



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMAR K. THOMPSON, )  
 )  
 Defendant Below, )  
 Appellant, )  
 )  
 v. ) No. 489, 2017  
 )  
 STATE OF DELAWARE, )  
 )  
 Plaintiff Below, )  
 Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Abby Adams (ID No. 3596)  
Deputy Attorney General  
Department of Justice  
114 East Market Street  
Georgetown, DE 19947  
(302) 856-5353

DATE: February 13, 2018

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS.....	i
NATURE AND STAGE OF THE PROCEEDINGS.....	1
SUMMARY OF THE ARGUMENT .....	4
STATEMENT OF FACTS .....	5
ARGUMENT	
I. THE SUPERIOR COURT DID NOT VIOLATE THOMPSON’S DUE PROCESS RIGHTS.....	9
CONCLUSION .....	25

## TABLE OF CITATIONS

<b>Cases</b>	<b>Page</b>
<i>Brown v. State</i> , 249 A.2d 269 (Del. 1968).....	13, 17
<i>Bruton v. State</i> , 2001 WL 760842 (May 24, 2001) .....	21
<i>Cruz v. State</i> , 990 A.2d 409 (Del. 2010).....	13, 14
<i>Diaz v. State</i> , 2014 WL 1017480 (Del. Mar. 13, 2014) .....	17
<i>Evans v. State</i> , 2002 WL 742607 (Del. Apr. 26, 2002).....	14
<i>Gagnon v. Scarpelli</i> , 411 U.S. 778 (1973).....	11, 12, 21
<i>Jenkins v. State</i> , 8 A.3d 1147 (Del. 2010) .....	12, 14, 19, 23
<i>Jones v. State</i> , 560 A.2d 1056 (Del. 1989) .....	13
<i>Kurzmann v. State</i> , 903 A.2d 702 (Del. 2006).....	13
<i>Mitchell v. State</i> , 2015 WL 1306914 (Del. Mar. 23, 2015).....	13
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972).....	10, 11, 12
<i>Odom v. State</i> , 2012 WL 3656367 (Del. Aug. 24, 2012) .....	17
<i>Ortiz v. State</i> , 869 A.2d 285 (Del. 2005) .....	21
<i>Pennsylvania Bd. of Prob. and Parole v. Scott</i> , 524 U.S. 357 (1998).....	20
<i>Sparks v State</i> , 2000 WL 724642 (Del. May 16, 2000).....	13
<i>State v. Kinard</i> , 2005 WL 2373701 (Del. Super. Sept. 28, 2005) .....	21
<i>United States v. Bazzano</i> , 712 F.2d 826 (3d Cir. 1983).....	17, 21
<i>United States v. Pierce</i> , 622 F.3d 209 (3d Cir. 2010).....	22

*Wallace v. State*, 956 A.2d 630 (Del. 2008) ..... 21  
*Zebroski v. State*, 12 A.3d 1115 (Del. 2010) ..... 9

**Statutes**

11 *Del. C.* § 4302 ..... 11

**Rules**

D.R.E. 1101 ..... 14  
Super. Ct. Crim. R. 32.1 ..... 12

## NATURE AND STAGE OF THE PROCEEDINGS

In 2012, Jamar Thompson (“Thompson”) and several co-defendants were arrested and charged with multiple counts of Receiving a Stolen Firearm, Drug Dealing (Tier 2), Possession of a Deadly Weapon by a Person Prohibited (“PDWBPP”), Possession of a Firearm During the Commission of a Felony (“PFDCF”), Possession of Drug Paraphernalia, and one count each of Possession of Marijuana and Conspiracy in the Second Degree. (Ai). On February 15, 2013, Thompson pled guilty to two counts of Drug Dealing (Tier 2), PFDCF, and PDWBPP. (Aiii). The Superior Court immediately sentenced Thompson to a total of 35 years at Level V, to be suspended after 3 years (with credit for time served) and successful completion of the Level V Key Program, for 1 year in a Level IV Residential Substance Abuse Treatment Program, followed by 18 months at Level III. Feb. 15, 2013 Sent. Ord. (B1-6).

In May 2015, Thompson was alleged to have violated his probation and his conditional release. (Aiv). In July 2015, after a hearing, the Superior Court found Thompson to be in violation of his probation and conditional release. (Av). The Superior Court discharged Thompson’s probation and conditional release as unimproved for his PFDCF conviction, discharged him as unimproved from probation for his PDWPP conviction, and sentenced him to a total of 25 years at Level V, suspended for 1 year at Level IV home confinement, to be followed by 1

year at Level III. July 10, 2015 Sent. Ord. (B7-10).<sup>1</sup> In May 2016, the Superior Court modified Thompson's sentence to remove the home confinement provision. May 13, 2016 Mod. VOP Sent. Ord. (B11-14).

On July 4, 2017, Thompson was arrested on new charges that are the subject of this appeal—two counts of PFBPP (for the gun and ammunition), Carrying a Concealed Deadly Weapon (“CCDW”), Possession of Marijuana, and Following Too Closely. (A1). On July 6, 2017, an administrative warrant was filed, and Thompson was brought before the Superior Court, which set cash bail and scheduled Thompson's violation of probation (“VOP”) hearing for July 14, 2017. (Av). On July 11, 2017, Thompson's probation officer filed a VOP report, alleging Thompson violated his probation by: (1) committing a new criminal offense or motor vehicle violation; (2) possessing, owning or controlling a deadly weapon; and (3) possessing a controlled substance (marijuana). (Av, 3).

On July 13, 2017, Thompson had a preliminary hearing in the Court of Common Pleas on his new charges. (A1). At the time, the State bond-discharged the new charges. (A1). On July 14, 2017, The Superior Court reduced the amount of Thompson's cash bail, and set his alleged VOP for a contested hearing on September 8, 2017. (Av-vi).

---

<sup>1</sup> At the same time, the Superior Court sentenced Thompson on new convictions in a 2015 case, Superior Court Criminal Action No. 1505012786. (B7).

At the contested hearing, the Superior Court found Thompson in violation of his probation. (Avi). The court ordered a presentence investigation, and on October 26, 2017, the court sentenced Thompson to a total of 18 years at Level V, with credit for time served, to be suspended after 3 years and 6 months for one year of Level IV Work Release, followed by 1 year of Level IV Home Confinement, followed by 3 years at Level III. Oct. 26, 2017 VOP Sent. Ord. (B15-18).

On November 13, 2017, the Grand Jury indicted Thompson for two counts of PFBPP, and one count each of CCDW, Possession of Marijuana and Following Too Closely. Super. Ct. Docket No. 1710014914. (B19). On November 17, 2017, the Superior Court arraigned Thompson on the new charges. (B19). On December 18, 2017, the Superior Court continued Thompson's case review for the second time at his request, because Thompson requested a new attorney. (B20).

Thompson's case has been set for a final case review on March 21, 2018, and for a jury trial in Superior Court on March 27, 2018. Thompson's counsel has filed two discovery requests in that case; however, as of the date of this Answering Brief, counsel has not filed a suppression motion. (B19-20).

Thompson appealed his probation violation and sentence, and, on January 11, 2018, filed his Opening Brief on appeal. This is the State's Answering Brief.

## SUMMARY OF ARGUMENT

**I.-III. DENIED.** The Superior Court did not violate Thompson’s due process rights. A violation of probation hearing is not a criminal trial and does not invoke the same procedures and protections. Thompson was provided with the evidence used against him prior to his contested VOP hearing, did not file a motion to compel or a motion to suppress prior to the hearing, nor did he seek a continuance to identify and review additional evidence. Neither Thompson nor his witness, who were both present at the hearing, were “unavailable” to testify solely because they exercised their right to avoid self-incrimination. Thompson’s suppression issue has no merit because the exclusionary rule applied as a remedy for Fourth Amendment violations does not apply in probation hearings, and Thompson has failed to adequately raise the issue under the Delaware Constitution. There was ample evidence against Thompson—the police officer’s sworn testimony regarding events that he witnessed, which the Superior Court found to be credible. The Superior Court’s legal conclusions were correct and it did not abuse its discretion in finding that Thompson violated his probation by a preponderance of the evidence, particularly where Thompson did not contest the motor vehicle violation.



## STATEMENT OF FACTS

On July 4, 2017, at about 12:47 p.m., Officer Demalto of the Governor's Task Force was on duty driving an unmarked sport utility vehicle on Route 13 southbound in the area of Seaford, when he noticed a gold Acura RL hastily weaving through traffic ahead of him. (A37-39). Traffic was heavy. (A39). The car was not signaling lane changes. (A39). The officer followed the Acura as it turned onto Brickyard Road and followed a black sedan extremely closely. (A40). There was an "explosion" in the front of the Acura, and smoke and fluid spewed from under the hood. (A40). Believing the Acura had collided with the black sedan, the officer followed it as it pulled into the parking lot of the Service Tire Truck Center at Route 13 and Brickyard Road. (A40).

The officer pulled his vehicle behind the Acura intending to check and make sure no one in the Acura was injured, and to investigate why the car was following too closely. (A41). The officer got out of his vehicle and approached the operator of the Acura, who was still inside the vehicle. (A41). Lamar Thompson ("Thompson") was the only occupant in the vehicle. (A41). The vehicle appeared to be "unstable, unsafe and inoperable. There was a large amount of green fluid on the windshield and leaking from the hood area. There was a noticeable amount of smoke and steam coming from the hood area . . . ." (A42).

The officer asked Thompson if he had been in an accident. Thompson told

him that something in the car had malfunctioned, causing it to overheat and explode. (A42). For the safety of Thompson and the officer, the officer asked Thompson to get out of the vehicle. (A42).

As Thompson spoke to the officer outside the vehicle, Thompson appeared to be very uncomfortable. (A42). Thompson was looking off into the distance and avoided eye contact. He walked around the vehicle and tried to open the hood, stating that he needed to get to a nearby residence. (A43).

The officer asked Thompson for his driver's license, and returned to his patrol vehicle to check Thompson's history. (A43). He learned that Thompson was on probation, and that he had an extensive criminal history with several drug and weapon offenses. (A43-44). Due to Thompson's nervous demeanor and his criminal history, the officer called a Blades police officer whom he knew was nearby at the Route 13 and Brickyard Road intersection, to assist him. (A44, 57). The officer also contacted a probation officer who was assigned to the Governor's Task Force to check on Thompson's probation compliance. (A45).

Officer Demalto returned to Thompson and asked him questions about his probation. (A44). Thompson told the officer he was compliant with his probation, but he could not remember on which day in the prior week he had reported, which the officer found odd. (A44). The officer told Thompson that an officer with a K-9 would be arriving. At that point, Thompson "made a very odd statement. He

advised, before the officer had arrived, that the K-9 had probably smelled green fluid that had been coming out of his inoperable vehicle.” (A45).

Officer Demalto asked Thompson if he would consent to a search, and Thompson declined. (A46). When the Blades officer arrived, the officer asked him to use his narcotic-certified dog to conduct a free-air sniff of the vehicle. (A46). The K-9 alerted at the driver’s door. (A46). The officer asked Thompson if there was “anything illegal inside of the vehicle that would cause such an alert, such as firearms, narcotics or drug paraphernalia. . . . Thompson advised that it was his girlfriend’s car and that there wasn’t anything illegal in the car that belonged to him.” (A47). The officer asked Thompson to stand with the Blades officer, and he searched the Acura. (A47). As the search began, Thompson told the officer that there was some marijuana in the center armrest. (A47). The officer located marijuana oil or wax in the center arm rest, and also found a Smith & Wesson 9-millimeter handgun concealed under the front passenger seat, within arm’s reach of Thompson when he was in the driver’s seat. (A48-49, 51). The gun was loaded with a magazine containing fourteen 9-millimeter rounds. (A48). The officer asked Thompson if his fingerprints would be on the gun, and Thompson said that they would. (A49). The officer then searched Thompson. (A50). The officer found \$755 in United States Currency. (A50). The suspect substance field-tested positive for marijuana. (A50). The entire encounter, up until the officer located

the gun, took about 20 minutes.

Officer Demalto took Thompson back to the Troop for processing. (A50). Thompson told the officer that the cash did not belong to him. (A50). Fingerprints were lifted from the gun, but the test results were inconclusive. (A51). The gun was analyzed for DNA, but the results were not known. (A53). Thompson declined to be interviewed. (A67).

The Acura was registered to a woman who advised the officer that the handgun found in the car belonged to her and that she wanted it back. (A64-65). The officer told her it had been admitted into evidence and would not be available immediately to her. (A65). The gun was, in fact, registered to the female who claimed it. (A65-66, 71).

## **I. THE SUPERIOR COURT DID NOT VIOLATE THOMPSON’S DUE PROCESS RIGHTS.<sup>2</sup>**

### **Questions Presented**

Whether the full panoply of trial discovery and related sanctions to deter Fourth Amendment violations applicable in a criminal trial apply to a probationer’s revocation proceeding. Whether the Superior Court erred when it refused to hear a suppression issue at a probation hearing, where no motion had been filed, and the United States Supreme Court has held that the exclusionary rule does not apply to parole hearings, which are constitutionally indistinct from probation hearings.

Whether the sworn testimony of a police officer about events he witnessed firsthand is “not competent” evidence of a violation of probation.

### **Scope and Standard of Review**

This Court reviews questions of law and alleged constitutional violations *de novo*.<sup>3</sup> “This Court normally reviews a trial court’s revocation of a defendant’s probation for abuse of discretion.”<sup>4</sup>

### **Argument**

Thompson argues that the State and the Superior Court committed an array of errors in connection with his violation of probation hearing, which violated the

---

<sup>2</sup> This Argument addresses Arguments I-III in the Appellant’s Opening Brief.

<sup>3</sup> *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).

<sup>4</sup> *Jenkins v. State*, 8 A.3d 1147, 1152 (Del. 2010).

Superior Court rules and his right to due process. He asserts that he was not provided the full discovery due him pursuant to Superior Court Criminal Rule 32.1, that the Superior Court violated his due process rights by proceeding with the hearing where he and his witness were “unavailable” to testify, that the Superior Court improperly refused to consider his suppression motion at the hearing, and that the State failed to establish his violation by a preponderance of the evidence. Thompson’s claims are unavailing.

A violation of probation hearing is not a criminal trial; and does not invoke the same procedures and protections. Thompson was provided with the evidence used against him prior to trial, did not file a motion to compel or a motion to suppress prior to the hearing, nor did he seek a continuance to identify and review additional evidence. There was ample evidence against Thompson—the police officer’s sworn testimony regarding events that he witnessed, which the Superior Court found to be credible. The Superior Court’s legal conclusions were correct and it did not abuse its discretion in finding that Thompson violated his probation by a preponderance of the evidence, particularly where Thompson did not contest the motor vehicle violation.

In *Morrissey v. Brewer*,<sup>5</sup> the United States Supreme Court determined that limited due process applies to parole revocation hearings. In reaching this

---

<sup>5</sup> 408 U.S. 471 (1972).

conclusion, the Court considered the purpose of parole:

[P]arole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.”<sup>6</sup>

The next year, in *Gagnon v. Scarpelli*, the Court addressed the revocation of probation and determined that there was no difference “relevant to the guarantee of due process between the revocation of parole and the revocation of probation.”<sup>7</sup>

The Court held that, “[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty” and, therefore, a probationer is entitled to the same due process protections outlined for parolees in *Morrissey*.<sup>8</sup> The Court had explained in *Morrissey* that “the full panoply of rights due a defendant in [a criminal prosecution] does not apply to parole revocation. . . . Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on

---

<sup>6</sup> *Id.* at 477.

<sup>7</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 782, n.3 (1973). Parole and probation are defined in 11 *Del. C.* § 4302(11) and (14), and Thompson has not identified any differences between the two that call for different treatment with respect to the issues addressed here.

<sup>8</sup> *Id.* at 782.

observance of special parole restrictions.”<sup>9</sup> The Court recognized that, “[g]iven the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.”<sup>10</sup>

These decisions have been incorporated into Delaware law, as this Court has explained:

Although a defendant accused of a probation violation is not entitled to a formal trial, the United States Supreme Court has held that in a VOP hearing certain “minimum requirements of due process” must be satisfied. In Delaware, those requirements are set forth in Superior Court Criminal Rule 32.1. That Rule provides that a defendant accused of a probation violation is entitled to: (i) a bail hearing; (ii) written notice of the alleged violation; (iii) disclosure of the evidence against the person; (iv) an opportunity to appear and present evidence; (v) an opportunity to question adverse witnesses; and (vi) notice of the right to retain counsel.<sup>11</sup>

These protections afforded for an alleged violation of probation (“VOP”) are also codified in section 4334:

Title 11, section 4334(c) of the Delaware Code sets forth, in part, the procedure to be used in VOP proceedings:

Upon such arrest and detention, the Department shall immediately notify the court and shall submit in writing a report showing in what manner the probationer has violated the

---

<sup>9</sup> *Morrissey*, 408 U.S. at 480.

<sup>10</sup> *Id.* at 483.

<sup>11</sup> *Jenkins v. State*, 8 A.3d 1147, 1153 (Del. 2010) (quoting *Gagnon v. Scarpelli*, 477 U.S. 778, 786 (1973) and Super. Ct. Crim. R. 32.1(a)).



conditions of probation or suspension of sentence. Thereupon, or upon arrest by warrant as provided in subsection (b) of this section, the court shall cause the probationer to be brought before it without unnecessary delay, for a hearing on the violation charge. The hearing may be informal or summary. If the violation is established, the court may continue or revoke the probation or suspension of sentence....

In *Brown v. State*, this Court interpreted the statute as requiring a hearing before a revocation of probation. Regarding the type of hearing required, this Court explained that “except for the provisions that such hearing may be ‘informal or summary,’ and that the violation must be ‘established,’ there is no statutory prescription as to its nature and scope.” . . . .

A probationer accused of violation is not entitled to a trial in any strict or formal sense; his entitlement in this regard is limited to “an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper.”<sup>12</sup>

The scope and form of the inquiry at a VOP proceeding has been addressed over time. The State must prove the violation by a preponderance of the evidence.<sup>13</sup>

“There is . . . no absolute right to assistance of counsel.”<sup>14</sup> “[T]he rules of evidence

---

<sup>12</sup> *Cruz v. State*, 990 A.2d 409, 413–14 (Del. 2010) (footnotes omitted) (quoting *Brown v. State*, 249 A.2d 269, 271 (Del. 1968)).

<sup>13</sup> *Kurzmann v. State*, 903 A.2d 702, 716 (Del. 2006). “A preponderance of the evidence means ‘some competent evidence’ to ‘reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.’” *Mitchell v. State*, 2015 WL 1306914, \*2 (Del. Mar. 23, 2015) (quoting *Kurzmann, id.*) (additional citation omitted)).

<sup>14</sup> *Sparks v State*, 2000 WL 724642, at \*2 (Del. May 16, 2000) (citing *Jones v. State*, 560 A.2d 1056, 1057 (Del. 1989)). “An indigent probationer is entitled to the assistance of counsel only when: (1) the probationer raises a timely and colorable claim that he or she has not committed the alleged violation; or (ii) there

do not apply.”<sup>15</sup> Hearsay evidence is admissible, however, “probation cannot be revoked solely upon the basis of testimony from a witness who has ‘no first-hand knowledge of the events constituting the violations.’”<sup>16</sup> In addition, the “same judge who presided at that criminal trial [can] consider the same evidence at a subsequent VOP hearing involving the same conduct.”<sup>17</sup>

**A. There is no formal discovery for a probation hearing, and there was no discovery violation.**

Thompson next argues that Superior Court Criminal Rule 32.1 requires that he receive the same full, formal discovery required in a criminal trial for his VOP proceeding. Thompson claims that he is not required to ask for this discovery. Op. Br. at 12. He alleges that the lack of full discovery, coupled with the fact that he and his witness were allegedly “unavailable,” violated his due process rights. Thompson is incorrect. There is no right to full discovery for a VOP hearing, and Thompson was not prejudiced where the Superior Court limited the evidence to

---

are substantial and complex reasons which justified or mitigated the violation and which make revocation inappropriate.” *Id.* Related to the former situation, “[d]ue process requires that the State provide the probationer with counsel ‘[w]hen a violation of probation hearing follows an acquittal after a criminal trial for the same alleged conduct.’” *Cruz*, 990 A.2d at 416.

<sup>15</sup> *Evans v. State*, 2002 WL 742607, at \*2 (Del. Apr. 26, 2002) (citing D.R.E. 1101(b)(3)).

<sup>16</sup> *Jenkins v. State*, 8 A.3d at 1152 (citations omitted).

<sup>17</sup> *Cruz*, 990 A.2d at 415.

that disclosed in the police report, which Thompson had received prior to trial. (A33-36, 77).

As addressed above, the VOP hearing is not a stage in a criminal prosecution, is not a criminal trial, and does not require the same constitutional protections. Thompson has cited no case law, either at the hearing or on appeal, which provides a probationer the same discovery rights at a VOP hearing as in a criminal trial. Thompson served a generic, detailed discovery request seeking trial discovery with the case number of the 2012 case. (A4-13). That discovery request did not make clear that the information was sought about the events of July 4, 2017, was not addressed to the attention of the prosecutor known to have been assigned to the VOP, was not brought to the prosecutor's attention until the day before the hearing, and was not mentioned in the email correspondence in which the parties scheduled the contested hearing. (A32-33). Thompson did not file a motion to compel discovery prior to the hearing. *Id.*

Thompson argues the Superior Court forced him to proceed without adequate discovery, but fails to identify adequately what information he believes to exist that would have assisted him at the VOP hearing that had not been disclosed previously. Thompson has not shown prejudice. Thompson has cited the possibility of an MVR or body cam (there were none (A41, 62)), the recording of Thompson's later interaction with police (he asserted his right to remain silent

(A67)), potential recordings of the officer's interactions with SUSCOM (Thompson has not asserted that the traffic stop occurred in any manner other than as police described, and the officer did not contact SUSCOM until he called for backup (A56)), and the search warrant for the buccal DNA swab (Thompson received a copy of the warrant at the time of the search (A22)). Op. Br. at 13. Police had not attempted to obtain fingerprints from the marijuana or its packaging (A69), the prints they attempted to take from the gun were of no value (A51), the tests on the drugs had not been completed (A69), the DNA tests had not been completed (A92), and the officer disposed of his notes after he transcribed them into the police report. (A62). The State had shown defense counsel the photograph of the gun seized prior to the hearing (A52), and did not oppose admission of the trace on the gun, which indicated that Thompson's girlfriend was the owner. (A71). Thompson did not file a motion to compel, and did not seek a continuance to: (1) brief the discovery issue; or (2) obtain additional discovery. He has failed to show that the discovery he sought was reasonably likely to result in any information material to Thompson's alleged violation, as opposed to a fishing expedition. In any case, Thompson has not established a right to full discovery or any prejudice from any item not disclosed.

The State is not “obligated to pursue the new criminal charge before it proceeded with the VOP charge.”<sup>18</sup> The fact that Thompson and his witness exercised their privilege against self-incrimination by opting not to testify at the VOP hearing does not make them “unavailable” in violation of Thompson’s due process rights. In a *per curiam* decision in *United States v. Bazzano*, the District Court’s decision denying postponement of Bazzano’s probation hearing withstood review.<sup>19</sup> The Chief Judge determined that Bazzano’s Fifth Amendment rights were not infringed because he was not compelled to testify at the probation hearing, finding no distinction between that situation and a defendant who preserves his right against self-incrimination at trial knowing that the failure to testify would be damaging with respect to punishment.<sup>20</sup> Both Thompson and his witness were present and available to testify, and chose not to do so. Thompson can show no prejudice from the fact that his witness did not testify, because the Superior Court judge accepted counsel’s proffer of the content of the witness’s testimony as evidence. (A80). Thompson did not proffer any additional or different defense he would raise in his own testimony, had he elected to take the stand; therefore, he cannot establish prejudice. Further, it is not unusual that a

---

<sup>18</sup> *Diaz v. State*, 2014 WL 1017480, \*2 (Del. Mar. 13, 2014) (citing *Odom v. State*, 2012 WL 3656367 (Del. Aug. 24, 2012) and *Brown v. State*, 2011 WL 253151 (Del. Jan. 25, 2011)).

<sup>19</sup> 712 F.2d 826 (3d Cir. 1983) (*per curiam*).

<sup>20</sup> *Id.* at 842.

probationer-defendant would be faced with potential criminal charges while trying to defend an alleged violation of probation. Had the criminal trial proceeded first, Thompson testified (or not) and was acquitted, he still could have been found in violation of probation given the lower standard of proof. The Superior Court correctly found that it was Thompson's choice not to testify (A81), and the judge did not abuse his discretion in allowing the hearing to proceed.

Prior to the hearing, the Superior Court reviewed Rule 32.1 and determined Thompson had been provided all the protections outlined in the Rule. The court properly declined to turn a probation hearing into a full trial, and declined to require full trial discovery. (A31-36). Thompson has failed to establish any violation of Rule 32.1, due process, or any other constitutional protection, or any resulting prejudice.

**B. Thompson failed to properly raise the suppression issue, and the argument has no merit.**

Thompson's Fourth Amendment claim fails for three reasons. First, Thompson did not file a suppression motion prior to the contested VOP; therefore, he failed to properly raise the suppression issue in Superior Court. Second, the United States Supreme Court has determined that the exclusionary rule does not apply to probation revocation hearings. Third, Thompson has failed to properly raise the issue under the Delaware Constitution, waiving that claim.

Thompson failed to properly raise his suppression issue with the Superior Court. In *Jenkins v. State*, the probationer had filed a suppression motion in his co-pending criminal case.<sup>21</sup> Jenkins, who was contesting a VOP, had filed a suppression motion in his pending criminal case, but had not filed a suppression motion with respect to the contested VOP hearing. Jenkins alleged that the Superior Court judge “exhibit[ed] a ‘closed mind’ by not considering the suppression motion at the VOP hearing,” and he argued that the Superior Court erred because the motion was later successful in the criminal case.<sup>22</sup> This Court found that “[a]lthough a suppression motion was later granted in the co-pending criminal case, it would have been improper for the sentencing judge to decide the search warrant’s validity in the VOP hearing where the issue had not been properly raised.”<sup>23</sup> The Court concluded that “Jenkins has failed to show that the sentencing judge’s decision was plain error.” As in *Jenkins*, Thompson failed to file a suppression motion with respect to his contested VOP hearing. Thompson cites *Jenkins* to support his argument, but does not attempt to distinguish the two cases where his suffers from the same flaw. And here, unlike *Jenkins*, neither the State nor the judge had any basis to suspect that a suppression motion may be raised at the hearing, as there was no co-pending criminal case. Thompson did not ask for a

---

<sup>21</sup> 8 A.3d at 1156.

<sup>22</sup> *Id.* at 1155.

<sup>23</sup> *Id.* at 1156.

continuance to file a suppression motion. Following *Jenkins*, Thompson failed to adequately raise the issue below, and his claim fails.

Even if this Court were to consider the issue, the exclusionary rule does not apply to deter Fourth Amendment violations in VOP hearings. In *Pennsylvania Board of Probation and Parole v. Scott*, the United States Supreme Court explained:

We have emphasized repeatedly that the government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution. Rather, a Fourth Amendment violation is "fully accomplished" by the illegal search or seizure, and no exclusion of evidence from a judicial or administrative proceeding can "cure the invasion of the defendant's rights which he has already suffered." The exclusionary rule is instead a judicially created means of deterring illegal searches and seizures. As such, the rule does not "proscribe the introduction of illegally seized evidence in all proceedings or against all persons," but applies only in contexts "where its remedial objectives are thought most efficaciously served . . . . Moreover, because the rule is prudential rather than constitutionally mandated, we have held it to be applicable only where its deterrence benefits outweigh its "substantial social costs."<sup>24</sup>

The Court reasoned that "[a]pplication of the exclusionary rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings," and "would provide only minimal deterrence benefits;" therefore, the Court held that "the federal exclusionary rule does not bar the introduction at parole revocation hearings of

---

<sup>24</sup> 524 U.S. 357, 362-63 (1998).



evidence seized in violation of a parolee's Fourth Amendment rights."<sup>25</sup> As the Supreme Court previously held that probation revocation proceedings are "constitutionally indistinguishable" from parole revocation proceedings, the Court's decision also applies to probation revocation hearings.<sup>26</sup> This Court recognized the Supreme Court's *Scott* ruling in *Bruton v. State*, finding that the United States Supreme Court has declined to extend the exclusionary rule to proceedings other than criminal trials.<sup>27</sup> Thompson's summary argument that the use of the evidence violates his rights under the Delaware Constitution has not been adequately raised as this Court explained in *Wallace v. State*; therefore, the claim is deemed waived.<sup>28</sup> Op. Br. at 19.

In any event, suppression is not warranted in this case. Thompson began acting nervous as soon as the officer arrived, inexplicably wanting to investigate under the hood of, and potentially drive away in, a clearly inoperable vehicle that

---

<sup>25</sup> *Id.* at 364.

<sup>26</sup> *Gagnon v. Scarpelli*, 411 U.S. at 782, n.3; *United States v. Bazzano*, 712 F.2d at 829 ("[A] majority of the court holds today that the Fourth Amendment exclusionary rule does not apply to probation revocation proceedings.").

<sup>27</sup> 2001 WL 760842, at \*1 (May 24, 2001); *State v. Kinard*, 2005 WL 2373701, at \*3 (Del. Super. Sept. 28, 2005) (finding that the exclusionary rule does not apply in VOP hearings).

<sup>28</sup> *Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008) (citing *Ortiz v. State*, 869 A.2d 285, 291 n. 4 (Del. 2005) (*overruled on other grounds by Rauf v. State*, No. 39,2016, 2016 WL 4224252 (Del. Aug. 2, 2016))). ("This Court has held that "conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal.").

was smoking and spewing hot fluid. The officer ran Thompson's license and ran a background check, which revealed that Thompson was on probation and had an extensive criminal history. The officer informed Thompson that an officer with a K-9 would be coming to assist, and Thompson replied that the dog probably smelled the fluid from the car, before the officer with the K-9 even arrived. Based on the totality of the circumstances, the officer had reasonable suspicion that Thompson possessed illegal substances, and it was appropriate for the officer to extend the stop and, once the K-9 alerted, to conduct the search.

Even if the officer had not extended the traffic stop based on Thompson's behavior, the car was inoperable in a public place. Officer Demalto could have obtained a K-9 sniff and inevitably discovered the gun and drug evidence.<sup>29</sup>

**C. There was ample, credible evidence to establish the VOP.**

Thompson argues that there was not competent evidence for the Superior Court to determine he possessed the gun and marijuana in violation of his probation. This claim has no merit because there was ample evidence to find each of the several probation violations alleged.

---

<sup>29</sup> *United States v. Pierce*, 622 F.3d 209, 213 (3d Cir. 2010) (“It is also well-established that, looking at the totality of the circumstances, a dog's positive alert while sniffing the exterior of the car provides an officer with the probable cause necessary to search the car without a warrant.”).

This case was not based purely on hearsay. The police officer who conducted the traffic stop testified at the hearing about what he personally observed—Thompson’s traffic violations; the gun and suspected marijuana that the officer found in the vehicle, and Thompson’s statements that the dog would alert from the liquid coming from the vehicle, that there was nothing illegal in the vehicle “that belonged to him,” and that his fingerprints would be found on his girlfriend’s gun. The Superior Court also accepted counsel’s proffer regarding what Thompson’s witness would say if she elected to testify. Finally, Thompson did not challenge the officer’s testimony regarding his traffic violations.

In *Jenkins*, this Court found similar evidence sufficient to establish a VOP.<sup>30</sup> In *Jenkins*, the evidence consisted of the probation officer’s testimony about Jenkins’ “technical” violations for failing to report a new address and positive urine screens, which Jenkins did not challenge, a police officer’s testimony “based on firsthand observations of which he had personal knowledge,” and information from a confidential source.<sup>31</sup> The Court held:

[T]he evidence need only “reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of the probation.” Here, the trial judge had sufficient independent evidence, including evidence of uncontested technical violations as well as [the police officer’s and probation officer’s] testimony, upon which to find that Jenkins had violated his probation. The trial judge did not commit plain error in

---

<sup>30</sup> 8 A.3d at 1153.

<sup>31</sup> *Id.*

revoking Jenkins' probation.<sup>32</sup>

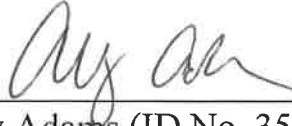
Thompson has not contested the traffic violations, which were among the allegations in the administrative warrant. (A3). The Superior Court cured any alleged discovery issue by limiting the State to the evidence in the police report, which addressed the traffic offenses. (A17). The traffic offenses alone were sufficient to establish that Thompson violated his probation. As in *Jenkins*, the Superior Court did not abuse its discretion in finding facts that were uncontested and based on the officer's personal observations, and making the determination that the officer was credible, and finding that Thompson violated his probation.

---

<sup>32</sup> *Id.*

## CONCLUSION

The judgment of the Superior Court should be affirmed.



---

Abby Adams (ID No. 3596)  
Deputy Attorney General  
Department of Justice  
114 East Market Street  
Georgetown, DE 19947  
(302) 856-5353

DATE: February 13, 2018

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

**JAMAR K. THOMPSON,** )  
 )  
Defendant Below, )  
Appellant, )  
 )  
v. ) No. 489, 2017  
 )  
**STATE OF DELAWARE,** )  
 )  
Plaintiff Below, )  
Appellee. )

**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 Time 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 5,720 words, which were counted by Microsoft Word 2016.

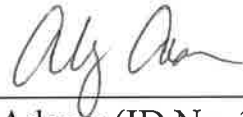
Dated: February 13, 2018

/s/ Abby Adams  
Abby Adams (ID No. 3596)  
Deputy Attorney General  
Department of Justice  
114 East Market Street  
Georgetown, Delaware 19947  
(302) 856-5353

## CERTIFICATE OF SERVICE

I, Abby Adams, being a member of the Bar of the Supreme Court of Delaware, hereby certify that on February 13, 2018, I caused the attached document to be served by File and Serve to:

Tasha Marie Stevens, Esq.  
Fuqua, Willard, Stevens & Schab, P.A.  
26 The Circle  
P.O. Box 250  
Georgetown, Delaware 19947



---

Abby Adams (ID No. 3596)  
Deputy Attorney General  
Delaware Department of Justice  
114 E. Market Street  
Georgetown, DE 19947