022.[41]

The Superior Court issued its decision on November 28, 2022.[42] The trial court determined that *Gural* was no longer good law and that "the Court shouldn't apply the collateral consequences doctrine under present-day Rule 61 at all."[43] In response to the first question raised by this Court, the trial court answered that "a person convicted of a felony for the first time may claim to face collateral consequences under *Gural v. State*, but such a claim is not cognizable under Rule 61 because of the Rule's now-clearly-defined scope and procedural bars."[44] The Superior Court additionally opined that if this Court were to determine the

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[38] A011C.

[39] A011D.

[40] A011D.

[41] A011D.

[42] *State v. Martin* ("*Martin III*"), 2022 WL 17244558 (Del. Super. Ct. Nov. 28, 2022); A011E.

[43] *Id*. at *4.

[44] *Id*. at *6.

collateral-consequences rule *did* apply to Rule 61, that a person who satisfies his sentence during the pendency of the postconviction process must meet the heavy requirements of Rule 61(d)(2): (1) establish actual innocence utilizing newly-discovered evidence; or (2) demonstrate that a new rule of constitutional law, that was made retroactive to cases on collateral review either by this Court or the United States Supreme Court, applies to the movant's case, which serves to render the conviction invalid.[45]

Finally, the trial court answered this Court's second questions as follows: when balancing the finality, resource, and fairness factors that contour any collateral consequences rule, a pardoned felon need not necessarily be treated the same as on challenging his first conviction.[46]

This Court subsequently requested supplemental briefs addressing the Superior Court's November 28, 2022 Order, as well as various other cases and questions posed by this Honorable Court. After such briefing and oral argument, this Court issued a decision reversing the Superior Court's dismissal of Appellant's postconviction motion, ruling that the collateral consequences of his conviction

[45] *Id*. at *6-7 (discussing *Super. Ct. Crim. R.* 61(d)(2)). Rule 61(d)(2) applies to petitioners filing a successive motion for postconviction relief. *See Super. Ct. R.* 61(d)(2).

[46] *Id*. at *8.

operated as an exception to the mootness doctrine.[47] This Court subsequently remanded the matter to the trial court for a determination on the merits of Appellant's postconviction claims.[48]

Ultimately, the trial court issued an Order denying Mr. Martin's postconviction motion on July 1, 2024.[49] Appellant filed a timely notice of appeal. This is Mr. Martin's Opening Brief.

[47] *Martin v. State* ("*Martin IV*"), 306 A.3d 50, 65 (Del. 2023).

[48] *Id*.

[49] *State v. Martin* ("*Martin V*"), 2024 WL 3273429 (Del. Super. Ct. July 1, 2024); A011F; A471-81.

SUMMARY OF ARGUMENT

The Superior Court erred by denying Mr. Martin's postconviction motion despite the failure of Trial Counsel to research legal precedent regarding whether the strength of the odor of marijuana correlates to the amount of marijuana likely present. Trial Counsel was aware the State was likely to advance an argument during the suppression hearing that the stronger the odor of marijuana, the more likely to be present. Mr. Martin possessed a medical marijuana card which allowed him to possess marijuana, thus differentiating his case from others where the odor of marijuana alone gave rise to probable cause to search his vehicle.

Trial Counsel's failure to find case law establishing that the pungency of the odor has no correlation to the amount of marijuana present directly resulted in the denial of the suppression motion, as the Superior Court premised its decision that police had probable cause to search Appellant's vehicle on the mistaken belief that the stronger the odor of marijuana, the greater the quantity of the drug likely to be present. Mr. Martin accordingly established ineffectiveness and prejudice under *Strickland v. Washington*[50] and should have been granted postconviction relief.

[50] 466 U.S. 668 (1984).

STATEMENT OF FACTS

Members of the Wilmington Police Department commenced an investigation of Timothy Adkins after receiving a tip that he was transporting large quantities of marijuana across the country and selling it in Wilmington, Delaware.[51] The authorities were also provided an address for Adkins located within the city.[52] A confidential source told the police during the early part of 2017 that Adkins was transporting large quantities of marijuana utilizing freight trucks.[53]

The authorities set up covert surveillance on February 7, 2017 at 712 Dora Moors Lane in New Castle, the residence where Adkins was believed to be staying.[54] The authorities observed a box truck arrive, whereupon the driver removed three duffel bags and brought them to the residence.[55]

Police followed Adkins after he left the residence and proceeded to 228 Cityview Avenue.[56] They followed the suspect to a parking lot on Route 9 where

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[51] A036.

[52] A036.

[53] A036.

[54] A037.

[55] A037.

[56] A037.

his tractor-trailer was parked, along with three cabs.[57] The parking lot was located at 314 Baywest Boulevard in New Castle.[58]

Police observed a Jeep Liberty pull into the driveway of the Dora Moors Lane residence shortly before noon.[59] After checking the registration, police learned the Jeep was co-owned by Darnell Martin.[60] A black male exited the vehicle and entered the residence.[61] The same man exited at approximately 12:40 p.m. carrying one of the duffel bags.[62] The driver of the Jeep was accompanied by Adkins as he left the home.[63] The man placed the duffel bag into the Jeep and left the residence, whereupon police began to follow the vehicle.[64] The Jeep proceeded to the Baywest parking lot.[65]

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[57] A037.

[58] A037.

[59] A038.

[60] A038.

[61] A038.

[62] A038.

[63] A038.

[64] A038.

[65] A038.

One of the trucks at the parking lot was jointly registered to Darnell Martin and K&M Trucking LLC.[66] The driver of the Jeep exited his vehicle and entered the truck registered to Martin and K&M via the passenger door.[67] A few seconds later, he exited the truck and reentered the Jeep, leaving the parking lot.[68] Police once again followed.[69]

The Jeep next drove to 1 Karen Lane, where the driver parked and entered the residence.[70] At some point the Jeep left that location and proceeded to 11 Marina Lane.[71] The driver stayed inside the apartment complex located at Marina lane for a short period of time, before returning to his vehicle and leaving the area.[72] At Llangollen Boulevard and Route 9, Detective Ketler purportedly observed the Jeep fail to use its traffic signal and officers initiated a traffic stop.[73]

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[66] A038.

[67] A038.

[68] A038.

[69] A038.

[70] A038.

[71] A040.

[72] A040.

[73] A040; A050.

Special Agent Oliver with the FBI approached the vehicle first, and Detective Ketler purportedly approached the vehicle as well.[74] Detective Ketler detected a "large amount of marijuana emanating from the vehicle."[75] The authorities asked the driver, eventually identified as Mr. Martin, whether he had any contraband in the vehicle.[76] Mr. Martin responded that he had a small amount of marijuana, but that he was a medical marijuana cardholder.[77]

Mr. Martin was removed from his vehicle and a drug-sniffing dog was brought to the scene with its handler, Detective Cintron.[78] The canine positively alerted to the presence of illegal drugs along the passenger side of the vehicle.[79] Detective Schupp searched the vehicle and located a black duffel bag on the backseat.[80] Marijuana was found inside the bag.[81]

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[74] A050.

[75] A051.

[76] A052.

[77] A052.

[78] A040.

[79] A040.

[80] A128.

[81] A128.

ARGUMENT

CLAIM I. THE SUPERIOR COURT ERRED IN DENYING MR. MARTIN'S MOTION FOR POSTCONVICTION RELIEF DESPITE THAT TRIAL COUNSEL FAILED TO RESEARCH AND FIND CASE LAW REGARDING THE STRENGTH OF ODOR OF MARIJUANA THAT UNEQUIVOCALLY CONTRADICTED THE SUPPRESSION JUDGE'S BASIS FOR DENYING HIS MOTION TO SUPPRESS.

A. Question Presented

Whether the trial court erred in determining trial counsel was ineffective for failing to research legal precedent establishing that the strength of the odor of marijuana has no correlation to the quantity of marijuana present, despite knowing that such fact would be an issue at the suppression hearing, and where the Superior Court's decision to deny Appellant's motion to suppress was predicated on its acceptance of the proposition that the stronger the odor of marijuana, the greater the quantity likely to be present. This issue was preserved via the filing of a Motion for Postconviction Relief.[82]

[82] A011; A380-423.

B. Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion.[83] A *de novo* standard is applied to legal and constitutional questions.[84]

C. Merits of Argument

1. Applicable Law

a. Ineffective assistance of counsel.

"The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."[85] This basic principle permeates through counsel's entire representation of a client and warrants certain duties that are owed to a criminal defendant.[86]

The basic building blocks of an attorney's responsibilities are competence, diligence, and zealous representation.[87] These duties are embodied in the

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[83] *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013).

[84] *Id*.

[85] *Cooke v. State*, 977 A.2d 803, 843 (Del. 2009) (citing *United States v. Cronic*, 466 U.S. 648, 656 (1984)).

[86] *See Cooke*, 977 A.2d at 841.

[87] *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 353 (2009) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client

Delaware Rules of Professional Conduct and are specifically expressed in *Strickland*: "Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."[88]

Counsel also has the duty to assert all possible legal claims and to preserve any potential issues for review.[89] Counsel is expected to have full knowledge of relevant legal issues.[90] When these crucial duties are not performed or are performed in a deficient manner, a complete breakdown of the adversarial process contemplated by the Sixth Amendment has occurred. The right to counsel is the

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zealously within the bounds of the law…") (internal citations omitted); *In re Reardon*, 759 A.2d 568 (Del. 2000) (sanctioning an attorney for violating the duty of diligence); *Matter of Tos*, 576 A.2d 607, 610 (Del. 1990) ("A lawyer shall provide competent representation to a client").

[88] *Strickland*, 466 U.S. at 688.

[89] *Sacher v. United States*, 343 U.S. 1, 9 (1952) ("Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal"). *See also Maness v. Meyers*, 419 U.S. 449, 459 (1975) ("An objection alerts opposing counsel and the court to an issue so that the former may respond and the latter may be fully advised before ruling.") (internal citations omitted).

[90] ABA Standards for Criminal Justice Defense Function R. 4-5.1 cmt. (3d ed. 1993) ("The lawyer's duty to be informed on the law is . . . important; although the client may sometimes be capable of assisting in the fact investigation, the client is not likely to be educated in or familiar with the controlling law").

right to advocacy.[91] If counsel is not acting in the role of a zealous advocate, there can be no effective assistance.

b. The impermissible extension of traffic stops.

The Fourth Amendment to the United States Constitution and Article I, Section 6 of the Delaware Constitution protect citizens from unlawful searches and seizures.[92] Under *Terry v. Ohio*,[93] 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."[94] 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

[91] *Cronic*, 466 U.S. at 656.

[92] 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.").

[93] 392 U.S. 1 (1968).

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

presence and go about his business."[95] 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."[96]

The Delaware Constitution offers broader protections to its citizens than those guaranteed by the Fourth Amendment of the United States Constitution.[97] The Delaware Constitutional Exclusionary Rule is the remedy for a violation of defendant's right to be free from illegal searches and seizures. The rule provides "for the exclusion from trial of any evidence recovered or derived from an illegal search and seizure."[98]

In the context of the seizure of a motor vehicle, the "duration and execution of a traffic stop is necessarily limited by the initial purpose of the stop."[99] 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

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

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

[97] *Id*. at 865-66.

[98] *Id*. at 872.

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

that must be supported by independent facts sufficient to justify the additional intrusion."[100] 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 its pursuit is unreasonably attenuated or allowed to lapse into a state of suspended animation."[101]

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.[102] 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.[103] 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.[104]

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

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

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

[103] *Id*. at *3.

[104] *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.[105] The officers continued to question him, primarily about an alias he had once used and his destination in Virginia. Chandler refused consent to search.[106] The police summoned a K-9 officer and the drug dog hit on the car's trunk.[107]

The Superior Court in *Chandler* 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.[108] The trial 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.[109] 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.[110]

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

[106] *Id.* at 138.

[107] *Id*. at 139.

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

[109] *Id*. at 144.

[110] *Id*. at 149.

In *State v. Dillard*, police conducted a traffic stop of a minivan after observing the vehicle had improper window tint.[111] The driver, upon request of the police, produced his license and registration.[112] After finding no issues with the documentation, the authorities asked the driver to step out of the vehicle.[113] The police then asked the driver who owned the vehicle[114], where the driver was coming from, and whether there was "anything illegal" in the car.[115] The driver responded negative and refused the officer's request to give consent to search the minivan.[116]

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."[117] The

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[111] *State v. Dillard*, 2018 WL 1382394 at *1 (Del. Super. Ct. Mar. 16, 2018), *aff'd* 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.").

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

[113] *Id*.

[114] 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*.

[115] *Id*.

[116] *Id*.

[117] *Id*.

officer who initiated the stop returned to his vehicle to write a citation for the improper window tint.[118] While writing the ticket, the officer radioed for a K-9 unit to respond to the scene.[119] 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.[120]

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.[121] The trial court agreed with the defendant and suppressed the evidence.[122]

The *Dillard* Court 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.[123] The Superior Court took issue

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[118] *Id*.

[119] *Id*. at *2.

[120] *Id*.

[121] *Id*.

[122] *Id*. at *9.

[123] *Id*. at *4.

with the question regarding the presence of "anything illegal" in the vehicle, 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."[124]

The crux of the *Dillard* Court's decision, however, rested in the ticketing officer's request for a K-9 unit to come to the scene.[125] 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."[126] 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.[127]

The Superior 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*.[128] There, the Supreme Court held that "a traffic stop prolonged

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

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

[126] *Id*. at *6.

[127] *Id*.

[128] *Id*. at *5 (citing *Rodriguez v. United States*, 135 S.Ct. 1609 (2015)).

beyond the stop's 'mission' is unlawful," and that the "critical question" for a reviewing court to consider is "whether conducing the sniff 'prolongs'—*i.e.*, adds time to—the stop."[129] Because "[t]his measure need not be large," the *Dillard* Court held that any measurable extension of a traffic stop, absent reasonable suspicion, was violative of a defendant's rights.[130]

2. Trial Counsel was Ineffective

Trial Counsel filed a suppression motion on behalf of Mr. Martin, arguing in pertinent part that police lacked probable cause to extend the traffic stop of the defendant's vehicle beyond its initial purpose to investigate a new criminal offense.[131] The motion reads:

> The extension of the stop runs afoul of *Caldwell* and its progeny. The new facts beyond the turn signal violation are the presence of a black duffel bag, the odor of marijuana observed by Oliver, and the drug dog hit. Mr. Martin tried to explain he is a medical marijuana card holder, which would obviously account for the odor of marijuana and the drug dog hit. The black duffel bag is a red herring because the tipster gave no specifics about it. If the officers had a hunch it contained marijuana, they could have presented that information to a neutral and detached magistrate.[132]

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[129] *Id*. at *5 (quoting *Rodriguez*, 135 S.Ct. at 1616).

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

[131] A028-29.

[132] A028-29.

In essence, the defense argued that because Mr. Martin was permitted to possess and use marijuana for medicinal purposes, the mere odor of marijuana emanating from the vehicle or Mr. Martin's person could not give rise to probable cause to search the automobile.

During the suppression hearing, Detective Ketler testified that, as he approached the vehicle, he "smelled a large amount of marijuana emanating from the vehicle."[133] The prosecutor soon explored the officer's testimony further:

> Q: Are you – based on your observation, was the marijuana that you were smelling medicinal marijuana?
>
> A: It smelled like a large amount, it smelled like it could possibly over six -- it was a large amount.
>
> Q: And why do you say it smelled like a large amount? How can you tell the difference between a large and small amount?
>
> A: If there was one person in the car smoking a cigarette versus six people smoking, I mean there was, abundant; you could smell it as soon as you walked up to the vehicle.
>
> Q: Was anyone else in this vehicle?
>
> A: No, just the defendant.[134]

Trial Counsel explored Detective Ketler's contention on cross-examination:

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[133] A051.

[134] A052.

Q: You made a comment about the marijuana did not smell like medicinal marijuana. Does medicinal marijuana have a different smell than regular marijuana?

A: Not necessarily. Just the quantity. It was an abundance. It smelled like, as I characterized before, one person smoking in the vehicle verses [*sic*] ten people smoking in the vehicle. So there was an abundance of fragrance that was emanating from the vehicle.

Q: Well, are you trained to tell the difference between smoked marijuana and raw marijuana?

A: My training and experience, yes.

Q: And which was this?

A: Which was what?

Q: What did you smell?

A: Marijuana – unburned marijuana.

Q: Unburned?

A: Correct.

Q: So your analogy about smoking has nothing to do with smelling smoked marijuana?

A: I mean, I smelled smoked marijuana and I smelled unsmoked marijuana.

Q: So you were able to discern both smells?

A: Correct.

Q: From would be from [*sic*] the driver's side window being down?

A: Yes.[135]

In deciding whether to grant the motion, the Court wrestled with the effect that the odor of marijuana had on the probable cause analysis given that Mr. Martin had a medical marijuana card.[136] The Court stated:

> And, so then the question becomes, you know, what is the effect of the defendant having a medical marijuana card or permission to use medical marijuana, and then, so, there is limitations on how much medical marijuana can be possessed, and Detective Ketler testified that, using an analogy, that this was just an intensive volume of, aroma, if you will, the strength of aroma, that this was well beyond a small amount; and his analogy was it was between one person smoking a cigarette and many people smoking a cigarette – the volume of smoke. Well, this is the volume of aroma; had nothing to do, really, with whether it was marijuana that was smoked in the car or not smoked in the car.
>
> So, that being said, that Detective Ketler testified that there was a difference between smelling a little bit of marijuana and smelling a lot. And I think the evidence was that there were, was 2,700 grams of marijuana, something like that, which would, and if we take 28 grams to an ounce, well this was 100 ounces, less than that, something less than that, which is vastly more [. . .] .
>
> I think considerably more than, and, it's logical to assume that that order of magnitude would create a greater aroma. So, and then the obviously – which I think is sufficient to justify the vehicle search. But even still, we have the K 9 hit.[137]

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[135] A070-71.

[136] A111.

[137] A111-12.

Thus, the Court gave great weight to Detective Ketler's testimony that the odor he detected was consistent with a large quantity of marijuana.

While the issue does not appear to have arisen in the State of Delaware, other jurisdictions have held that an individual cannot determine the quantity of a substance based on the strength of the aroma.[138] "[C]haracterizations of odors as strong or weak are inherently subjective; what one person believes to be a powerful scent may fail to register as potently for another."[139] The Supreme Judicial Court of Massachusetts has held that "[a]s a subjective and variable measure, the strength of a smell is thus at best a dubious means for reliably detecting the presence of a criminal amount of marijuana."[140] The reason for such holding is because the perceived strength of an odor "will depend on a range of other factors, such as ambient temperature, the presence of other fragrant substances, and the pungency of the specific strain of marijuana present."[141]

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[138] *But see, e.g., Lefebvre v. State*, 19 A.3d 287, 298 (Del. 2011) (Steel, J., dissenting) (recognizing, in the context of alcohol, that it is "the nature of the beverage consumed—not the quantity of the alcohol consumed—[which] affects the strength of the beverage's odor.").

[139] *Com. v. Overmyer*, 11 N.E.3d 1054, 1059 (Mass. 2014).

[140] *Id*.

[141] *Id*.

The Maryland Court of Appeals has reached a similar conclusion. In *Robinson v. State*, police testified that "the strength of the odor of marijuana and the amount of marijuana do not always correlate, and even a small amount of the most powerful grade of marijuana may have a strong odor."[142] Our sister State's High Court noted that the State conceded that "it is effectively impossible for law enforcement officers to identify a quantity of marijuana based on odor alone" when it held that the strength of an odor does not have any correlation to the quantity of marijuana present.[143]

Here, Trial Counsel did not raise any argument regarding the inability of Detective Ketler to link the purported strength of the odor with the suspected quantity of marijuana in the vehicle. The discovery provided to Trial Counsel put him on notice that the authorities detected what they described as a "strong odor of marijuana" emanating from the vehicle.[144] Trial Counsel knew prior to the suppression hearing that part of the defense's argument related to Mr. Martin's status as someone permitted to possess and ingest medical marijuana was that the

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[142] *Id*.

[143] *Robinson v. State*, 152 A.3d 661, 683 (Md. 2017).

[144] A419.

odor of marijuana should not serve to increase reasonable articulable suspicion into probable cause.[145]

Even if Trial Counsel had not researched the issue prior to the suppression hearing, Detective Ketler's testimony and the rationale behind the Court's ruling on the motion should have prompted investigation after the fact. Had Trial Counsel researched whether the strength of an odor correlates to the quantity of marijuana present, he could have filed a Motion for Reargument with the Court or, in the alternative, raised the issue on appeal. Trial Counsel did neither.

"Defense counsel has a duty to learn the relevant law of a case and to evaluate its application to his client, and failure to do so may render his performance constitutionally ineffective."[146] Stated differently, a defense "attorney has a duty to research the applicable law."[147] Trial Counsel failed to do so here, and was ineffective under *Strickland* as a result.

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[145] *See* A029 ("Mr. Martin tried to explain he is a medical marijuana card holder, which would obviously account for the odor of marijuana and the drug dog hit.").

[146] *Straw v. United States*, 931 F.Supp. 49, 51 (D. Mass. 1996) (citing *Correale v. United States*, 479 F.2d 944 (1st Cir. 1973)).

[147] *United States v. Hernandez*, 283 F.Supp.3d 144, 150 (S.D.N.Y. 2018). *See also, e.g., Armstrong v. Kenna*, 534 F.3d 857, 865 (8th Cir. 2008) (holding that where an attorney is aware of a legal issue pertinent to her case, "a reasonably competent attorney would have investigated and research the law further . . . ."); *and State v. Kyllo*, 215 P.3d 177, 180 (Wash. 2009) ("Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.").

Additionally, during the postconviction process, Trial Counsel acknowledged that the cases cited by Appellant "would have been highly relevant, because as a medical marijuana card holder, Mr. Martin was permitted by law to possess marijuana up to a certain quantity."[148] Trial Counsel also conceded that while he "knew from discovery that the testimony would likely be that the odor was strong," he did not research cases addressing the issue.

3. Appellant Suffered Prejudice

To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This is a standard lower than 'more likely than not."[149] To put it another way, it is "a probability sufficient to undermine confidence in the outcome."[150]

The trial court's decision to deny Mr. Martin's suppression motion specifically turned on Detective Ketler's testimony that the odor of marijuana he detected suggested the presence of a large quantity of the controlled substance. Having accepted Trial Counsel's argument that Mr. Martin's status as a medical

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[148] A426.

[149] *Ploof*, 75 A.3d at 852.

[150] *Strickland*, 466 U.S. at 694.

marijuana cardholder required the police to have more than the mere odor of marijuana to search the vehicle, the suppression judge focused specifically on the officer's testimony that what he smelled "was well beyond a small amount,"[151] directly citing Detective Ketler's testimony that "there was a difference between smelling a little bit of marijuana and smelling a lot."[152]

The Court accepted Detective Ketler's testimony at face value. Trial Counsel did not challenge the officer on his ability to correlate the strength of the odor with the quantity or drugs likely present in the vehicle, nor did he present any case law to the Court in which other jurisdictions have held that there is no link between the pungency of an odor and the amount of marijuana present. Ultimately, what Detective Ketler presented to the Court was not based on any training or reliable experience, but a hunch bootstrapped by his discovery. Had Trial Counsel brought the line of cases discussed *supra* to the attention of the Superior Court and argued that Detective Ketler acted on nothing more than a hunch, there is a reasonable probability that the outcome of the suppression hearing would have been different.

[151] A111.

[152] A112.

Mr. Martin had no factual or legal defense to the charges against him, as evidenced by his agreement to move forward after suppression to a stipulated bench trial rather than exercising his constitutional right to a jury trial and putting the State to its burden of proving his guilt to a jury beyond a reasonable doubt. The only mechanism Mr. Martin had to overcome the charges against him was to have the search declared unconstitutional. Had he been successful in suppressing the fruits of the warrantless search of his vehicle, the State would have had no evidence with which to proceed against Mr. Martin at trial.[153] Trial Counsel's failure to research the law relevant to odor and its correlation with quantity—and to subsequently argue such precedent to the Court—was constitutionally deficient. Mr. Martin was prejudiced as a result and the Superior Court should have granted postconviction relief. Failure to do so constituted error and warrants reversal.

[153] The parties and the Court seemed to agree that if the search of the vehicle was constitutionally infirm, the subsequent search of Mr. Martin's home was similarly illegal. *See* A100-03.

CONCLUSION

For the reasons stated herein, Mr. Martin 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

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