

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

v.

JOSIAH MORGAN,

Defendant.

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I.D. # 1802009319

Submitted: September 28, 2018

Decided: November 8, 2018

**Upon Defendant's Motion to Suppress:
DENIED**

This 8th day of November, 2018, upon consideration of the Motion to Suppress (the "Motion") filed by Josiah Morgan, the record in this case, and the applicable legal authorities, it appears to the Court that:

FACTUAL BACKGROUND

1. Morgan was indicted on charges of Carrying a Concealed Deadly Weapon, Possession of a Weapon with a Removed Serial Number, Resisting Arrest, Possession of Marijuana, two counts of Drug Dealing, and three counts of Possession of a Firearm During the Commission of a Felony. The charges arise from a traffic stop in which Morgan was the vehicle's front seat passenger. During the traffic stop, the officer ordered Morgan out of the car, and shortly thereafter Morgan struggled with the officer and fled the scene. In his Motion, Morgan contends the officer lacked either reasonable articulable suspicion or probable

cause for his initial seizure, and all evidence flowing from the seizure and his flight therefore must be suppressed.

2. On February 14, 2018, Officer David Schulz, a member of the Wilmington Police Department, was on proactive patrol in the City of Wilmington in an unmarked police vehicle with his partner, Corporal Moses. While driving in the area of 12th and Washington streets, the officers observed a tan Toyota Camry disregard a traffic light. The officers stopped the vehicle at the 400 block of Washington Street.

3. Corporal Moses approached the driver side window to advise the driver of the reason for the stop. At the same time, Officer Schulz approached the passenger side and made contact with the vehicle's front seat passenger, Morgan. Upon approaching the passenger side window, Officer Schulz observed a thin cigar in the vehicle's center console. Officer Schulz believed the cigar was a marijuana blunt. At the suppression hearing, Officer Schulz testified that the cigar "appeared to be modified because it was smaller and thinner than a typical cigar would be." He explained that, based on his training, experience, and daily contact with marijuana while on patrol, he knows it is common for individuals to empty the contents of a store-bought cigar and fill it with marijuana.

4. After observing what Officer Schulz believed was a marijuana blunt, he and Corporal Moses ordered both the driver and Morgan out of the car and

asked them to place their hands on top of the vehicle. While exiting the vehicle, Morgan hesitated in following Officer Schulz's commands, at which point Officer Schulz grabbed Morgan's right-hand wrist. Morgan immediately pulled away, and a struggle ensued, during which Officer Schulz tripped on a large tree root in the sidewalk. Officer Schulz's stumble allowed Morgan to break free and flee on foot. While in pursuit, Officer Schulz observed Morgan reach for his waistband area, which caused Officer Schulz to believe Morgan was carrying a firearm. Officer Schulz lost sight of Morgan several times, but ultimately caught up with him at the intersection of 5th and Montgomery streets.

5. Morgan was taken into custody and searched. During that search, police found on Morgan's person two grams of crack cocaine and a small Listerine bottle containing several oxycodone pills. Officer Schulz later recovered a loaded Smith and Wesson 9mm semi-automatic handgun at the intersection of North Jefferson and West 5th streets, near the path Morgan took during the foot chase.

6. Neither party contends the officers lacked reasonable articulable suspicion to initiate the traffic stop. The parties disagree, however, as to whether the interaction between Officer Schulz and Morgan was a detention or an arrest. Morgan argues the interaction constituted an arrest, for which the police lacked probable cause. Even if the interaction was a detention, Morgan argues, Officer Schulz did not have reasonable articulable suspicion to detain him based on the

brief observation of the cigar from several feet away. Morgan contends the illegal detention or arrest renders all subsequently-obtained evidence inadmissible. The State argues this was not an arrest, but an investigatory detention arising from a traffic stop. The State contends Officer Schulz's order and showing of force was not consistent with an arrest. The State also argues that even if the interaction did escalate to an arrest, there was probable cause to arrest Morgan for possession of marijuana. The State concedes that, if Morgan's detention was unconstitutional, evidence obtained after his flight must be suppressed.

ANALYSIS

7. The Fourth and Fourteenth Amendments to the United States Constitution guarantee "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."¹ A "seizure" occurs "when a reasonable person would have believed he or she was not free to ignore the police presence."² There is no dispute the initial traffic stop was a lawful seizure after a motor vehicle violation. Morgan, however, challenges whether Officer Schulz's decision to order him out of the car constituted an illegal seizure.

¹ U.S. Const. amend. IV. Article I, § 6 of the Delaware Constitution contains a similar search and seizure provision that, at times, is broader than the protections afforded by the United States Constitution.

² *Jones v. State*, 745 A.2d 856, 869 (Del. 1999).

A. At the time he was ordered to exit the car and place his hands on the vehicle, Morgan was detained but not under arrest.

8. Morgan first argues he was placed under arrest when Officer Schulz ordered him to exit the vehicle. There are three categories of police-citizen interactions: (1) a consensual encounter; (2) a detention or “Terry Stop” where an individual is restrained for a short period of time; and (3) a full-scale arrest.³ Only the second and third categories are seizures under the Fourth Amendment. Distinguishing a detention from an arrest is important because an officer only may arrest an individual if the officer has probable cause to believe the person has committed a crime.⁴ For a detention, however, an officer has a lower threshold, and may stop an individual for investigatory purposes if he has reasonable articulable suspicion that the individual “is committing, has committed, or is about to commit a crime.”⁵ Like an arrest, a detention is a seizure, but the duration and scope are more limited.⁶ If, however, “the duration of the stop or the amount of force used in the situation is unreasonable,” a detention may escalate to an arrest, requiring probable cause.⁷

9. When considering whether an interaction was an arrest or a detention, this Court must “take care to consider whether the police are acting in a swiftly

³ *Quarles v. State*, 696 A.2d 1334, 1337 (Del. 1997).

⁴ *Id.*

⁵ *Woody v. State*, 765 A.2d 1257, 1262 (Del. 2001).

⁶ *Id.*

⁷ *Flowers v. State*, 2018 WL 4659227, at *4 (Del. Sept. 27, 2018) (citing *Wiers v. Barnes*, 925 F.Supp. 1079, 1087 (D. Del. 1996)).

developing situation and . . . should not indulge in unrealistic second-guessing.”⁸

A detention does not ripen to an arrest simply because, in hindsight, the police could have used “less intrusive” means to accomplish the investigation.⁹ Although there is no bright-line rule distinguishing a detention from an arrest, some factors courts consider are (1) the amount of force applied, (2) the extent to which the person was restrained, (3) whether handcuffs were used, (4) the number of officers involved, (5) the duration of the stop, and (6) whether the person was suspected of being armed and dangerous.¹⁰

10. Morgan contends Officer Schulz’s order directing him to exit the car and place his hands on the vehicle, combined with the use of force, exceeded the scope of a detention and amounted to a full-scale arrest. Based on the interaction’s brief duration, the number of officers present, and the minimal level of force applied, this interaction was not an arrest, but merely a detention relating to a traffic stop.

11. First, the initial traffic stop and subsequent order to exit the vehicle was not significant in duration. The entire interaction occurred within a few minutes, cut short by the altercation between Morgan and Officer Schulz. In addition, the number of officers involved in the investigation was not so excessive

⁸ *U.S. v. Sharpe*, 470 U.S. 675, 686 (1985).

⁹ *Id.* at 686-687.

¹⁰ *State v. Kang*, 2001 WL 1729126, at *6 (Del. Super. Nov. 30, 2001) (citing *United States v. Perea*, 986 F.2d 633, 645 (2d Cir. 1993)); 22 C.J.S. CRIMINAL PROCEDURE AND RIGHTS OF ACCUSED § 45.

as to transform the stop into an arrest. There were two officers interacting with Morgan and the driver, and only Officer Schulz directly approached Morgan.

12. Finally, under the circumstances of the stop, the amount of force Officer Schulz used did not convert the detention to an arrest. During an investigatory stop, “[g]enerally, a show of force, including the use of drawn weapons, does not render [the] investigative stop unreasonable if the police determine that it is ‘reasonably necessary to protect themselves and maintain the status quo.’”¹¹ As Officer Schulz testified, asking a detainee to place his hands on the roof of the vehicle allows police to maintain control over the situation for purposes of officer safety. Here, Officer Schulz asked Morgan to exit and place his hands on the vehicle, and Morgan did not comply with that instruction. Officer Schulz only used force after Morgan hesitated to show his hands, and Officer Schulz’s decision to grab Morgan’s wrist was a reasonable response to protect both police officers. Those facts, viewed in the totality of the circumstances, support the conclusion that the interaction between Officer Schulz and Morgan was a detention.

¹¹ *Flowers*, 2018 WL 4659227, at *7 (quoting *U.S. v. Goode*, 2009 WL 294760, at *2 (3d Cir. Feb. 9, 2009)).

B. Officer Schulz was permitted to order Morgan out of the vehicle during the course of the traffic stop.

13. In addition to his argument that the interaction was a full-scale arrest, Morgan also argues, in the alternative, that Officer Schulz lacked reasonable articulable suspicion to order him out of the car and extend the traffic stop. To lawfully detain an individual, an officer must have “reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot.’”¹² The State bears the burden of proof in showing the officer had reasonable articulable suspicion to detain.¹³ Reasonable suspicion is a “less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.”¹⁴ To satisfy the standard, an officer must “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.”¹⁵ The Court looks at “the totality of the circumstances as viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with such an officer’s subjective interpretation of those facts.”¹⁶

14. Morgan argues Officer Schulz ordered Morgan out of the car to investigate whether the cigar Officer Schulz observed was a marijuana blunt.

¹² *U.S. v. Sokolow*, 490 U.S. 1, 7 (1989).

¹³ *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001).

¹⁴ *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

¹⁵ *Bryant v. State*, 2017 WL 568345, at *1 n.1 (Del. Feb. 8, 2017) (quoting *Jones*, 745 A.2d at 861).

¹⁶ *Id.*

Morgan argues Officer Schulz did not have reasonable articulable suspicion to extend the traffic stop to investigate possible drug possession.¹⁷ Morgan's argument, however, ignores settled precedent. That is, Officer Schulz was permitted to order Morgan out of the car during the course of a valid traffic stop, and Officer Schulz's subjective intent in doing so does not render the traffic stop unconstitutional.

15. An officer may "seize" a vehicle and its occupants to conduct a brief, investigatory traffic stop if there is reasonable articulable suspicion of criminal activity, including a traffic violation.¹⁸ At the hearing on the motion, Morgan asserted that although the Fourth Amendment to the United States Constitution permits an officer to order a vehicle's occupants out of a car during a traffic stop, the Delaware Supreme Court never has addressed whether the Delaware Constitution provides broader protections that preclude such action. Although the Delaware Supreme Court never expressly has addressed whether the Delaware Constitution precludes a police officer from ordering a vehicle's occupants out of the car without some basis other than a traffic violation, the Delaware Supreme Court repeatedly has affirmed in recent years that, "[d]uring a lawful stop, a police officer may order both the driver and passengers out of the vehicle pending

¹⁷ Mot. to Suppress at ¶ 10.

¹⁸ *West v. State*, 143 A.3d 712, 716 (Del. 2016).

completion of the traffic stop.”¹⁹ Given the Supreme Court’s clear, recent pronouncements on that issue, Delaware law on this point seems well-settled to me.

16. In this case, Morgan concedes police officers had reasonable articulable suspicion to initiate the stop for the traffic violation. Officer Schulz, therefore, was permitted under Delaware law to order Morgan out of the car while the traffic stop was in progress. The fact that Officer Schulz only chose to do so after he saw what he believed was marijuana is immaterial. An ulterior motive does not strip police of their legal justification for a stop.²⁰ The detention relating to the traffic violation had not concluded at the time Officer Schulz ordered Morgan out of the car, and Officer Schulz therefore legally was justified in ordering Morgan out of the car.

C. Officer Schulz’s conduct did not exceed the scope of the detention, and the evidence gathered during and after Morgan’s flight and arrest therefore need not be suppressed.

17. “[I]n addition to the requirement of ‘reasonable suspicion,’ an investigatory detention must be ‘reasonably related in scope to the circumstances

¹⁹ *Cropper v. State*, 123 A.3d 940, 944 (Del. 2015) (citing *Holden v. State*, 23 A.3d 843, 847 (Del. 2011)); see also *Loper v. State*, 8 A.3d 1169, 1174 (Del. 2010) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 107-111 (1977)).

²⁰ *U.S. v. Robinson*, 414 U.S. 218, 221 n.1 (1973); *State v. Darling*, 2007 WL 1784185, at *3-4 (Del. Super. June 8, 2007). See also *Whren v. U.S.*, 517 U.S. 806, 812-13 (1996).

which justified the interference in the first place.”²¹ The issue here is whether Officer Schulz’s order for Morgan to show his hands, combined with the use of force when Morgan failed to comply, exceeded the permissible scope of the detention.

18. Whether an officer’s actions were appropriate under the circumstances of the stop must be viewed in light of the inherent danger police officers face during traffic stops.²² Once a detention is justified by reasonable suspicion, an officer may take reasonable steps to ensure his own safety.²³ For example, the use of drawn weapons, handcuffs, or ordering an individual to lie down to prevent flight may be justified under the circumstances.²⁴ Additionally, a show of force or physical contact may be reasonable when a detainee does not comply with an officer’s command to show his hands.²⁵ In this case, the reasonableness of the order and the minimal physical contact must be evaluated not “with the 20/20 vision of hindsight,” but in light of the conditions in which the officer was

²¹ *Coleman v. State*, 562 A.2d 1171, 1176 (Del. 1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)); *Flowers*, 2018 WL 4659227, at *4.

²² *Robertson v. State*, 596 A.2d 1345, 1353 (Del. 1991) (quoting *Michigan v. Long*, 463 U.S. 1032, 1048 (1983)) (“[I]nvestigative detentions involving suspects in vehicles are especially fraught with danger to police officers.”).

²³ *Id.* (quoting *Bromwell v. State*, 427 A.2d 884, 891 (Del. 1981)) (“Once a forced encounter is justified, ‘the officer’s right to take suitable measures for his own safety follow[s] automatically.’”).

²⁴ *Flowers*, 2018 WL 4659227, at *7.

²⁵ *Id.*

operating and his need to make a split-second decision regarding the situation.²⁶ In the Court's view, the level of intrusion here was within the scope of the detention.

19. In order to protect both himself and Corporal Moses, Officer Schulz instructed Morgan to exit the vehicle and put his hands on the roof of the car. Officer Schulz's intention was to ask Morgan if he had anything on him and to request consent for a pat down. Morgan did not immediately follow the instruction to place and keep his hands on the car, at which point Officer Schulz grabbed Morgan's wrist to ensure compliance. Officer Schulz's command for Morgan to keep his hands visible was reasonable in the context of officer safety. Additionally, Officer Schulz's use of force was minimally intrusive and was a justified response to Morgan's failure to comply. As the State concedes, a frisk for weapons would not have been justified because there was no reasonable articulable suspicion that Morgan was armed.²⁷ A weapons frisk never occurred, however, because immediately upon Officer Schulz's contact with Morgan, Morgan pulled away and fled.

²⁶ *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Terry*, 392 U.S. at 20-22).

²⁷ *State v. Abel*, 68 A.3d 1228, 1233 (Del. 2012) ("In order to justify a pat down on the grounds of officer safety, an officer must have reasonable, articulable suspicion that the person subject to the frisk is presently armed and dangerous."). During the hearing, Morgan suggested Officer Schulz's testimony that he intended only to seek permission for a pat down was implausible, and that Officer Schulz intended to frisk Morgan for weapons. Even if Morgan is correct, however, the analysis does not change. The officer's instruction to Morgan to keep his hands in view was reasonable under the circumstances, as was the officer's physical contact when Morgan failed to comply. What Officer Schulz might have done next is pure conjecture and irrelevant because Morgan instead resisted the detention and fled.

20. At that point, Morgan's flight was a valid basis to arrest him. This case differs from *Jones v. State*, on which Morgan relies, because in *Jones* the officers had not legally detained the defendant.²⁸ In *Jones*, the defendant fled after his detention, was arrested for resisting detention, and searched incident to that arrest.²⁹ The Court concluded the officers lacked reasonable suspicion to detain the defendant initially and therefore suppressed the evidence obtained during the search incident to arrest.³⁰ Here, because the detention, including Officer Schulz's order and use of minimal force, was permissible during the traffic stop, the seizure was legal. Accordingly, Morgan's flight was a valid basis to arrest for resisting arrest or detention, and the evidence seized at the time of arrest need not be suppressed.

Therefore, for all the foregoing reasons, Josiah Morgan's Motion to Suppress is **DENIED. IT IS SO ORDERED.**



Abigail M. LeGrow, Judge

Original to Prothonotary

cc: Allison Abessinio, Deputy Attorney General
Michael W. Modica, Esquire

²⁸ *Jones*, 745 A.2d at 869-72.

²⁹ *Id.* at 859.

³⁰ *Id.* at 869-74 (Noting that, although resisting even an illegal arrest is a crime, it "cannot be used to allow an officer, lacking reasonable suspicion to effect a stop or search that leads to an illegal arrest, to contend that evidence seized incident to that illegal arrest is admissible.").