IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	ID No. 1702005493
	)	Cr. A. Nos. IN17-02-1754 & 55.
DARNELL D. MARTIN,	)	
Defendant.	)	

Submitted: March 4, 2024
Decided: July 1, 2024

ORDER

Upon Defendant Darnell D. Martin's Motion for Postconviction Relief,
DENIED.

This 1st day of July, 2024, upon consideration of the Defendant Darnell D. Martin's Amended Motion for Postconviction Relief (D.I. 67), his trial counsel's affidavit (D.I. 68), the State's response to those submissions (D.I 69), Mr. Martin's reply (D.I. 72), and the record in this matter, it appears to the Court that:

(1) In April of 2017, a grand jury returned a 16-count indictment charging Mr. Martin in four of those counts with: one count of drug dealing in marijuana; one count of felony aggravated possession of marijuana; one count of second-degree conspiracy; and one count of failure to use a turn signal.[1]

(2) These offenses arose when Mr. Martin was stopped for failing to use his turn signal while driving at Route 9 and Llangollen Boulevard in New Castle

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[1] D.I. 2.

County.[2] That traffic stop eventually led to a search of the Jeep he was driving.[3]

(3) When the police approached the vehicle, they smelled a strong odor of marijuana (both burnt and raw) coming from the vehicle.[4] Mr. Martin told the officers that he had a small amount of marijuana in the vehicle, but that he had a medical marijuana card.[5]

(4) A police canine unit arrived and the drug-detection dog alerted to the presence of drugs in the vehicle.[6] The officers saw large black duffel bag in the rear seat of the vehicle.[7] They then searched the vehicle, including the duffel bag. The police found almost 3 kilos of marijuana in the bag.[8]

(5) Prior to trial, Mr. Martin's counsel filed a motion to suppress the drugs found. He contended that the initial stop of Mr. Martin's vehicle was invalid, that stop was then impermissibly extended, and the warrantless search thereof lacked probable cause.[9]

(6) Another judge of this Court denied the motion from the bench at the

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[2] Suppression Hr'g Tr., at 5-7 (D.I. 26) (available at App. to Amend. Mot. for Postconviction Relief, A-044) (all citation to that appendix will be cited hereinafter as "A-__").

[3] *Id*. at A-053-54.

[4] *Id*. at A-051-52, 070-071.

[5] *Id*. at A-051-052, 069.

[6] *Id*. at A-053.

[7] *Id*. at A-053-054.

[8] *Id*.

[9] Suppression Mot., at 6-11 (D.I. 15) (available at A-019-043).

conclusion of the suppression hearing.[10]

(7) Several weeks later, following a bench trial before the undersigned, Mr. Martin was convicted of the drug dealing, aggravated possession, and related conspiracy charge. He was immediately sentenced to serve, *inter alia*, an unsuspended two-year term of imprisonment—a statutory minimum the imposition of which was required and could not be suspended.[11]

(8) Mr. Martin—still with the same counsel—filed a direct appeal of his conviction and sentence. His sole issue on appeal was that this Court erred when it denied his suppression motion.[12] Among other things, he then argued:

> The FBI agent told Mr. Martin that he smelled an odor of marijuana, and Mr. Martin explained he had a valid medical marijuana card. This explains the odor and the subsequent canine alert, which were the only two facts relied upon by the police. The testifying detective claimed the odor was very strong, but there was no testimony establishing what would be a permissible degree of odor for someone entitled to possess marijuana legally.[13]

(9) Our Supreme Court affirmed Mr. Martin's convictions and sentence,

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[10] D.I. 24; A-109-113.

[11] DEL. CODE ANN. tit. 16, § 4752(2) (2016) (drug dealing a tier 2 quantity of marijuana with an aggravating factor is a class B felony); *id*. at tit. 11, §§ 4205(b)(2) & (d) (sentence "[f]or a class B felony [is] not less than 2 years . . . [and any] minimum, mandatory, mandatory minimum or minimum mandatory sentence [ ] required by subsection (b) of [§ 4205] . . . shall not be subject to suspension by the court").

[12] *See* Direct Appeal Open. Br. 3-4, (available at A-139-166).

[13] A-146; Direct Appeal Reply Br. 7, (available at A-355-368) ("Ketler, for his part, did not establish that he had any specialized training or expertise in how much different a large amount or small amount of marijuana would smell.").

holding that:

> The Superior Court's rulings rejecting appellant Darnell Martin's arguments that the detention of his vehicle violated 21 *Del. C.* § 701 and was thereafter extended by the detaining officers without the requisite level of suspicion should be affirmed on the basis of and for the reasons stated in the Superior Court's bench rulings.[14]

(10) The next month, Mr. Martin filed a *pro se* postconviction motion and requested appointment of counsel.[15] Through his appointed counsel he filed this amended and timely motion for postconviction relief under this Court's Criminal Rule 61.[16]

(11) When considering applications for postconviction relief under its criminal rules, this Court addresses any applicable procedural requirements before turning to the merits or addressing any substantive issues.[17]

(12) Rule 61 sets forth several procedural bars to postconviction claims, two of which could be relevant here. Rule 61(i)(3) bars any particular claim that could have been but that was not raised at trial, unless the defendant can show cause for relief from the procedural default and prejudice.[18] And Rule 61(i)(4) provides "[a]ny

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[14] *Martin v. State*, 2018 WL 4959037, at * (Del. Oct. 12, 2018).

[15] D.I. 39 and 40.

[16] D.I. 67.

[17] *Ayers v. State*, 802 A.2d 278, 281 (Del. 2002) (citing *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255 (1989)) ("Before examining the merits of any Motion for Postconviction Relief, our courts must first apply the rules governing the procedural requirements for relief set forth in Rule 61.").

[18] SUPER. CT. CRIM. R. 61(i)(3) ("Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred,

ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction [or] in an appeal . . . is thereafter barred."[19]

(13) Generally, Rule 61(i)(3)'s bar is inapplicable to "claims [of] ineffective assistance of counsel, which could not have been raised in any direct appeal,"[20] so the Court usually considers those claims on their merits during postconviction proceedings.[21]

(14) Says Mr. Martin now:

> 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 odor of marijuana should not serve to increase reasonable articulable suspicion into probable cause.
>
> Even if Trial Counsel had not researched the issue prior to the suppression hearing, [the detective]'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. [22]

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unless the movant shows . . . [c]ause for relief from the procedural default and . . . [p]rejudice from violation of the movant's rights.").

[19] SUPER. CT. CRIM. R. 61(i)(4).

[20] *State v. Smith*, 2017 WL 2930930, at *1 (Del. Super. Ct. July 7, 2017).

[21] And given Mr. Martin's ineffectiveness gloss, the State eschews any attempt to prevent the Court's examination of his claim by invocation of Rule 61(i)(4). State's Postconviction Resp. 6, Apr. 24, 2020 (D.I. 69). *Green v. State,* 283 A.3d 160, 176 (Del. 2020) ("[T]he mere fact that a postconviction relief claim might bear some resemblance to a formerly adjudicated claim does not trigger Rule 61 (i)(4)'s bar.").

[22] Amend. Mot. for Postconviction Relief, at 28 (D.I. 67). For his part, Mr. Martin's trial counsel (who also represented him on direct appeal) acknowledges that he did not uncover these cases,

(15) In his view, had his counsel unearthed and argued two specific cases—one from Massachusetts,[23] the other from Maryland[24]—this Court would have granted his suppression motion in the first instance, or reversed itself on reargument, or its ruling would have been reversed on direct appeal. According to Mr. Martin, these foreign cases would have prohibited this Court from considering the police observation of the strength or intensity of the marijuana odor as some indicator of the quantity of marijuana (smoked or raw) present in his car.[25]

(16) One claiming ineffective assistance of counsel must demonstrate that: (a) his defense counsel's representation fell below an objective standard of reasonableness, and (b) there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different.[26] And "[t]he likelihood of [that] different result must be substantial, not just conceivable."[27]

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believes they would have been "highly relevant" to Mr. Martin's claims, and says now that—notwithstanding the applicable plain error standard—he would have used them to argue on appeal "that the quantity of marijuana cannot be determined by the strength of its odor." Trial Counsel Aff., at 3-4 (D.I. 68).

[23] *Commonwealth v. Overmyer*, 11 N.E.3d 1054 (Mass. 2014).

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

[25] Amend. Mot. for Postconviction Relief, at 26-28.

[26] *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *see also Alston v. State*, 2015 WL 5297709, at *2-3 (Del. Sept. 4, 2015).

[27] *Starling v. State*, 130 A.3d 316, 325 (Del. 2015) (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)); *see Strickland*, 466 U.S. at 693 ("It is not enough for the [postconviction movant] to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." (citation

(17) "[I]f the Court finds that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the Court may dispose of the claim on this basis alone."[28]

(18) In shouldering his prejudice burden, Mr. Martin must "demonstrate more than a mere 'conceivable' chance of a different result" of his suppression proceedings here or on appeal thereof.[29] The "objective inquiry is not mathematically precise" but there can only be a finding of the required prejudice "when there is a substantial likelihood—*i.e.*, a meaningful chance—that a different outcome would have occurred but for counsel's deficient performance."[30] By this measure, Mr. Martin has failed to satisfy *Strickland*'s prejudice showing.[31]

(19) 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—

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omitted)).

[28] *State v. Manley*, 2014 WL 2621317, at *7 (Del. Super. Ct. May 29, 2014); *Green*, 238 A.3d at 174-75 ("We may dispose of an ineffective-assistance claim based on the absence of sufficient prejudice without addressing the performance prong if, in fact prejudice is lacking."); *Strickland*, 466 U.S. at 691 ("an error by counsel, even if professionally unreasonable, does not warrant setting aside the criminal judgment if the error had no effect").

[29] *Baynum v. State*, 211 A.3d 1075, 1084 (Del. 2019) (citing *Harrington*, 562 U.S. at 112).

[30] *Id.*

[31] *See Neal v. State*, 80 A.3d 935, 942 (Del. 2013) ("*Strickland* requires more than a showing merely that the conduct could have, or might have, or it is possible that it would have led to a different result.") (cleaned up).

"*no* link between the pungency of an odor and the amount of marijuana present"[32] and, therefore, prohibiting strength-of-aroma as a factor in a reasonable articulable suspicion or probable cause analysis is a stretch too far.

(20) 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."[33] And, while articulating certain of the parties' concessions and testimony below,[34] 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.[35]

(21) 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.[36] Too, it would likely violate some basic rules the Court follows in these

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[32] Amend. Mot. for Postconviction Relief, at 30 (emphasis added).

[33] *Overmyer*, 11 N.E.3d at 1059; *id*. at 1058 ("Although the odor of unburnt, rather than burnt, marijuana could be more consistent with the presence of larger quantities, it does not follow that such an odor reliably predicts the presence of a criminal amount of the substance, that is, more than one ounce, as would be necessary to constitute probable cause.") (cleaned up).

[34] *Robinson*, 152 A.3d at 683.

[35] *Id.*

[36] *E.g. People v. Zuniga*, 372 P.3d 1052, 1060 (Colo. 2016) explaining that:

examinations—that it view suppression evidence using a "practical," "everyday life" lens[37] and need not ascribe every possible innocent explanation to it.[38] Here, the suppression judge was not so misdirected.[39] And Mr. Martin has not demonstrated a reasonable probability of a different result either upon reargument here[40] or on

> [T]he Troopers' detection of a "heavy odor" of raw marijuana contributed to the conclusion that marijuana was in the vehicle, potentially in an illegal amount. . . . Many marijuana-related activities remain illegal in Colorado, meaning detection of a marijuana odor—particularly a "heavy" odor—still adds to the totality of circumstances and can contribute to a probable cause determination.

[37] *See Illinois v. Gates*, 462 U.S. 213, 231 (1983) ("Thus, probable cause is now measured, not by precise standards, but by the totality of the circumstances through a case by case review of the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.") (cleaned up); *see also Houston v. State*, 251 A.3d 102, 114 (Del. 2021) (When addressing a similar argument, the court explained: "Whether an officer is 'qualified to know the odor' is to be determined on a case-by-case basis, . . . just as any other observation by the officer would be considered under the totality-of-the circumstances test . . . "[w]hen an officer testifies about something he has learned . . . through his police experience . . . "'commonsense judgments and inferences about human behavior' should guide the court.").

[38] *Compare Lefebvre v. State*, 19 A.3d 287, 293 (Del. 2011) ("That hypothetically innocent explanations may exist for facts learned during an investigation does not preclude a finding of probable cause."), *with Overmyer*, 11 N.E.3d at 1059 (discussing what court believes to be factors--traits such as gender and age of smeller, ambient temperature, the presence of other fragrant substances, the pungency of the specific strain of marijuana present, masking agents [chewing gum, mints, tobacco products], and the environment where the odor is detected—that might explain or confound one's stated observation of a strong odor). *See also State v. Stewart*, 2011 WL 494734, at *6 (Del. Super. Ct. Jan. 31, 2011) (holding that trial court erred when suppressing evidence, in part, "by discounting the probative value of the totality of the circumstances by focusing on a possible innocent explanation for each factor"); *Zuniga*, 372 P.3d at 1059 ("[W]hile a possible innocent explanation may impact the weight given to a particular fact in a probable cause determination, it does not wholly eliminate the fact's worth and require it to be disregarded.").

[39] *See* A-111-112.

[40] *See State v. Spencer*, 2023 WL 3052370, at *5 (Del. Super. Ct. Apr. 24, 2023) (setting forth the bases for reargument of a suppression decision); *State v. Remedio*, 2015 WL 511059, at *9 (Del. Super. Ct. Jan. 26, 2015) (explaining it is the reargument movant's burden to demonstrate newly discovered evidence, a change in the law, or manifest injustice).

appeal.[41]

(22) Were the Court to go on and evaluate counsel's conduct—which it need not[42]—Mr. Martin's ineffectiveness claim would fare no better.

(23) The reasonableness of prior counsel's conduct must always be analyzed in light of applicable and controlling law at the time of that complained-of conduct. And "[i]t is not the role of the Court to determine what the best lawyers would have done or even what most good lawyers would have done. Instead, the Court must determine whether trial counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[43]

(24) Recall, 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

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41 *See Neal*, 80 A.3d at 948 (when a postconviction movant fails to show that his appellate counsel would have prevailed under the plain error standard of review that would have applied to his argument on direct appeal, he cannot meet *Strickland*'s prejudice requirement).

42 *Strickland,* 466 U.S. at 697; *Ploof v. State*, 75 A.3d 811, 825 (Del. 2013) ("*Strickland* is a two-pronged test, and there is no need to examine whether an attorney performed deficiently if the deficiency did not prejudice the defendant.").

43 *State v. Peters*, 283 A.3d 668, 686 (Del. Super. Ct. 2022) (cleaned up), *aff'd*, 299 A.3d 1 (Del. 2023); *Hoskins v. State*, 102 A.3d 724, 730 (Del. 2014).

deficiency alone fell below the *Strickland* line of objectively reasonable conduct.[44]

(25) Mr. Martin has 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, Mr. Martin would have had the pounds of marijuana found on his backseat excluded by this Court (or the Delaware Supreme Court). So, Mr. Martin's postconviction motion must be **DENIED.**

SO ORDERED this 1st day of July, 2024.

/s/ *Paul R. Wallace*

Paul R. Wallace, Judge

Original to Prothonotary

cc: Benjamin S. Gifford IV, Esquire
Timothy G. Maguire, Deputy Attorney General
Patrick J. Collins, Esquire

[44] *Everett v. Beard*, 290 F.3d 500, 509 (3d Cir. 2002) ("Of course, the state of the law is central to an evaluation of counsel's performance at trial. A reasonably competent attorney patently is required to know the state of the *applicable* law.") (emphasis added), *abrogated on other grounds, Priester v. Vaughn*, 382 F.3d 394 (3d Cir. 2004); *Peters*, 283 A.3d at 696 (explaining that counsel cannot be deemed ineffective for failing to raise novel or unanswered questions with no real precedential guidance under state law, anticipate changes in state law, or foresee new developments in state law).