

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CURTIS J. BROWN,	§	
	§	No. 59, 2017
Defendant Below-	§	
Appellant,	§	
	§	Court Below:
v.	§	Superior Court of the
	§	State of Delaware
STATE OF DELAWARE,	§	
	§	Cr. I.D. No. 1502004036 (N)
Plaintiff Below-	§	
Appellee.	§	

Submitted: August 16, 2017
Decided: August 17, 2017

Before **STRINE**, Chief Justice; **VALIHURA** and **VAUGHN**, Justices.

ORDER

This 17th day of August 2017, the Court, having considered this matter on the briefs of the parties, has concluded that the same should be affirmed on the basis of and for the reasons assigned by the Superior Court in its Memorandum Opinion of January 9, 2017.¹

¹ Appellant contends that he was entitled to an exculpatory presumption along the lines of *Deberry v. State*, 457 A.2d 744 (Del. 1983), with respect to his performance on three field sobriety tests (“FSTs”). He asserts that the FSTs were administered such that a video recording device in the officer’s patrol car failed to capture footage of his lower extremities. The Superior Court did not address this argument, holding only that Brown was not entitled to a *Deberry* instruction arising from a malfunction of the officer’s microphone that caused the video to record without audio. *See Brown v. State*, 2017 WL 89059, at *3 n.17 (Del. Super. Jan. 9, 2017). The Superior Court’s reasoning in rejecting the audio claim applies equally to Appellant’s argument concerning the administration of the FSTs outside the full view of the camera. The State preserved and disclosed the video evidence in its possession, and Brown has not demonstrated that law enforcement has an affirmative duty to video record all FST administrations. Accordingly, Appellant’s argument concerning the video of his performance on the FSTs is without merit.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Karen L. Valihura
Justice