IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
	)	
v.	)	ID #s 0811007667, 0811007578
	)	
KYLE WATSON,	)	
Defendant.	)	

Date Submitted: March 20, 2009
Date Decided: May 1, 2009

Upon Consideration of Defendant's Motion to Suppress - **DENIED**

ORDER

Colleen K. Norris, Esq., 820 North French Street, Wilmington, DE 19801, attorney for the State of Delaware

Kevin J. O'Connell, Esq., State Office Building, 820 North French Street, Wilmington, DE 19801, attorney for Defendant

Jurden, J.

I. INTRODUCTION

Kyle Watson ("Defendant") hereby moves to suppress evidence that was discovered as a result of a pat-down and administrative search. For the reasons discussed below, the Defendant's Motion is **DENIED**.

II. BACKGROUND

On November 11, 2008, at approximately 7:30 p.m., Officers Kucharski ("Kucharski") and Truluck ("Truluck") (collectively "the Officers"), of the City of Wilmington Police Department were on routine patrol near the intersection of 9th and Pine Streets in Wilmington, Delaware.[1] Kucharski knew this to be a high crime area. He described it as an "open air drug market" – an area where drug dealers make hand-to-hand drug transactions to individuals in vehicles and on foot.[2] While patrolling the area, the Officers noticed Defendant walking on the sidewalk, westbound, in the 600 block of East 9th Street.[3] Kucharski recognized Defendant from "numerous stops" and "previous arrests" that he had performed in the same area.[4] When Kucharski was asked on direct examination whether Defendant was "doing anything in particular" when he saw him, Kucharski responded that Defendant was "just walking."[5] Kucharski was aware that

[1] Suppression Hr'g Tr. at 12 (March 20, 2009).
[2] *Id.* at 12-13.
[3] *Id.* at 15. Kirwood Street runs perpendicular to 9th Street and parallel to Pine Street, one block to the East.
[4] *Id.* at 14.
[5] *Id.* at 15.

Defendant lives on the 500 block of 9th Street. He noted that the "most likely scenario" was that Defendant was walking home.[6]

Upon seeing Defendant, the Officers made a left turn from Kirkwood Street onto 9th Street – driving the wrong direction down a one-way street for approximately half of a block.[7] The Officers approached Defendant to "ascertain his business."[8] While "rolling" in their vehicle alongside Defendant, the Officers asked the Defendant "where he was going that night and what he was doing."[9] As Defendant continued walking, he responded in a "calm tone" that he was heading home.[10] Shortly thereafter, Defendant, with a more "aggressive demeanor," said "What? Do you want to jump out on me? I'm 29 negative, I'm clean. Pat me down. Search me."[11]

Based on Defendant's comments and demeanor, Kucharski believed that he may have been concealing a deadly weapon.[12] The Officers immediately stopped their patrol vehicle, exited it, ordered Defendant to place his hands on the vehicle, and conducted a pat-down search of Defendant's person.[13] During the pat-down,

---

[6] *Id.* at 35.
[7] Suppression Hr'g Tr. at 36.
[8] *Id.* at 15.
[9] *Id.* at 16.
[10] *Id.* at 17.
[11] *Id*. at 17, 36; *see* Def.'s Motion to Suppress at ¶1, Docket Item ("D.I.") 7. "29 Negative" means that there are no outstanding arrest warrants or capiases. According to Defendant, the Officers cut him off in their patrol car, "jumped out" of their car and began patting-down Defendant without any words spoken on their part or his. According to Defendant, there was no consent and, in fact, no conversation *at all*. The Court does not find Defendant's testimony on this point credible. Suppression Hr'g Tr. at 64.
[12] Suppression Hr'g Tr. at 21.
[13] *Id.* Kucharski testified that once he had Defendant place his hands on the vehicle, in his own mind, Defendant was "not free to leave." *Id*. at 22.

Kucharski felt a "small rock-like object" at the waistband of Defendant's mesh shorts, which he believed, based on his training and experience,[14] was illegal narcotics.[15] The rock-like object removed from Defendant's shorts subsequently field-tested positive for 2.84 grams of crack-cocaine.[16] The Officers immediately placed Defendant under arrest.

Kucharski informed Detective Hazzard ("Hazzard") of the Wilmington Police Department that Defendant was arrested for drug possession. Hazzard, in conjunction with Probation Officer Dupont ("Dupont"), confirmed that Defendant was on probation.[17] Shortly thereafter, Dupont's supervisor approved an administrative search of Defendant's residence.[18] Hazzard executed the search of Defendant's room at 506 E. 9th Street in Wilmington, Delaware. During the administrative search, Hazzard discovered drug paraphernalia and approximately 10.7 grams of crack-cocaine.[19] Defendant now seeks to suppress the drugs and drug paraphernalia that were discovered during the pat-down and administrative searches.

[14] Approximately 20-25 drug arrests.
[15] *Id.* at 25.
[16] *Id.* at 28.
[17] Defendant was on Level II probation at the time, however, Hazzard testified that prior to the administrative search, he understood Defendant to be on Level III probation. Suppression Hr'g Tr. at 50.
[18] *Id.* at 47.
[19] *Id.* at 49.

III. DISCUSSION

On a motion to suppress, the State bears the burden of establishing that the challenged search or seizure complied with the rights guaranteed Defendant by the United States Constitution,[20] the Delaware Constitution,[21] and Delaware statutory law.[22] The burden of proof on a motion to suppress is proof by a preponderance of the evidence.[23] The outcome of Defendant's Motion is determined on the State's ability to prove that: (1) Defendant's consent was valid; (2) the consent was not tainted by an unlawful stop; and (3) the administrative search complied with Delaware's standards.[24]

A. Consent to Search

The State has proven by a preponderance of the evidence that Defendant validly consented to the search. The State bears the burden of proving that Defendant's consent to search was freely and voluntarily given, and not the product of coercion.[25] Consent must be "unequivocal and specific" and "freely

[20] U.S. CONST. amend. IV, XIV.
[21] Del. Const. art. I, § 6 ("The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.")
[22] Pursuant to 11 *Del. C.* § 1902(a), a police officer is authorized to "stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination." *See also Hunter v. State*, 783 A.2d 558, 560 (Del. 2001).
[23] *State v. Hunter*, 2004 WL 2744513, at *2 (Del. Super. Sept. 10, 2004).
[24] *See* discussion *infra* Parts A, B, and C.
[25] *State v. Winn*, 2006 WL 2052678, at *4 (Del. Super. July 3, 2006).

and intelligently" given.[26] While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish knowledge as the *sine qua non* of an effective consent.[27] Whether consent is voluntary is a question of fact to be determined from the "totality of the circumstances."[28] In this case, the Court is not concerned about police coercion.[29] Rather, the Court's concern centers on whether Defendant unequivocally consented to the search of his person.[30]

Here, Defendant was walking down a public street when he stated, "What? Do you want to jump out on me? I'm 29 negative, I'm clean. *Pat me down. Search me.*"[31] Defendant invited the Officers to pat him down. While perhaps unwise, the consent was explicit and completely voluntary. Based on the totality of the circumstances, the Court is satisfied that Defendant freely and unequivocally consented to the search.

B. The Propriety of the Stop and Search

The Fourth Amendment of the United States Constitution and the Delaware counterpart do not restrict law enforcement officers from "initiat[ing] contact with

[26] *Id.*
[27] *State v. Harris*, 642 A.2d 1242 (Del. Super. 1993) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)).
[28] *State v. Huntley*, 777 A.2d 249, 257 (Del. Super. 2000) (citing *Schneckloth*, 412 U.S. at 227).
[29] Defendant was not in a situation in which he was particularly vulnerable to police coercion. He was not in police custody or under interrogation of any kind.
[30] *See Harris*, 642 A.2d at 1246.
[31] *See supra*, note 11 (emphasis added).

citizens on the street for the purpose of asking questions."[32] A law enforcement officer's consensual encounter with an individual amounts to a "stop" or "seizure" from the moment when a reasonable person believes that the individual is not "free to ignore the police presence"[33] and "walk away."[34] If the person is not free to leave, police officers must have reasonable articulable suspicion to detain the individual.[35] Without reasonable articulable suspicion, the Court must suppress anything recovered during the stop as inadmissible evidence at trial.[36] A valid consent is tainted if it is given during an illegal detention; tainted consent is ineffective to justify a search.[37]

Here, Defendant consented to the search before the encounter rose to the level of a "stop." According to the Officers, their patrol vehicle was still "rolling" down the street, side-by-side with Defendant, when he expressly invited the Officers to "pat him down." While the Officers engaged Defendant in conversation, Defendant continued walking without changing his direction or pace. The patrol vehicle did not physically block Defendant's walkway, and the Officers

[32] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1287 n.5 (Del. 2008) (quoting *Purnell v. State*, 832 A.2d 714, 719 (Del. 2003)).
[33] *Lopez-Vazquez*, 956 A.2d at 1287 n.6 (quoting *Jones v. State*, 749 A.2d 855, 869 (Del. 1999)).
[34] *Jones*, 749 A.2d at 867. The *Jones* Court held: "Jones was seized within the meaning of Section 1902 and Article I, § 6 when Patrolman Echevarria first ordered him to stop and remove his hands from his pockets. If that seizure was not based upon reasonable and articulable suspicion, anything recovered as a result of that seizure is inadmissible at trial." *Id.* at 869.
[35] *See Id.*
[36] *Id.*
[37] *Lopez-Vazquez*, 956 A.2d at 1291-92 ("The absence of a reasonable basis for a Fourth Amendment seizure bears directly upon the validity of . . . [the defendant's] subsequent consent to search. 'If consent is given after an illegal seizure, that prior illegality taints the consent to search' because the primary purpose of the federal exclusionary rule is to deter future unlawful police conduct and safeguard constitutional rights.")

did not activate the vehicle lights or sirens. Given these facts, it would have been reasonable for Defendant to believe that he was free to leave.[38] Based on the preponderance of the evidence, the interaction between the Officers at the time of Defendant's consent to search was a mere encounter and not a stop. Therefore, the State does not need to establish reasonable suspicion for the fruits of the pat-down search to be admissible.

Had the Court found Defendant's consent to be invalid, the outcome of this motion would be quite different. Without Defendant's consent to search, the Officers could not have *legally* detained him to conduct the search. It is clear that when the Officers parked their vehicle and ordered Defendant to place his hands on the vehicle, the Defendant was "seized." The Court is not persuaded by the State's argument and Kucharski's testimony that the Officers had reasonable articulable suspicion to conduct a pat down search, *even without Defendant's consent*.[39] Furthermore, the Court does not agree with Kucharski's assertion that "law-abiding citizens don't feel the need to become aggressive" when approached by law enforcement officers.[40] Law abiding citizens may become aggressive if they feel

[38] *See Ross v. State*, 925 A.2d 489, 494 (Del. 2007) ("we hold that the presence of uniformed police officers following a walking pedestrian and requesting to speak with him, without doing anything more, does not constitute a seizure under Article I, § 6 of the Delaware Constitution.")
[39] Suppression Hr'g Tr. at 66-68; State's Resp. to Def.'s Motion to Suppress, D.I. 13.
[40] "*Terry* and its progeny require that a pat-down search for weapons be based upon an officer's reasonable suspicion developed specifically with respect to each individual suspect . . . The Court is not bound in its analysis by the officer's subjective beliefs as expressed at the hearing." *State v. Matos*, 2001 WL 1398585, *4 n.21 (Del. Super. Oct. 2, 2001) (citing *United States v. Day*, 455 F.2d 456 (3d Cir. 1972)).

that they are being harassed. This type of behavior does not necessarily or automatically mean an individual has violated the law.

Law enforcement officers need more than a mere "hunch" to detain a citizen in a public place.[41] Reasonable suspicion "requires 'some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.'"[42] Analytically, the standard is highly fact specific and based on the totality of the circumstances.[43] In this instance, the State fails to articulate a set of facts and circumstances that rise to the level of reasonable suspicion. The fact that Kucharski recognized Defendant from previous arrests and knew the street where Defendant was walking to be a high crime area are factors to be considered in evaluating reasonable suspicion. However, it was hardly suspicious for Defendant to be walking toward home at 7:30 p.m. just a few blocks shy of his residence. The State did not offer any evidence that Defendant's demeanor or conduct were suggestive or indicative of criminal activity. Defendant's visible irritation during his interaction with the police was not sufficient to justify detaining Defendant without his consent to do so.[44]

---

[41] *Lopez-Vazquez*, 956 A.2d at 1289; *Terry v. Ohio*, 392 U.S. 1, 29 (1968).
[42] *Lopez-Vazquez*, 956 A.2d at 1287 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)); *Terry*, 392 U.S. at 21.
[43] *See e.g. Lopez-Vazquez*, 956 A.2d at 1289.
[44] *Lopez-Vazquez*, 956 A.2d at 1288-89. ("activity such as 'leaving the scene upon the approach, or the sighting of a police officer' or the 'refusal to cooperate with an officer who initiates an encounter' cannot be the sole grounds constituting reasonable suspicion. These events, however, may be considered, as part of the totality of the circumstances.")

C. Administrative Search of Defendant's Residence

The Fourth Amendment to the United States Constitution and Article I, Section 6 of the Delaware Constitution[45] protect individuals from unreasonable search and seizures. These constitutional provisions embody and protect individuals' right to privacy from government intrusion. The general standard requires law enforcement officers to obtain a judicial warrant supported by probable cause in order to search someone's dwelling for contraband.[46] However, the general standard is relaxed in situations where the State is monitoring individuals on probation.[47] Inherent in the very nature of probation is that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'"[48] As a result, a probationer's expectation of privacy in his or her residence is less than that of an average citizen.[49] Probationers do not sacrifice all of their privacy rights; law enforcement officers must still have reasonable grounds to search a probationer's residence.[50]

[45] *See supra*, note 21.
[46] *State v. Hunter*, 2004 WL 744513, at *2 (Del. Super. Sept. 10, 2004).
[47] *Griffin v. Wisconsin*, 438 U.S. 868, 873-74 (1987); *Hunter*, 2004 WL 744513, at *2.
[48] *Griffin*, 438 U.S. at 874 (citation omitted); *see also U.S. v. knight*, 543 U.S. 112, 121 (2001); *Hunter*, 2004 WL 2744513, at *2.
[49] *State v. Redden*, 2003 WL 22853419 (Del. Super. Oct. 22, 2003).
[50] *Griffin*, 483 U.S. at 872.

The Delaware Supreme Court recently affirmed that probation officers "may conduct searches of individuals *in accordance with Department procedures*."[51] Section 7.10 of the Department of Correction regulations outlines all of the procedures probation officers are to follow in executing an administrative warrant.[52] Under § 7.19(VI)(A)(1), the officer must use an "Arrest-Search Checklist" for all the arrests and searches, unless exigent circumstances exist. The Checklist includes five factors for law enforcement officers to consider before searching a probationer:

> (1) whether the officer has knowledge or sufficient reason to believe that the offender possesses contraband;
>
> (2) whether the officer has knowledge or sufficient reason to believe that the offender is in violation of probation or parole;
>
> (3) whether there is information from a reliable informant indicating that the offender possesses contraband or is violating the law;
>
> (4) the information from the informant is corroborated; and
>
> (5) whether approval from the search has been obtained from a supervisor.[53]

Reviewing the Checklist is not a mechanical procedure, but rather a means to ensure that there are reasonable grounds to undertake a search.[54]

---

[51] 11 *Del. C.* § 4321(d).
[52] *See* Delaware Department of Correction Bureau of Community Corrections Probation and Parole Procedure § 7.19 (amended effective June 5, 2001); *State v. Thomas*, 2007 WL 949491 (Del. Super. March 29, 2007).
[53] *Sierra v. State*, 958 A.2d 825, 829 (Del. 2008) (quoting § 7.19 (VI)(A)).
[54] *See id.* at 829-31. Here, the State did not submit to the Court a checklist that any officer had filled out. The Delaware Supreme Court explains that, "[a]lthough the preferable (and wisest from an evidentiary standpoint)

Here, there is no question that the information Hazzard conveyed to Dupont was reliable. The context of the administrative search did not concern the credibility and reliability of anonymous informants, but rather direct evidence from experienced police officers that Defendant possessed contraband. After Kucharski discovered the contraband, he contacted Dupont. Dupont followed administrative procedures by reviewing with, and gaining approval from, his supervisor. Dupont obtained reliable information that Defendant possessed illegal narcotics while on probation. Dupont knew that Defendant was in possession of such narcotics while walking towards his residence. Under the totality of the circumstances, Dupont had reasonable grounds to believe that more contraband would be found in the residence to justify the administrative search.

The Court finds that the State has established by a preponderance of the evidence that Dupont had reasonable grounds to search Defendant's bedroom, and all evidence seized pursuant to that search comported with constitutional and statutory requirements. For the foregoing reasons, Defendant's Motion to Suppress is **DENIED**.

IT IS SO ORDERED.

_____

Jurden, J.

---

method to conduct the [administrative] search is to both fill out the checklist and perform an independent analysis of the situation in the process, the most important thing is that the analysis itself occurs." *Id.* at 831 n.23.