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Case Number 301,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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Dated: October 17, 2024

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NATURE AND STAGE OF THE PROCEEDINGS

On April 17, 2017, a Superior Court grand jury indicted Darnell Martin for drug dealing (marijuana), aggravated possession of marijuana, conspiracy in the second degree, and failure to use a turn signal. D.I. 2.[1] On July 6, 2017, Martin moved to suppress the evidence seized in his case, which the Superior Court denied after a hearing. D.I. 8, 15, 26. On January 9, 2018, the Superior Court held a stipulated bench trial and found Martin guilty of drug dealing (marijuana) and aggravated possession of marijuana, but not guilty of failure to use a turn signal. D.I. 30. At sentencing on January 9, 2018, the Superior Court merged the drug dealing and aggravated possession offenses. D.I. 30. For drug dealing, the Superior Court sentenced Martin to twenty-five years of Level V incarceration, suspended after two years, for eighteen months of Level II probation. A135-38. Martin appealed, and this Court affirmed on October 12, 2018.[2]

On December 6, 2018, Martin filed a *pro se* motion for postconviction relief under Criminal Rule 61 and a motion for the appointment of counsel. D.I. 39, 40. The Superior Court appointed counsel to assist Martin in postconviction. D.I. 43. On December 3, 2019, Martin filed an amended Rule 61 motion. D.I. 67. On March 17, 2021, the Superior Court issued an order dismissing Martin's postconviction

[1] "D.I. __" refers to items on the Superior Court Criminal Docket in *State v. Darnell D. Martin*, I.D. #1702005493. A001-011F.
[2] *Martin v. State*, 2018 WL 4959037, at *1 (Del. Oct. 12, 2018).

motion because Martin lacked standing owing to the completion of his sentence and his claims were moot.[3] Martin appealed, and this Court, on October 9, 2023, reversed and remanded the case for the Superior Court to consider the merits of his postconviction motion.[4] D.I. 95. On July 1, 2024, the Superior Court denied Martin's postconviction motion.[5] D.I. 100. Martin has appealed. This is the State's Answering Brief.

[3] *State v. Martin*, 2021 WL 1030348, at *1 (Del. Super. Ct. Mar. 17, 2021).
[4] *Martin v. State*, 306 A.3d 50 (Del. 2023).
[5] *State v. Martin*, 2024 WL 3273429 (Del. Super. Ct. July 1, 2024).

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court did not abuse its discretion when it denied Martin's postconviction motion. Martin's postconviction claim is meritless. Martin has not established that trial counsel's performance was constitutionally deficient or that he suffered prejudice from any purported error of counsel. Trial counsel's failure to include an argument regarding the odor of marijuana based on two nonbinding cases from other jurisdictions in support of Martin's suppression motion did not fall below objective professional standards. Martin is also unable to demonstrate *Strickland* prejudice because he cannot establish that including such an argument would have resulted in a different outcome.

STATEMENT OF FACTS

Evidence presented at Darnell Martin's suppression hearing established that, on February 7, 2017, Wilmington Police Detective Deshaun Ketler was conducting surveillance for an ongoing drug investigation involving Timothy Atkins, Martin, and Keith Mason. A47. To conduct this surveillance, Ketler operated an unmarked, undercover Honda Accord, which was not equipped with emergency lights or sirens. A58. Ketler saw Martin, who was driving a Jeep Liberty, turn westbound onto Llangolen Drive without using a turn signal. A49. Because Ketler was in an undercover vehicle and unable to perform a traffic stop, F.B.I. Special Agent John Oliver, who was following Ketler in a car equipped with emergency equipment, stopped Martin for the traffic offense. A48-49, A64-65. The traffic stop occurred in the area of Sterling and Dudley Place. A49. Ketler assisted with the traffic stop, arriving right after Oliver pulled over Martin. A49-50.

As Oliver approached Martin's car, Ketler parked directly behind Oliver's car, exited his car, put on a police vest, and approached the driver's side of Martin's car, standing with Oliver. A50, A59, A65-66. Ketler immediately "smelled a large amount of marijuana emanating from the vehicle." A52. Ketler stood next to Oliver when Oliver engaged Martin at the traffic stop. A66. Oliver asked Martin about the odor of marijuana coming from the car; Martin responded that he had a "small amount of marijuana" in the car and possessed a medical marijuana card. A52.

Because the officers suspected that Martin possessed a significant quantity of marijuana, a K-9 was called to the scene. A52.[6] Oliver and Ketler removed Martin from the Jeep, and Martin sat, unhandcuffed, on the hood of the police car as the K-9 performed a smell of the car. A52, A69. The K-9 alerted to the vehicle. A53. The police searched the Jeep and located a black bag in its back seat containing a large quantity of suspected marijuana. A53-54.[7] Upon discovering the suspected marijuana, the police arrested Martin. A53-54. Ketler was present from the initiation of the traffic stop to Martin's arrest. A68.

Martin testified at the hearing. A77. According to Martin, at 6:30 p.m. on February 7, 2017, he drove in his Jeep to a trucking yard in New Castle to see if his tractor trailer was operational. A79. Martin was pulled over by law enforcement after he left the yard to return home. A80. Martin claimed that one officer went to the driver's side of his car, and the other responded to the passenger side. A81. Martin denied that Ketler was present at the traffic stop.[8] A81. Martin claimed that

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[6] Ketler testified that he believed there was an "abundance" of marijuana because "[i]t smelled like . . . one person smoking in the vehicle verses [sic] ten people smoking in the vehicle." A70. Ketler stated that "you could smell it as soon as you walked up to the vehicle." A52.

[7] At Martin's stipulated bench trial, a report from the testing of the suspected controlled substance by NMS Labs was admitted into evidence and showed that the substance found in the vehicle was marijuana and weighed approximately 2,305 grams. A128.

[8] Martin's counsel asked how Martin was sure that Ketler was not present at the traffic stop. A81. Martin responded, "He's a black dude, and there were no black

Oliver yanked him out of the car, put him in handcuffs, and walked him down to Oliver's SUV. A83. Martin denied seeing Ketler's Honda Accord, and claimed it was not until Oliver got him back to his vehicle that he confronted him about the odor of marijuana. A83. Martin alleged that Oliver asked for consent to search his car, which he declined. A85. Martin testified that a K-9 arrived on scene, but Oliver waved off the K-9, telling the handler that Martin had a "medical marijuana card." A86. The K-9 and his handler left without searching the car. A86. Martin claimed he was taken to the Wilmington Police Department and held in a cell for twenty-seven hours. A87.

dudes out there." A81. Martin indicated that all of the police on the scene were "white guys" and was "sure it wasn't no black dudes there." A82.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING MARTIN'S POSTCONVICTION MOTION.

Question Presented

Whether the Superior Court abused its discretion in denying Martin's postconviction motion.

Standard and Scope of Review

This Court reviews the denial of postconviction relief for abuse of discretion.[9] However, the Court reviews "legal or constitutional questions, including ineffective-assistance-of-counsel claims, *de novo*."[10]

Merits of the Argument

In his timely-filed Rule 61 motion, as amended, Martin claimed that his trial counsel was ineffective for not arguing in support of Martin's suppression motion and on direct appeal that police lacked probable cause because the strength of marijuana's odor does not correlate to its quantity. A394, A408. When the Superior Court denied Martin's postconviction motion, it concluded that he "ha[d] not carried his burden of demonstrating that his trial counsel's representation fell below an objective standard of reasonableness or that, but for his alleged errors, [he] would

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[9] *Cabrera v. State*, 173 A.3d 1012, 1018 (Del. 2017).
[10] *Swan v. State*, 248 A.3d 839, 856 (Del. 2021) (quoting *Green v. State*, 238 A.3d 160, 173 (Del. 2020) (internal quotes and other citations omitted).

have had the pounds of marijuana found on his backseat excluded by this Court (or the Delaware Supreme Court)."[11] The Superior Court did not abuse its discretion or otherwise err when it denied Martin's postconviction motion.

On appeal, Martin presents the same argument that he did in the Superior Court - trial counsel was ineffective under *Strickland v. Washington*[12] in not arguing that police lacked probable cause that Martin possessed a large quantity of marijuana based on the drug's odor. Relying on authority from Massachusetts and Maryland, Martin alleges that "other jurisdictions have held that an individual cannot determine the quantity of a substance based on the strength of the aroma."[13] He contends, "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."[14] And, "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 . . . ."[15] Martin is incorrect.

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[11] *State v. Martin*, 2024 WL 3273429, at *5 (Del. Super. Ct. July 1, 2024).
[12] 466 U.S. 668 (1984).
[13] Op. Brf. at 29.
[14] Op. Brf. at 10.
[15] Op. Brf. at 10.

To prevail on an ineffective-assistance-of-counsel claim, the United States Supreme Court held in *Strickland* that a defendant must show both: (1) "that counsel's representation fell below an objective standard of reasonableness;" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[16] There is a strong presumption that counsel's legal representation was professionally reasonable.[17] Mere allegations of ineffectiveness will not suffice; instead, a defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.[18] In fairly assessing an attorney's performance under *Strickland*'s two-part test, "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[19] The "prejudice" analysis "requires more than a showing of a theoretical possibility that the outcome was affected."[20] The defendant must actually show a reasonable probability of a different

[16] *Strickland*, 466 U.S. at 688, 694.
[17] *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990) (citations omitted).
[18] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).
[19] *Strickland*, 466 U.S. at 689.
[20] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).

result but for trial counsel's alleged errors.[21] "It is not enough to 'show that the errors had some conceivable effect on the outcome of the proceeding.'"[22]

When the Superior Court considered Martin's claim regarding trial counsel's performance, it determined:

> [] Mr. Martin is not claiming that his attorney failed to file a suppression motion or argue the proper applicable standards announced by the federal and this State's courts. Rather Mr. Martin's complaint here is far more granular—his attorney should have brought two specific out-of-state cases to this Court's attention via a motion for reargument of his suppression motion or to our Supreme Court's attention on direct appeal. The Court cannot find that alleged deficiency alone fell below the *Strickland* line of objectively reasonable conduct.[23]

The court was correct. Martin cannot show that trial counsel's performance was deficient under *Strickland*. There is a strong presumption that trial counsel's legal representation of Martin was professionally reasonable.[24] A court evaluating an ineffective-assistance-of-counsel claim "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct."[25] Although counsel has a duty to learn the relevant law of a case,[26] "[o]nly

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[21] *Strickland*, 466 U.S. at 695.
[22] *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 693).
[23] *Martin*, 2024 WL 3273429, at *5.
[24] *Flamer*, 585 A.2d at 753-54. (citations omitted).
[25] *Strickland*, 466 U.S. at 690.
[26] *See e.g.*, *White v. State*, 173 A.3d 78 (Del. 2017) (counsel's failure to ask for a lesser-included offense instruction based on mistaken understanding of Delaware law was objectively unreasonable).

in a rare case can an attorney's performance be considered unreasonable under prevailing professional standards when she does not make an [argument] which could not be sustained on the basis of the existing law."[27]

Here, Detective Ketler testified at Martin's suppression hearing that he smelled both smoked and unsmoked marijuana during the traffic stop. A70-71. He also analogized the strength of the odor to "one person smoking in the vehicle verses [sic] ten people smoking in the vehicle." A70. This Court has concluded that "[m]arijuana was, and remains, contraband subject to forfeiture" and that the "[u]se or consumption of marijuana in a moving vehicle is a misdemeanor."[28] This Court has also determined, "[t]hat possession of personal uses of marijuana is not a criminal offense does not render marijuana odors, raw or burnt, irrelevant to determinations of probable cause."[29] Moreover, "the odor of an illegal drug is sufficient to constitute probable cause for the search of a car."[30] Based on controlling Delaware precedent, police had probable cause, and the existence of a medical marijuana card would not have affected the analysis. Trial counsel was not ineffective in not researching persuasive authority on this issue. Martin's arguments are not supported by existing Delaware precedent and would have required his trial

[27] *United States v. Davis*, 394 F.3d 182, 189 (3d Cir. 2005) (internal quotation and citation omitted).
[28] *Valentine v. State*, 2019 WL 1178765, at *2 (Del. Mar. 12, 2019).
[29] *Id.*
[30] *Law v. State*, 2018 WL 2024868, at *2 (Del. Apr. 30, 2018).

counsel to have argued for a change in the law. There was no duty of trial counsel to have done so.

Even if trial counsel had performed deficiently, Martin has not demonstrated prejudice. Martin has not shown a reasonable probability that the outcome of his suppression motion or direct appeal would have been different if counsel had presented this argument, which was based on persuasive authority.[31] The Superior Court correctly determined Martin failed to satisfy *Strickland's* prejudice prong:

> Mr. Martin's postconviction argument assumes that the two cases he now cites would have been sufficiently persuasive as a sole basis for ruling in his favor here on reargument or in the Delaware Supreme Court on appeal. But his interpretation of these cases as decisively holding that there is—as a matter of law—"*no* link between the pungency of an odor and the amount of marijuana present" and, therefore, prohibiting strength-of-aroma as a factor in a reasonable articulable suspicion or probable cause analysis is a stretch too far.
>
> In *Commonwealth v. Overmyer* the Massachusetts high court observed only that, in its view, "[a]s a subjective and variable measure, the strength of a smell is at best a dubious means for reliably detecting the presences of a criminal amount of marijuana," and ruled there "we are not confident, at least on this record, that a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine." And, while articulating certain of the parties' concessions and testimony below, Maryland's high court actually ruled on appeal that an odor of marijuana did provide probable cause to search, regardless of the intensity or strength thereof.
>
> Were this Court to ascribe the same strict read of these two cases that Mr. Martin now urges, it would have to ignore other courts' very reasonable counter view. Too, it would likely violate some basic rules the Court follows in these examinations—that it view suppression

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

> evidence using a "practical," "everyday life" lens and need not ascribe every possible innocent explanation to it. Here, the suppression judge was not so misdirected. And Mr. Martin has not demonstrated a reasonable probability of a different result either upon reargument here or on appeal.[32]

Martin holds fast to his argument that had trial counsel challenged Det. Ketler's testimony, associating the odor of marijuana with a quantity of marijuana, the Superior Court would have granted his suppression motion (in the first instance or upon reargument) or this Court would have reversed the Superior Court's decision on appeal. His contentions are unavailing.

The Superior Court noted that the cases Martin now presents, *Commonwealth v. Overmyer*,[33] and *Robinson v. State*,[34] do not support the strict proposition Martin posits here. In *Overmyer*, the Supreme Judicial Court of Massachusetts held the odor of marijuana "alone does not constitute probable cause to believe that a vehicle contains a criminal amount of contraband or specific evidence of a crime, such that the automobile exception to the warrant requirement may be invoked."[35] As noted above, the Massachusetts high court's view of the issue is inapposite to this Court's. In Delaware, the odor of marijuana is relevant to a determination of probable cause.[36] In *Robinson*, the Maryland Court of Appeals, "conclude[d] that a law enforcement

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[32] *Martin*, 2024 WL 3273429, at *4 (citations omitted).
[33] 11 N.E. 3d 1054 (Mass. 2014).
[34] 152 A.3d 661 (Md. 2017).
[35] *Overmyer*, 11 N.E.3d at 1058.
[36] *Valentine* 2019 WL 1178765, at *2; *Law*, 2018 WL 2024868, at *2.

officer has probable cause to search a vehicle where the law enforcement officer detects an odor of marijuana emanating from the vehicle."[37] As is evident from the Maryland court's holding, the odor of marijuana is relevant to the determination of probable cause in that state. Even if trial counsel had presented *Overmyer* and *Robinson* as persuasive authority, it is not likely that the result of the suppression hearing or in appeal case would have changed in Martin's case because the odor of marijuana is relevant to the determination of probable cause in this state. As such, Martin cannot demonstrate that he was prejudiced by trial counsel's failure to present *Overmyer* and *Robinson* and advocate for wholesale change to Delaware law.

[37] *Robinson*, 152 A.3d at 680.

CONCLUSION

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

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Date: October 10, 2024

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 3,024 words, which were counted by Microsoft Word 2016.

Dated: October 10, 2024

/s/ Andrew J. Vella
Andrew J. Vella
Chief of Appeals