



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDRE MCDOUGAL, )  
 )  
 Defendant – Below, )  
 Appellant, )  
 )  
 v. ) No. 350, 2018  
 )  
 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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## NATURE AND STAGE OF THE PROCEEDINGS

In 2011, a jury convicted Andre McDougal (“McDougal”) of Trafficking in Cocaine, Possession With Intent to Deliver Cocaine and Possession of a Deadly Weapon By a Person Prohibited (“PDWBPP”), and acquitted McDougal of Possession of a Firearm During the Commission of a Felony and Receiving a Stolen Firearm charges involving the same gun. A3. McDougal appealed and this Court affirmed his convictions.<sup>1</sup>

On July 10, 2013, McDougal, acting *pro se*, filed a Motion for Postconviction Relief. A6. The Superior Court appointed postconviction counsel, who filed an amended Motion for Postconviction Relief on July 1, 2014. A6. A Superior Court Commissioner issued findings of fact and recommended denial of McDougal’s postconviction motion on August 18, 2017. A14. A Superior Court judge subsequently adopted the commissioner’s findings and denied McDougal’s motion.<sup>2</sup> A14. This appeal followed. McDougal filed an Opening Brief and Appendix. This is the State’s Answering Brief.

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<sup>1</sup>*McDougal v. State*, 2012 WL 3862030 (Del. Sept. 5, 2012).

<sup>2</sup>*State v. McDougal*, 2018 WL 1393981 (Del. Super. March 16, 2018).

## **SUMMARY OF THE ARGUMENT**

I. Appellant's argument is denied. The Superior Court did not abuse its discretion when it denied McDougal's motion seeking postconviction relief. McDougal failed to demonstrate prejudice from counsel's decision to stipulate to McDougal's status as a person prohibited from owning or possessing a firearm. As a result, McDougal's claim of ineffective assistance of counsel fails.

## STATEMENT OF FACTS

On direct appeal, this Court recounted the facts as follows:

On November 18, 2010, at approximately 10:20 a.m., a detective from the City of Wilmington Police Department's Operation Safe Streets was conducting surveillance in the 2300 block of Carter Street in Wilmington, Delaware. The area was known by police to be a high crime area with drug trafficking activity. The detective conducted his surveillance with binoculars from a nearby rooftop. The day was clear and the detective had an unobstructed view of the target area.

At approximately 10:35 a.m., the detective's attention was drawn to an African American man, wearing a black leather jacket, who entered the 2300 block of Carter Street from the north. The man, later identified as McDougal, then entered the alleyway on the east side of Carter Street next to a vacant row house at number 2314. After a few seconds, McDougal walked onto the porch at number 2312. It is undisputed that McDougal neither owned nor resided at that property. After a few more seconds, McDougal sat down on the front steps. Another man then entered the porch and stayed a couple of minutes.

Thereafter, two other African American men approached Carter Street from the north. The detective observed McDougal walk back to the alleyway and then quickly leave the alleyway. Thereafter, the detective observed McDougal engage in some kind of interchange with one of the men, who later was identified as James Hamilton. The detective testified that it appeared to him that Hamilton and McDougal engaged in what the police term a "hand-to-hand" transaction involving the exchange of drugs and money. At that point, additional law enforcement was called in to assist. A police sergeant stopped Hamilton and patted him down. While the officer was speaking with Hamilton, four baggies of heroin, each containing a blue wax paper baggie stamped "Jaguar," fell from Hamilton's pant leg onto the ground.

After receiving permission from the property owner, the police searched the porch area at 2312 Carter Street. Under a hat that was sitting on a chair they found a loaded handgun and one hundred thirty baggies, each containing a blue wax paper baggie of heroin with the

name “Jaguar” stamped on it. The heroin was packaged as ten bundles of thirteen baggies each. The police detective testified that the heroin, which was later determined to weigh 2.71 grams, had a street value of approximately \$600. At the time the handgun was seized, it was inoperable. No fingerprint or DNA testing was conducted on the weapon, although the serial number indicated that it had been stolen outside the State of Delaware.<sup>3</sup>

At trial, McDougal stipulated to his status as a person prohibited from owning or possessing a firearm by virtue of a prior conviction. A79. The jury convicted McDougal of the drug charges and the person prohibited charge, and acquitted him of all other charges related to the same firearm. A3.

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<sup>3</sup> *McDougal*, 2012 WL 3862030, at \*1.

## ARGUMENT

### I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED MCDUGAL'S MOTION FOR POSTCONVICTION RELIEF BASED UPON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

#### Question Presented

Whether the Superior Court abused its discretion when it denied McDougal's motion for postconviction relief.

#### Standard of Review

This Court reviews the Superior Court's denial of a motion for postconviction relief based on claims of ineffective assistance of counsel "under an abuse of discretion standard . . . carefully review[ing] the record to determine whether 'competent evidence supports the court's findings of fact and whether its conclusions of law are not erroneous.'"<sup>4</sup>

#### Merits of the Argument

McDougal claims that trial counsel was ineffective for stipulating to the fact that he was a person prohibited from possessing a deadly weapon. He contends, "there is no objectively reasonable explanation for trial counsel's failure" to move for severance of the PFBPP charge.<sup>5</sup> McDougal's argument that trial counsel should

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<sup>4</sup> *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (quoting *Dawson*, 673 A.2d at 1196).

<sup>5</sup> *Op. Brf.* at 11.



have moved to sever the PFBPP charge simply because it was “just about the easiest thing a defense lawyer can do”<sup>6</sup> misapprehends the now-familiar *Strickland*<sup>7</sup> standard.

To prevail on a claim of ineffective assistance of counsel, McDougal must show (1) that trial counsel’s actions fell below an objective standard of reasonableness and (2) that there exists a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.<sup>8</sup> In addition, this Court has consistently held that in setting forth a claim of ineffective assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them.<sup>9</sup>

The essence of McDougal’s argument is that trial counsel should have attempted to sever the PFBPP charge from the rest of his criminal case, rather than stipulating to his prohibited status. An attorney’s failure to sever a PFBPP charge does not *ipso facto* constitute ineffective assistance.<sup>10</sup> McDougal must still

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<sup>6</sup> *Op. Brf.* at 11.

<sup>7</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>8</sup> *Strickland*, 466 U.S. 688, 694. *Accord e.g. Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992); *Flamer v. State*, 585 A.2d 739, 753-54 (1990); *Riley v. State*, 585 A.2d 719, 726-27 (Del. 1990); *Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989); *Stevenson v. State*, 469 A.2d 797, 799 (Del. 1983).

<sup>9</sup> *E.g. Skinner v. State*, 1994 WL 91138 (Del. Mar. 3, 1994); *Brawley v. State*, 1992 WL 353838 (Del. Oct. 7, 1992); *Wright v. State*, 1992 WL 53416. (Del. Feb. 20, 1992).

<sup>10</sup> *See Dale v. State*, 2017 WL 443705, at \*2 (Del. Jan 31, 2017); *Wheeler v. State*, 2015 WL 6150936, at \*3 (Del. Oct. 19, 2015).

demonstrate prejudice to satisfy *Strickland*.<sup>11</sup> Because McDougal is required to satisfy both prongs of *Strickland*, the Court need not determine whether trial counsel's performance was constitutionally deficient if it first determines that McDougal was not prejudiced by trial counsel's actions.<sup>12</sup>

In *Dale v. State*, this Court considered and rejected the same argument McDougal makes here.<sup>13</sup> Dale stipulated, through trial counsel, that he was a person prohibited from possessing a firearm or ammunition.<sup>14</sup> The stipulation did not refer to the reason that Dale was person prohibited.<sup>15</sup> On appeal, Dale claimed that the Superior Court abused its discretion when it denied his motion seeking postconviction relief, finding Dale was unable to demonstrate *Strickland* prejudice.<sup>16</sup> This Court affirmed the Superior Court's decision, and determined (1) severance is not automatic in cases where one of the charges is PFBPP; and (2) "[n]owwithstanding the frequency with which Person Prohibited charges are severed, a defendant making an ineffective assistance of counsel claim must show that

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<sup>11</sup> See *Dale*, 2017 WL 443705, at \*2.

<sup>12</sup> "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . , "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which [ ] [ ] will often be so, that course should be followed." *Strickland*, 466 U.S.at 697.

<sup>13</sup> *Dale*, 2017 WL 443705, at \*2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

joinder of the offenses was sufficiently prejudicial that it was objectively unreasonable for defense counsel not to move for severance.”<sup>17</sup>

Here, McDougal claims that he was prejudiced because the jury knew he had a prior conviction, which “improperly permitted [the jurors] to factor Mr. McDougal’s status as a convicted criminal into [their] assessment.”<sup>18</sup> The Superior Court determined that the jury’s verdict demonstrates McDougal suffered no prejudice as a result of trial counsel’s failure to move to sever the PFBPP charge. The court found:

If the jury had drawn an impermissible conclusion that McDougal was a person of bad character with a general criminal disposition, then they would have convicted him of all the charges. The jury did not.<sup>19</sup>

The court did not abuse its discretion in making that finding. The jury’s verdict contradicts McDougal’s claim of prejudice. McDougal was convicted of the drug charges and PFBPP, and the jury acquitted him of PFDCF and Receiving a Stolen Firearm. While the jurors were aware that McDougal was prohibited by virtue of a prior criminal conviction, they were unaware of the nature or details of the conviction.<sup>20</sup> If the jury had imputed a general criminal disposition or a propensity for the possession and use of firearms, McDougal would have been convicted of all

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<sup>17</sup> *Id.*

<sup>18</sup> *Op. Brf.* at 12.

<sup>19</sup> *McDougal*, 2018 WL 1393981, at \*7.

<sup>20</sup> A79.

charges associated with the single firearm in the indictment. Rather, the jury, as instructed, considered each count separately and reached its verdict, convicting McDougal of some charges and acquitting him of others. As a result, McDougal cannot demonstrate a reasonable probability that there would have been a different result had trial counsel moved to sever the PFBPP charges. Because McDougal cannot satisfy the prejudice prong of *Strickland*, his claim of ineffective assistance of counsel fails. The Superior Court did not abuse its discretion when it denied McDougal's postconviction motion.

## **CONCLUSION**

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

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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 MS Word.

2. This brief complies with the type-volume requirement of Rule 14(d)(i) because it contains 1,735 words, which were counted by MS Word.

STATE OF DELAWARE  
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella  
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DATE: September 7, 2018

## CERTIFICATION OF SERVICE

The undersigned, being a member of the Bar of the State of Delaware, hereby certifies that on this 7th day of September, 2018, he caused the attached *State's Answering Brief* to be delivered electronically via Lexis/Nexis File&Serve to the following persons:

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STATE OF DELAWARE

DEPARTMENT OF JUSTICE

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