



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

BAKR DILLARD, )  
)  
Defendant Below- )  
Appellant, ) No. 256, 2024  
)  
v. ) ON APPEAL FROM  
) THE SUPERIOR COURT OF THE  
) STATE OF DELAWARE  
STATE OF DELAWARE, ) ID No. 2205002834  
)  
Plaintiff Below- )  
Appellee. )

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
DELAWARE IN AND FOR NEW CASTLE COUNTY

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**REPLY BRIEF**

**COLLINS PRICE & WARNER**

Kimberly A. Price, ID No. 6617  
8 East 13<sup>th</sup> Street  
Wilmington, DE 19801  
(302) 655-4600

*Attorney for Appellant*

Dated: January 7, 2024

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Appellant Bakr Dillard, through the undersigned counsel, replies to the State's Answering Brief as follows:

**ARGUMENT**

**I. THE SUPERIOR COURT ERRED IN DENYING MR. DILLARD'S MOTION TO DISMISS OR ALTERNATIVELY TO DECLARE A MISTRIAL AS A SANCTION FOR THE STATE'S HIGHLY PREJUDICIAL MIDTRIAL DISCOVERY VIOLATION.**

The Opening Brief argued that the trial judge erred in denying Mr. Dillard's Motion to Dismiss or alternatively to declare a mistrial for the State's mid-trial discovery violation surrounding the DNA evidence. The Superior Court's remedy of excluding the DNA evidence on the gun, after it had already been admitted and testified to by the State's expert, was insufficient and violated Mr. Dillard's right to fair trial.

*Contrary to the State's assertions, Mr. Dillard did not waive his argument that the trial erred in denying his request for a motion to dismiss or alternatively to declare a mistrial.*

In its Answering Brief, the State contends that Mr. Dillard's claim is not reviewable on appeal because he "agreed that the remedy fashioned by the Superior Court was appropriate for the State's failure to timely produce the police report."<sup>1</sup> The defense initially requested either dismissal and/or a mistrial as a remedy for the State's discovery violation.<sup>2</sup> Alternatively, the defense asked that

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<sup>1</sup> Ans. Br. at 19.

<sup>2</sup> A565.

the trial court preclude the State from eliciting any additional testimony as to which magazine Mr. Dillard's DNA was attributed.<sup>3</sup>

Evidentiary issues not properly raised before the trial court constitute waiver of that issue on appeal, unless there is plain error.<sup>4</sup> Here, Mr. Dillard raised this discovery violation before the trial court. Counsel articulated the defense's position in two written submissions before the Court held oral argument on February 12, 2024.<sup>5</sup> The issue was raised and fairly presented to the trial court and is not waived in this direct appeal.<sup>6</sup>

Mr. Dillard preserved the issue for appeal by filing a motion to dismiss and/or declare a mistrial. The trial judge indicated it was going to deny the defense's requested relief. Instead, the Court proposed giving an instruction to the jury to disregard the DNA evidence.<sup>7</sup> Defense counsel agreed that this would cure the problem; but this does not constitute waiver of the issue. Counsel correctly understood that the trial judge was denying his requested relief and an alternative remedy was being considered. This issue has not been waived merely because the trial court proposed an alternative remedy to which counsel acquiesced.

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<sup>3</sup> A565-566.

<sup>4</sup> *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

<sup>5</sup> A564-566; A581-582; A583-606.

<sup>6</sup> *See Wainwright*, 504 A.2d at 1100 (“This Court, in the exercise of appellate authority, will generally decline to review contentions not raised below and not fairly presented to the trial court for decision.”).

<sup>7</sup> A602-603.

***The trial court’s denial of the motion to dismiss, or alternatively, to declare a mistrial, violated Mr. Dillard’s right to a fair trial.***

The State further contends that even if Mr. Dillard’s argument is not waived, it is without merit.<sup>8</sup> The State concedes that the trial court “correctly concluded” that the failure to produce the police reports until midway through trial was a violation of the protective order,<sup>9</sup> but argues that the Superior Court correctly denied the motion to dismiss and motion for a mistrial.<sup>10</sup> The State contends that the exclusion of the DNA evidence from the magazine and Glock was not an abuse of discretion.<sup>11</sup>

When the trial court determines that the State has committed a discovery violation, it has “broad discretion to fashion the appropriate remedy.”<sup>12</sup> When reviewing a discovery violation, this Court examines: “(1) the centrality of the error to the case; (2) the closeness of the case; and (3) steps taken to mitigate the results of the error.”<sup>13</sup>

In its Answering Brief, the State contends that this was not a close case and the Superior Court’s remedy cured the problem of the discovery violation.<sup>14</sup> But

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<sup>8</sup> Ans. Br. at 22.

<sup>9</sup> *Id.*

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

<sup>11</sup> *Id.*

<sup>12</sup> *Hopkins v. State*, 893 A.2d 922, 927 (Del. 2006) (quoting *Cabrera v. State*, 840 A.2d 1256, 1263 (Del. 2004).

<sup>13</sup> *Id.*

<sup>14</sup> Ans. Br. at 24-25.

the discovery violation was central to the case and Mr. Dillard's defense. His defense focused on distancing himself from the Glock and magazine found on April 15, 2022, the Honda Pilot, and thereby the shooting. The way the defense intended to do this was to highlight that Mr. Dillard's DNA was not located on the gun or magazine found on April 15th; rather, his DNA was on the separate magazine located on April 14, 2022. But this was not the case.

Midway through trial, the defense discovered that Mr. Dillard's DNA came back to the magazine, which was accompanied by a gun, located on April 15th. This information came to light after the State located police reports detailing the DNA swabbing of the gun and magazines and regarding the chain of custody of the DNA evidence. Since defense counsel did not have these reports before trial, he relied up on the State's representations of the DNA evidence, which were incorrect. This discovery violation goes to the heart of Mr. Dillard's defense and was central to his case.

The remedy imposed did not adequately mitigate the results of the State's error. Defense counsel made comments in his opening statement that Mr. Dillard's DNA was not on the gun or the magazine found with it. The State already called Leslie Mann, the DNA expert, to testify about her findings. Her report was introduced into evidence as a State exhibit. Given that all of this evidence had

already been introduced by the time this discovery violation came to light, excluding the DNA results was an insufficient remedy.

A mistrial is appropriate when “there is manifest necessity and no meaningful and practical alternatives.”<sup>15</sup> The State argues that the Court chose the fairest remedy by ordering that none of evidence about the DNA being found on the magazine with the Glock could be entered into evidence.<sup>16</sup> This was not a meaningful alternative sanction for the State’s discovery violation. The jury heard testimony from the DNA expert and viewed her report; it had already been admitted into evidence. It was impractical to believe that the jury would be able to wholly disregard this DNA evidence. The only appropriate remedy was either dismissal of the case or a mistrial with the DNA evidence being excluded at any future proceedings.

The State notes in its Answering Brief that in Mr. Dillard’s opening statement, counsel “confusingly” said that “the DNA evidence did not tie him to the shooting.”<sup>17</sup> This is not reflected in the record. Defense counsel stated:

Now, you heard from Ms. Volker, she said that the – there was a magazine in the cemetery and Mr. Dillard’s DNA was on that magazine. She also told you that you will hear evidence that there was a gun separately found the next day. But what she will not tell you and what she did not tell you and what you will hear is that the gun that does not have his DNA on it also had its own magazine. That

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<sup>15</sup> *Williams v. State*, 296 A.3d 895, 902 (Del. 2023).

<sup>16</sup> A27.

<sup>17</sup> Ans. Br. at 32.



magazine the State will not be able to show has his DNA on it. So we're talking about a separate magazine, separate from the gun, the one found on a separate day.<sup>18</sup>

At no point did counsel say that the DNA evidence did not tie him to the shooting; rather, counsel clarified that the magazine found with the gun both did not have Mr. Dillard's DNA on it. Counsel elaborated that the magazine that did have Mr. Dillard's DNA on it was found separate from the gun on a different day.

These assertions were based on misrepresentations from the State regarding the evidence. Without the police reports that should have been provided under the protective order, the defense was left to rely upon the State's representations when developing a defense strategy. This strategy, and defense counsel's credibility, were wholly undermined as a result of the State's discovery violation and failure to turn over critical police reports.

The Superior Court erred in denying Mr. Dillard's request for either a dismissal of the case or a mistrial with the DNA evidence excluded at any further proceedings. Instructing the jury to disregard the DNA evidence on the magazine and excluding this evidence – after it was already admitted and testified to by the State's expert – was an insufficient remedy for the State's discovery violation. The judgment of the Superior Court should be reversed.

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<sup>18</sup> A180.

## **CONCLUSION**

For the foregoing reasons, and those stated in the Opening Brief, Appellant Bakr Dillard respectfully requests that this Court reverse the judgement of the Superior Court.

### **COLLINS PRICE & WARNER**

/s/ Kimberly A. Price  
Kimberly A. Price, ID No. 6617  
8 East 13<sup>th</sup> Street  
Wilmington, DE 19801  
(302) 655-4600

Dated: January 7, 2024