



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY DAVIS,)
)
Defendant—Below,)
Appellant)
)
v.)
)
)
STATE OF DELAWARE)
)
Plaintiff—Below,)
Appellee.)

No. 175, 2023

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT’S REPLY BRIEF

Elliot Margules, Esquire [#6056]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5141

Attorney for Appellant

DATE: December 12, 2023

TABLE OF CONTENTS

TABLE OF CITATIONSii

ARGUMENT:

I. THE TRIAL COURT COMMITTED PLAIN ERROR AND VIOLATED DAVIS’S DUE PROCESS RIGHTS BY PERMITTING INADMISSIBLE AND HIGHLY PREJUDICIAL DRUG COURIER PROFILING TESTIMONY AS SUBSTANTIVE EVIDENCE OF GUILT, IN DIRECT CONTRADICTION OF THIS COURT’S PROHIBITION ON THE SAME.....1

Conclusion8

TABLE OF CITATIONS

Cases

<i>Carpenter v. Com.</i> , 2006 WL 1514290 (Ky. Ct. App. June 2, 2006).....	4
<i>Hopkins v. State</i> , 293 A.3d 145 (Del. 2023).....	5—6
<i>Hudson v. State</i> , 956 A.2d 1233 (Del. 2008).....	6
<i>Johnson v. State</i> , 813 A.2d 161 (Del. 2001).....	<i>passim</i>
<i>Mason v. State</i> , 590 A.2d 502 (Del. 1991)	5
<i>Morales v. State</i> , 696 A.2d 390 (Del. 1997).....	5
<i>People v. Hubbard</i> , 530 N.W.2d 130 (Mich. Ct. App. 1995)	4
<i>Quarles v. State</i> , 696 A.2d 1334 (Del. 1997)	4
<i>Reid v. Georgia</i> , 448 U.S. 438 (1980).....	3
<i>State v. Foster</i> , 621 N.E.2d 843 (Ohio Ct. App. 1993)	4
<i>State v. Porter</i> , 2004 WL 2419166 (Del. Super. Ct. Sept. 29, 2004)	4
<i>United States v. Fernandez</i> , 795 Fed. Appx. 153 (3d Cir. 2020)	5
<i>United States v. Griffin</i> , 2012 WL 12878573 (N.D. Miss. July 19, 2012)	4
<i>United States v. Hernandez-Cuartas</i> , 717 F.2d 552 (11th Cir. 1983)	2
<i>United States v. Humphrey</i> , 930 F.2d 919 (6th Cir. 1991).....	4
<i>United States v. Lui</i> , 941 F.2d 844 (9th Cir. 1991).....	5
<i>United States v. Quigley</i> , 890 F.2d 1019 (8th Cir. 1989)	4
<i>United States v. Sanchez-Hernandez</i> , 507 F.3d 826 (5th Cir. 2007).....	4
<i>United States v. Williams</i> , 957 F.2d 1238 (5th Cir. 1992).....	2, 7
<i>Wallace v. State</i> , 557 So. 2d 212 (Fla. Dist. Ct. App. 1990).....	5

Other Authority

Jodi Sax, <i>Drug Courier Profiles, Airport Stops and the Inherent Unreasonableness of the Reasonable Suspicion Standard After United States v. Sokolow</i> , 25 LOY. L.A.L. REV. 321 (1991)	3
Irene Dey, <i>Drug Courier Profiles: An Infringement on Fourth Amendment Rights</i> , 28 U. BALT. L.F. 3 (1998)	4
Stephen E. Hall, <i>A Balancing Approach to the Constitutionality of Drug Courier Profiles</i> , 1993 U. ILL. L. REV. 1007 (1993).....	4

I. THE TRIAL COURTS COMMITTED PLAIN ERROR AND VIOLATED DAVIS’S DUE PROCESS RIGHTS BY PERMITTING INADMISSIBLE AND HIGHLY PREJUDICIAL DRUG COURIER PROFILING TESTIMONY AS SUBSTANTIVE EVIDENCE OF GUILT, IN DIRECT CONTRADICTION OF THIS COURT’S PROHIBITION ON THE SAME.

When it comes to the propriety of Det. Silvers’ testimony, the most powerful takeaway from the State’s Answer comes from what it does not say. The State does not dispute Davis’ positions that Det. Silvers’ testimony was “unfairly unimpeachable” (Op. Br. at 15); that it left both juries with an “unfounded” “impression that he had *accurately* identified suspects couriering drugs for sale throughout his decades long career” (Op. Br. at 14—15); that this type of testimony “denies [defendants like Davis] the opportunity to mount a defense” (Op. Br. at 15); that it is “unreliable” (Op. Br at 16); it lacks *any* methodology (let alone a *reliable* methodology) or defined “set of characteristics... [such that] when testimony is eventually presented on the defendant’s specific conduct it[] inevitably, [] fit[s] the profile” (A18—19); or that “[t]he absence of any methodological structure left Det. Silvers’ testimony as somewhat of a free-for-all in which the State elicits highly prejudicial” and “irrelevant” statements. Op. Br. at 19.

According to the State, *Johnson*’s restriction on drug profiling testimony is limited to profiles solely reliant on “a list of non-drug characteristics,” and, because Det. Silvers’ opinion considered some “drug characteristics” it is perfectly

permissible. Answer at 14. This argument provides little reason why a trial court should permit—unreliable, unfair, and misleading – testimony, and as explained below, the State has not identified support for its proposed distinction in *Johnson* or elsewhere.

a. **Johnson’s reasoning applies to profiling testimony like Det. Silvers’.**

Johnson stated why it rejected drug courier profiling testimony for purposes of substantive of guilt: its reasoning had nothing to do with the category of factors associated with the profile, but from deficiencies in criminal profiling more generally.¹ And, the State does not dispute that those deficiencies were present here: Det. Silvers’ bolstering of his own testimony with references to an overwhelming number of past investigations (A176—77, A180, A422) runs contrary to “[e]very defendant[’s]...right to be tried based on the evidence *against him or her*, not on the techniques utilized by law enforcement officers in investigating criminal activity,”² and his use of factors like possessing “multiple denominations [of currency] and high numbers of those denominations” (A188; A437) and possessing a screw driver in a rental car (which he claims is “not common” for non-drug traffickers) (A434) have the effect of “including innocent citizens.”³ Op. Br. at 14.

¹ See *Johnson v. State*, 813 A.2d 161, 166 (Del. 2001) (accepting “*ratio decidendi*” of cases cited in n. 11).

² *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983) (*Johnson* n.11).

³ *United States v. Williams*, 957 F.2d 1238, 1242 (5th Cir. 1992) (*Johnson* n.11).

b. Johnson does not make the distinction put forth by the State, and the authorities Johnson relies on, and many others, reject it.

Distinguishing types of drug-profiling based on the categories of factors they consider, the approach advocated for in the Answer is not just at odds with *Johnson*'s reasoning, it also fails to account for what one commentator (relied on by *Johnson*) described as the "chameleon like quality" of drug courier profiling which stems from the "the inherent malleability of [] profiles ... [which] are not written down and ... completely change from one occurrence to another."⁴ In other words, there is no formal list of factors,⁵ which the State recognizes (Answer at 14); therefore, the drug courier profile cannot possibly be understood as one based on a "list of non-drug characteristics." Unsurprisingly, the distinction proposed by the State is not found in *Johnson*, and is inconsistent with sources relied on by *Johnson*, and court decisions around the country. *Johnson* itself, uses "drug courier profiling" interchangeably with "expert witness regarding the sale of illegal drugs,"⁶ cites favorably to numerous courts which use the "drug courier profile" to refer to drug dealer profiling more generally,⁷ and relies on scholarly sources which understand

⁴ Jodi Sax, *Drug Courier Profiles, Airport Stops and the Inherent Unreasonableness of the Reasonable Suspicion Standard After United States v. Sokolow*, 25 LOY. L.A.L. REV. 321, 351 (1991).

⁵ *Reid v. Georgia*, 448 U.S. 438, 440 (1980).

⁶ *Johnson*, 813 A.2d at 164.

⁷ *United States v. Williams*, 957 F.2d 1238, 1242 (5th Cir. 1992) ("The profiles themselves are nothing more than a compilation of characteristics which aid law enforcement officials in identifying persons who might be trafficking in illegal

the term as broadly referring to “characteristics generally associated with narcotics traffickers.”⁸ The Delaware Superior Court has interpreted this Court’s drug courier profiling precedent as applying to drug dealer profiling having nothing to do with traditional “drug couriers.”⁹ And in *Quarles*, this Court used “drug profile” interchangeably with “drug courier profile,” further demonstrating the intended breadth of its decisions on the issue.¹⁰ Courts around the country similarly use the term as an umbrella including a much larger swath of drug trafficking profiles.¹¹

narcotics”); *United States v. Quigley*, 890 F.2d 1019, 1021 (8th Cir. 1989) (characterizing drug courier profile as an “informal compilation of characteristics often displayed by those trafficking in drugs.”)

⁸ Irene Dey, *Drug Courier Profiles: An Infringement on Fourth Amendment Rights*, 28 U. BALT. L.F. 3, 3–4 (1998); Stephen E. Hall, *A Balancing Approach to the Constitutionality of Drug Courier Profiles*, 1993 U. ILL. L. REV. 1007 (1993) (describing drug courier profiles as a tool used by “law enforcement agencies... to identify and detain persons who display characteristics that law enforcement agents believe are typical of drug traffickers”).

⁹ *State v. Porter*, 2004 WL 2419166, at *3 (Del. Super. Ct. Sept. 29, 2004) (discussing drug courier profile testimony regarding whether an observed interaction was a “hand-to-hand drug transaction ... [or] a mere handshake).

¹⁰ *Quarles v. State*, 696 A.2d 1334, 1339 (Del. 1997).

¹¹ *United States v. Griffin*, 2012 WL 12878573, at *7 (N.D. Miss. July 19, 2012) (identifying “expert opinion testimony that a person is a ‘drug dealer’” as an example of “improper ‘drug courier profile’ testimony.”); *United States v. Sanchez-Hernandez*, 507 F.3d 826, 831 (5th Cir. 2007) (A “drug courier profile” is “nothing more than a compilation of characteristics that aid law enforcement officials in identifying persons who might be trafficking in illegal narcotics.”); *Carpenter v. Com.*, 2006 WL 1514290, at *2 (Ky. Ct. App. June 2, 2006) (equating “drug dealer [and] drug courier profile”); *People v. Hubbard*, 530 N.W.2d 130, 132 (Mich. Ct. App. 1995) (same); *State v. Foster*, 621 N.E.2d 843, 848 (Ohio Ct. App. 1993) (grouping drug courier and drug dealer profiles together as “profile case[s]”); *United States v. Humphrey*, 930 F.2d 919 (6th Cir. 1991) (“airport police officers had independently concluded that the occupants of the vehicle were possible drug dealers

c. The State has not identified a single case which held testimony like Det Silvers’ is permitted to be used as evidence of substantive guilt.

The State claims that this Court “regularly and consistently” permits testimony like Det. Silvers’ to be used for substantive guilt.¹² To advance this proposition, it cites four cases in which an expert appears to have testified similarly to Det. Silvers, but none which addressed an admissibility challenge even remotely like Davis’. *Mason v. State* (Answer at 17), and *Morales v. State* (Answer at 19) are pre-*Johnson* cases, which addressed challenges to the sufficiency of the evidence, not to the admissibility of profiling testimony.¹³ *Hopkins v. State* (Answer at 18), is post-*Johnson* but is once again focused on sufficiency of the evidence without

because they matched certain aspects of the drug courier profile.”); *Wallace v. State*, 557 So. 2d 212, 212 (Fla. Dist. Ct. App. 1990) (“drug courier/dealer profile.”).

¹² To be clear, Davis’ position is not that expert testimony pertaining to drug dealing is problematic. This Court has clearly held otherwise. Nor is Davis’ position that all of Det. Silvers’ testimony was inadmissible under *Johnson*. For instance, Det. Silver’s explanation of “coded language” in a text message was clearly helpful to the jury and does not implicate the *Johnson* Court’s concerns about profiling. *United States v. Fernandez*, 795 Fed. Appx. 153, 155 (3d Cir. 2020) (“it is well established that government agents may testify to the meaning of coded drug language.”). So too, when it comes to “complex drug-smuggling conspiracies,” which, unlike Davis’ case, present a system of drug dealing that a juror might not understand without expertise. *United States v. Lui*, 941 F.2d 844, 848 (9th Cir. 1991). Describing components of drug dealing which a juror would not otherwise understand is not where the prejudice flows from; rather it is the suggestion that Davis’ guilt should be inferred from the fact that he exhibited the same characteristics of some large number of unidentified alleged drug traffickers.

¹³ *Mason v. State*, 590 A.2d 502 (Del. 1991); *Morales v. State*, 696 A.2d 390, 393 (Del. 1997).

touching its admissibility.¹⁴ Moreover, the *Hopkins* concurrence even suggests that an objection to the admissibility of the testimony would have been appropriate.¹⁵

Finally, the appellant in *Hudson v. State* (Answer at 17—18) made an entirely different admissibility arguments: “as a matter of law, the chief investigating officer in a criminal case should never testify at trial as an expert witness”¹⁶ and that the expert in that case was not qualified “because he had received ‘little or no training outside that provided in-house.’”¹⁷ Given the nature of these challenges, unsurprisingly, *Hudson* does not even mention the word “profiling.” Still, to the degree it speaks to the problems with profiling raised by Davis, *Hudson* strongly suggests that testimony like Det. Silvers’ is inadmissible. The *Hudson* Court cited at length, and affirmed the trial court’s decision which prohibited the drug dealing expert in that case from making statements about his past arrests and investigations:¹⁸ the exact type of statement made by Det. Silvers and focused on in Davis’ challenge. Op. Br. at 14—15; A176—77, A180, A422. The *Hudson* Court explained, just as argued by Davis, that such testimony is inadmissible because it “cannot be cross-examined by the defendant.”¹⁹

¹⁴ *Hopkins v. State*, 293 A.3d 145, 151—152 (Del. 2023).

¹⁵ *Id.* at 152—53.

¹⁶ *Hudson v. State*, 956 A.2d 1233, 1237 (Del. 2008).

¹⁷ *Id.* at 1238.

¹⁸ *Id.* at 1237 (affirming trial court decision prohibiting drug expert from making statements like “I’ve arrested,” “I did this,” or “I did that”).

¹⁹ *Id.* at 1240.

d. The State explicitly used Det. Silvers’ impermissible testimony as proof of substantive guilt.

The State critiques Davis’ Opening Brief by noting, correctly, that it failed to provide a record citation for the claim that “during closing, [the prosecutor] explicitly relied on [Det. Silvers’] impermissible testimony as proof of Davis’ substantive guilt.” Answer at 13—14 (citing Op. Br. at 2). However, the State has not put forth a legal argument that flows from this omission. This is likely because it recognizes that the record unambiguously supports Davis’ claim, and the citations are easily found in the section of the record (the closing) identified by Davis and included in the appendix. A220—23; A455; A457; A463.

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

/s/ Elliot M. Margules _____
Elliot Margules [#6056]
Office of Public Defender
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: December 12, 2023