IN THE SUPREME COURT OF THE STATE OF DELAWARE

HEATHER JULIANO[1],	§	
	§	No. 320, 2019
Defendant Below,	§	
Appellant,	§	Court Below: Family Court
	§	of the State of Delaware
v.	§	
	§	ID No. 1901018130(K)
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: September 2, 2020
Decided: November 12, 2020

Before **SEITZ**, Chief Justice; **VALIHURA, VAUGHN**, **TRAYNOR**, and **MONTGOMERY-REEVES,** Justices, constituting the Court *en Banc*.

Upon appeal from the Family Court of the State of Delaware. **REMANDED.**

Thomas D. Donovan, Esquire, Dover, Delaware *for Appellant Heather Juliano*.

John R. Williams, Esquire, Department of Justice, Dover, Delaware for *Appellee State of Delaware*.

[1] The Court previously assigned pseudonyms to the parties under Supreme Court Rule 7(d).

TRAYNOR, Justice:

In *Whren v. United States*,[2] a unanimous United States Supreme Court held that a police officer's use of a traffic stop supported by the suspicion of a minor motor vehicle violation as a means to investigate more serious violations of the law, as to which the requisite suspicion does not exist, does not violate the Fourth Amendment's prohibition against unreasonable seizures. In this case, the appellant asks us to hold otherwise under Article I, § 6 of the Delaware Constitution.

Although we once again recognize that Article I, § 6's protections against unreasonable searches and seizures are different and broader than the protections afforded by the Fourth Amendment, in this opinion we join the vast majority of states that have either followed *Whren* or cited it with approval. In so holding, we confirm the standard by which the lawfulness of motor vehicle stops have been judged for several decades, albeit under the Fourth Amendment and not Article I, § 6. Under that standard, motor vehicle stops must be based on specific articulable facts indicating a reasonable suspicion that a violation of the law, including a traffic violation, has occurred. But we also recognize that legitimate concerns have been raised about law enforcement's use of seemingly arbitrary traffic stops as a means to investigate unrelated wrongdoing. These concerns are, however, most appropriately addressed by a vigilant application of our holding in *Caldwell v. State*,

[2] 517 U.S. 806 (1996).

which condemned the use of "marginally applicable traffic laws as a device to circumvent constitutional search and seizure requirements,"[3] rather than by the adoption of a new standard that places unnecessary restrictions on law enforcement's ability to detain violators of the law.

I. FACTUAL BACKGROUND

On January 29, 2019, Heather Juliano was a passenger in a sport-utility vehicle driven by Shakyla Soto in the vicinity of the Capital Green development in Dover. Corporal Robert Barrett of the Dover Police Department was patrolling the area, accompanied by Probation Officer Rick L. Porter, as part of the Department's Safe Streets program. According to Corporal Barrett, the Safe Streets program targets "violent offenders, . . . guns and drugs,"[4] and the probation officer was riding along to facilitate the questioning and search of any probationers the two might encounter during the patrol.

Corporal Barrett spotted Soto's SUV exiting Capital Green and noticed that the occupant of the front passenger seat was not wearing a seat belt. Although at

[3] *Caldwell v. State*, 780 A.2d 1037, 1048 (Del. 2001).

[4] App. to Opening Br. at A19. As an initial matter, we note that the parties' appendices on appeal did not include certain materials that are critical to our review. In particular, the appendices omitted Juliano's motion to suppress, relevant suppression hearing testimony, and the Family Court's written order denying the motion to suppress. Therefore, throughout this opinion our record citations are a mixture of direct references to the Family Court record and citations to the parties' appendices.

first—that is, as he decided to pull the vehicle over—Barrett thought that the unrestrained passenger was a black male in his early twenties, upon executing the stop, he learned that it was the 15-year old Juliano.[5]

Barrett approached the SUV on the driver's side, while Porter was on the passenger side. Barrett recognized the passenger as Juliano and noticed that she was putting her seat belt on. Almost immediately after Barrett initiated contact with the driver, he heard Porter say "1015 which means take . . . everybody into custody."[6] As of that moment, Barrett had not smelled an odor of marijuana or noticed any other evidence of foul play, and he was not sure why Porter was directing him to take all of the car's passengers, including back-seat passengers, Zion Saunders and Keenan Teat, into custody. At the time, Barrett speculated that Porter had detected "an odor of marijuana or a weapon or contraband."[7] Porter later told Barrett that, indeed, it was the odor of marijuana that prompted his instructions.

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[5] 21 *Del. C.* §4802 (a)(2) provides that "[t]he driver of a motor vehicle shall secure or cause to be secured in a properly adjusted and fastened seat belt system…each occupant of the passenger compartment who is 16 years of age or older." Despite Corporal Barrett's testimony that he immediately recognized the 15-year old Juliano as he approached the vehicle and was familiar with her criminal history—and therefore her juvenile status—Juliano did not challenge Barrett's testimony that, when he initiated the stop, he thought that the unbelted passenger was a black male in his early twenties. Had Barrett's testimony been otherwise—that is, had he known that Juliano was the unbelted passenger when he made the stop—he would not have had a reasonable basis upon which to believe that a seat-belt violation had occurred.

[6] App. to Opening Br. at A14.

[7] *Id.*

Three other Dover Police Department officers arrived on the scene in very short order. In fact, one of the officers—James Johnson, the one who took custody of and searched Juliano—arrived on the scene before any of the car's occupants had exited the vehicle.[8]

In response to Porter's "10-15" directive, Barrett took Soto into custody and placed her in handcuffs. Barrett then searched Soto—like Juliano, a female—and found nothing. But as Barrett escorted Soto to the rear of the SUV for the purpose of searching her, he "could smell marijuana very strong coming from Ms. [Juliano]."[9]

According to Barrett, all four occupants of the SUV were removed from the vehicle and handcuffed in response to Porter's order. The SUV was then searched, but no contraband was found. The officers then searched each of the vehicle's occupants. Barrett confirmed that these searches went beyond a pat-down for weapons:

> Q. …[T]hey're handcuffed first and now they [are] just patted down on the outside for weapons, for safety?
> A: Yes.

[8] The swiftness of the backup officers' arrival is remarkable, given that Porter's "10-15" directive was given almost immediately upon his and Barrett's contact with the occupants of the vehicle, and it prompted Barrett to get the driver out of the SUV immediately. Thus, Johnson's arrival on the scene before any of the occupants had gotten out of the vehicle suggests that the call for backup preceded the detection of any criminal activity.

[9] App. to Opening Br. at A14.

Q. Or did you actually go into each of their pockets and look for things?
A: Well, we were searching them because of the odor of marijuana so they were being searched.

Q. So you did a full scale search inside - - not just a patdown for safety?
A: Yes.

Q. [You] [h]andcuffed them and then reached into their pockets to see what you could find?
A: Yes, sir.[10]

One officer searched Teat and found a knotted bag containing crack cocaine in one of his pants pockets. Another officer searched Saunders and found both marijuana and heroin in his jacket pockets. But when Officer Johnson searched Juliano, he found no contraband. He did, however, find $245.00.

Officer Johnson described his search of Juliano at the scene:

Q. All right. Did you handcuff Ms. [Juliano] or was she already handcuffed when you got there?
A. I handcuffed her.

Q. You handcuffed her?
A. Yes.

Q. And then you patted her down for weapons?
A. Yes.

Q. And you didn't find any?
A. No.

[10] App. to Answering Br. at B4.

Q. …[T]hen and then you actually went inside of her pockets?
A. Yes.

Q. And didn't find anything other than cash?
A. Just cash.

Q. And you searched both front pockets, did she have coat pockets? What pockets did you search?
A. Her pants pockets.

Q. …So you went into her pants?
A. Yes.

Q. Front? Back?
A. I didn't go into her back.

Q. You didn't check her - -
A. No.

Q. - - back pockets for anything?
A. No.

Q. Okay…. [W]hy not?
A. Because that's kind of invading.

Q. So her front pockets is okay, but her back pockets is not?
A. The front pockets you can pull the side up pull them, whatever's in there.

Q. Did you pat down… the backside of her to see if there were any weapons?
A. Backhand.

Q. …So you used the back of your hand?
A. Yeah.

Q. …And - - and you didn't even notice anything in her pockets?

A. In the back pocket, no.[11]

Even though the officers found no contraband on Juliano's person or in the passenger compartment of Soto's SUV, Corporal Barrett decided to take Juliano back to the police station to be strip-searched. The record is a bit murky here regarding Juliano's custodial status—whether she was under arrest or merely subject to custodial detention—at this point. It seems that the police officers were unconcerned with such distinctions. For his part, Officer Johnson believed that all of the vehicle's occupants were under arrest.

The suppression hearing record suggests that the decision to take Juliano into full custody for the purpose of strip-searching her was made the moment the controlled substances were found in Teat's and Saunders's pockets, and arguably sooner. Barrett sought to justify this action because, based on his experience, "it's common . . . for drug dealers to pass off narcotics and weapons to females that are with them because they know that [police don't] do as thorough of a search on females."[12] He acknowledged, though, that he "didn't see anybody in the car handing off anything."[13] Barrett did not explain—nor did Juliano question—why this notion was in play here; after all, all of the vehicle's occupants were searched

[11] App. to Opening Br. at A32–33.
[12] *Id.* at A17.
[13] App. to Answering Br. at B5.

for weapons, and none were found, and neither Teat nor Saunders had handed off their drugs to anyone—the drugs were still in their pockets.

So because drugs were found on Teat and Saunders, Juliano was taken back to the Dover police station. Upon arrival there, Barrett asked his supervisor to approve a strip search of Juliano. The supervisor in turn asked his supervisor for approval. Eventually, Sergeant DiGirolomo—Barrett's supervisor's supervisor—confronted Juliano with the fact that "a more thorough search was going to be done by a female and asked [Juliano] if she had anything on her;"[14] rather than consent to the strip search, Juliano admitted that she did. Juliano was then escorted to another room where she retrieved a bag of marijuana and a bag of cocaine from within her pants. The ensuing strip-search of Juliano yielded nothing. Juliano was charged with Tier 1 possession of narcotics plus an aggravating factor (aggravated possession of cocaine), drug dealing, and possession of marijuana.

[14] App. to Opening Br. at A18.

II. PROCEDURAL BACKGROUND

A. The Motion to Suppress

Juliano moved the Family Court to suppress "all evidence seized as a result of her arrest and subsequent warrantless search and seizure."[15] According to Juliano's motion:

> [t]he officers' stop of the vehicle operated by Ms. Soto was not based on reasonable suspicion that a traffic violation or other criminal activity had occurred, and thus not justified. In fact, the officers' stopping of the vehicle and subsequent search was entirely pretextual. Furthermore, the officers' arrest and subsequent search of [Juliano] was not supported by probable cause, and thus not justified. The officers' threat of strip searching a juvenile, without a warrant, was not justified and a violation of her right to privacy.[16]

At the evidentiary hearing on the motion, the police all but admitted that Juliano's arrest was the product of a pretextual stop—that is, a motor vehicle stop for a minor traffic violation (the pretext) whose real purpose is to search for evidence of more serious violations of the law. Corporal Barrett explained that though the Safe Streets team's mission is to ferret out "violent offenders, . . . guns, and drugs,"[17] the team takes motor vehicle stops for things like cell phone usage while driving and

[15] Pet'r's Mot. to Suppress Evid. at 2, *State v. [Juliano]*, No. 1901018130 (Del. Fam. Ct. May 17, 2019) [hereinafter "Mot. to Suppress Evid."].
[16] *Id.*
[17] App. to Opening Br. at A19.

equipment violations "as far as [they] can"[18] in their search for drugs and guns. After the evidentiary hearing, which generated the factual record summarized above, the Family Court denied the motion in a brief bench ruling.[19]

That same day, the court set forth its findings and conclusions in a written order. In short, the court found that the seat-belt violation justified the stop, rejecting Juliano's argument that the officers' reliance on that violation was an unlawful pretext. The court then observed that once the officers stopped the vehicle, they were justified in ordering the driver and occupants out of the vehicle. From there, the court focused on the "independent facts" (odor of marijuana, familiarity with Juliano's criminal history, the officer's experience with adults handing off drugs to juveniles, and the drugs found on the person of the back-seat passengers) that, in the court's view, justified the search of Juliano's person. Missing from the court's analysis though was any discussion of whether the facts that arguably justified a

[18] *Id.* at A21. Later in his testimony, Barrett was more blunt in acknowledging how he uses minor traffic offenses to search for drugs and guns:

> A: Every time a vehicle passes by me in an intersection I look for cell phone usage,…I look for any equipment violations?
> Q. Because that gives you what you need to then try to search for drugs and guns; right?
> A: Yes.

June 3, 2019 Suppression Hearing Transcript at 41, *State v. [Juliano]*, No. 1901018130 (Del. Fam. Ct. May 17, 2019).

[19] In its bench ruling, the court stated that it had reviewed *State v. Heath* (*see infra* note 30) and other opinions rejecting *Heath* and then concluded that "the search was legitimate and so the motion to suppress is denied." App. to Opening Br. at A37.

search of Juliano's person at the scene also justified her arrest and transportation to police headquarters for a strip search.

B. The Trial

Juliano's trial was limited to the testimony of Corporal Barrett and Heather Moody, the forensic chemist who tested the substance Juliano turned over to the police after she was arrested. Not surprisingly, the court adjudicated Juliano delinquent on all three charges—aggravated possession of cocaine, drug dealing, and possession of marijuana and Juliano appealed.

C. Juliano's Arguments on Appeal

Although framed as a single argument, we interpret Juliano's argument on appeal to be two-fold. First, she asserts that, because the stop of Soto's vehicle was pretextual—that is, the police used the seat-belt violation as a pretext to search for drugs—it violates Article I, § 6 of the Delaware Constitution. Second—and interwoven throughout her brief's discussion of the pretext issue—Juliano argues that the police relied too heavily on the odor of marijuana to justify the warrantless search and seizure of evidence following the pretextual traffic stop. This "violates Delaware State Constitutional law,"[20] which according to Juliano, requires the police

[20] Opening Br. at 8.

in such situations "to consider the possibility"[21] that a detainee could be in lawful possession of marijuana under the Delaware Medical Marijuana Act. Juliano presented the first argument to the Family Court, but not the second.

III. ANALYSIS

A. Standard of Review

We review the trial court's grant or denial of a motion to suppress for an abuse of discretion.[22] The trial court's formulation and application of legal concepts are reviewed *de novo*,[23] as are constitutional claims.[24] Absent plain error, we will not review claims that were not presented to the trial court.[25] Under this standard, for an error to be "plain," it "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[26]

B. Pretextual Traffic Stops

In her motion to suppress evidence in the Family Court, Juliano contended that "the officers' stopping of the vehicle and subsequent search was entirely

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[21] *Id.* at 18.
[22] *Lopez-Vasquez v. State*, 956 A.2d 1280, 1284 (Del. 2008).
[23] *Jackson v. State*, 990 A.2d 1281, 1288 (Del. 2009).
[24] *Swan v. State*, 28 A.3d 362, 383 (Del. 2011).
[25] Supr. Ct. R. 8; *Rodriguez v. State*, 820 A.2d 372, 2003 WL 1857547, at *1 (Del. Apr. 1, 2003) (TABLE).
[26] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

pretextual."[27] She then urged the court to adopt the reasoning espoused in *State v. Heath*,[28] a 2006 Superior Court opinion, in which the court concluded that "purely pretextual stops" violate Article I, § 6 of the Delaware Constitution. The reason for Juliano's reliance on Article I, § 6 and *Heath*, as opposed to the Fourth Amendment to the United States Constitution, is simple: a similar argument under the Fourth Amendment was unanimously rejected by the United States Supreme Court in *Whren v. United States*.[29] In the Family Court's bench ruling denying the motion, the court acknowledged that it had consulted *Heath*, as well as other Superior Court opinions that declined to follow it.[30] In its written order entered that same day, the court did not refer to or cite *Heath*.

1. Article I, § 6 of the Delaware Constitution

Individuals are protected from unreasonable searches and seizures in Delaware by both the Fourth Amendment to the United States Constitution and Article I, § 6 of the Delaware Constitution. These two constitutional provisions bear a striking linguistic resemblance to each other. Under the Fourth Amendment, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against

[27] Mot. to Suppress Evid. at 2.
[28] 929 A.2d 390 (Del. Super. Ct. 2006).
[29] *Whren*, 517 U.S. 806.
[30] App. to Opening Br. at A37.

unreasonable searches and seizures, shall not be violated."[31] Article I, § 6 promises that "[t]he people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures."[32] But even where, as here, our state constitutional provision contains language that is similar to the language found in a corresponding federal constitutional provision, we have rejected the notion that the two must mean "exactly the same thing."[33]

Nowhere has this stance, which rejects a "lock step" interpretation[34] of our state constitutional protections in conformity with the United States Supreme Court's interpretation of the federal Bill of Rights, been more evident than in the area of search-and-seizure law. In *Mason v. State*, for instance, we recognized that "Delaware's independent interest in protecting its citizens against unreasonable searches and seizures did not diminish after the adoption of the Fourth Amendment to the federal Constitution."[35] This interest was then vindicated in *Jones v. State*, when we concluded that Article I, § 6 embodies different and broader protections

[31] U.S. CONST. amend. IV.
[32] DEL. CONST. art. I, § 6.
[33] *Sanders v. State*, 585 A.2d 117, 145 (Del. 1990).
[34] *Dorsey v. State*, 761 A.2d 807, 814 (Del. 2000) (citing Earl M. Maltz, False Prophet—Justice Brennan and the Theory of State Constitutional Law, 15 Hastings Const. L.Q., 429, 437–38 (1988) ("Under the lockstep formulation, changes or clarification of federal law by the United States Supreme Court lead to parallel changes in state constitutional law.")).
[35] *Mason v. State*, 534 A.2d 242, 248 (Del. 1987).

than the Fourth Amendment.[36] And shortly after *Jones*, in *Dorsey v. State*, this Court declined to adopt the good-faith exception to the federal exclusionary rule as recognized by the United States Supreme Court in *United States v. Leon*,[37] relying instead on "state constitutional dimensions to the enforcement of the exclusionary rule."[38]

Thus, it is well established that this Court will, where appropriate, extend our state constitutional prohibition against unreasonable searches and seizures beyond the protections recognized in the United States Supreme Court's Fourth Amendment jurisprudence. The question before us now is whether we should do so in the area of pretextual motor vehicle stops. Asked more generally—and drawing on our analysis in *Jones*—having previously decided that Article I, § 6 should be interpreted to provide protections that are greater than those available under the Fourth Amendment, "in what situations"[39] should we do so?

A more detailed consideration of how we approached the task of identifying the situations for which broader protections are available in *Jones* and *Dorsey* informs our analysis here. The question in *Jones* was when, during an investigatory

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[36] *Jones v. State*, 745 A.2d 856, 866 (Del. 1999) (citing and reaching the same conclusion as the Pennsylvania Supreme Court did in *Commonwealth v. Edmunds*, 586 A.2d 769 (Pa. 1995)).
[37] *United States v. Leon*, 468 U.S. 897 (1984).
[38] *Dorsey*, 761 A.2d at 821.
[39] *Jones*, 745 A.2d at 860–61.

stop, a seizure triggering Article I, § 6 protection occurs. The State urged the Court to adopt the United States Supreme Court's interpretation of the Fourth Amendment in *California v. Hodari D.*[40] In that case, the Supreme Court held that a seizure does not occur until the officer uses physical force or the defendant submits to the officer's authority. Noting that *Hodari D.* was inconsistent with this Court's view of when a person is seized within the meaning of Article I, § 6 and that numerous other states had likewise rejected *Hodari D.* on state constitutional grounds, then-Chief Justice Veasey framed the threshold question thus: "whether the search and seizure language in the Delaware Constitution means the same thing as the United States Supreme Court's construction of *similar* language in the United States Constitution."[41]

To answer this question, the Court looked to useful criteria developed by other state courts that had confronted similar questions under their state constitutions. The "partial list of those non-exclusive criteria"[42] included: textual language; legislative history; pre-existing state law; structural differences; matters of particular state interest or local concern; state traditions; and public attitudes. But above all else, the Court relied on "a comprehensive scholarly account of the historical differences

[40] *California v. Hodari D.*, 499 U.S. 621 (1991).
[41] *Jones*, 745 A.2d at 864 (emphasis in original).
[42] *Id.* at 864–65.

in the search and seizure provisions in the Delaware and United States Constitutions."[43] Based upon those differences and Article I, § 6's historical convergence for more than two hundred years with the same provision in the Pennsylvania Constitution, we concluded—as the Pennsylvania Supreme Court had determined under Pennsylvania's corresponding provision[44]—that our state constitutional provision "reflected *different* and *broader* protections than those guaranteed by the Fourth Amendment."[45]

But this conclusion was not the end of our analysis; the Court had yet to determine whether those "different and broader protections" should have a bearing on the determination of when a police officer's encounter with a citizen constitutes a seizure within the meaning of Article I, § 6. To answer that question, we turned to the decisions of other state supreme courts, particularly the Connecticut Supreme Court's opinion in *State v. Oquendo.*[46] Finding those decisions persuasive, we rejected *Hodari D.*'s requirement that a seizure requires either physical force or submission to the assertion of authority. Instead, we adopted a test that "focus[es]

[43] *Dorsey*, 761 A.2d at 815.
[44] *Edmunds*, 586 A.2d at 897 (emphasis in original).
[45] *Jones*, 745 A.2d at 866 (emphasis in original).
[46] *State v. Oquendo*, 613 A.2d 1300 (Conn. 1992).

upon the police officer's actions to determine when a reasonable person would have believed he or she was not free to ignore the police presence."[47]

Thus, we learn from *Jones* that our state constitutional analysis has two steps. First is the determination whether, as a general matter, the state constitutional provision under which a person seeks refuge provides different and broader protection than a similar federal constitutional provision. Second, and the step that is in play here, is whether that broader protection is properly applied to the police conduct—here, pretextual motor vehicle stops—challenged in the case before us.

A similar two-step analysis supported our departure from federal constitutional law in *Dorsey v. State*.[48] In *Dorsey*, a majority of this Court determined that the affidavit upon which the magistrate had issued a warrant to search Dorsey's two motor vehicles was deficient. The State, however, argued that, despite this deficiency, the evidence found during the search need not be suppressed. Instead, the State asked us to adopt the United States Supreme Court's interpretation of the federal exclusionary rule in *United States v. Leon*.[49] In that case, the United States Supreme Court had announced what has become known as the "good faith" exception, under which the use of evidence seized under a warrant that is ultimately

[47] *Jones*, 745 A.2d at 869.
[48] *Dorsey*, 761 A.2d 807.
[49] *Leon*, 468 U.S. 897.

found to be unsupported by probable cause is not barred if the police had a good faith belief that there was probable cause.

In rejecting the State's invitation to adopt the "good faith" exception recognized in *Leon*, we first noted that, during the previous year in *Jones*, we had concluded that the Delaware Constitution's search-and-seizure provisions "reflected *different* and *broader* protections than those guaranteed by the Fourth Amendment."[50] But as in *Jones*, the statement of this general principle was insufficient to answer the question before the Court: Is a good-faith exception to the warrant requirement consistent with Article I, § 6's "different and broader" protections?

To answer this secondary question, the *Dorsey* majority surveyed the history of the exclusionary rule in Delaware, noting that our recognition of the rule in *Rickards v. State*[51] came a decade before the federal exclusionary rule was extended to state prosecutions. The majority also observed that this Court's rationale for applying the exclusionary rule in *Rickards*—that it is incumbent on our courts "to use every means at our disposal to preserve [state constitutional] guarantees,"[52] the

[50] *Dorsey*, 761 A.2d at 817 (emphasis in original) (citing *Jones*, 745 A.2d at 865–66).
[51] 77 A.2d 199 (Del. 1950).
[52] *Id*. at 205.

exclusion of evidence providing "the most practical protection"[53]—differed from the basis for the United States Supreme Court's holding in *Mapp v. Ohio*,[54] which focused on the exclusionary rule's deterrent effect. The majority then pointed to our holding in *Mason v. State*[55] that there is no "good faith" exception to the enhanced statutory requirements for the issuance of nighttime search warrants. This history sufficed to persuade the *Dorsey* majority that "there are constitutional dimensions to the enforcement of the exclusionary rule,"[56] which has remained the constitutional remedy—unencumbered by a "good faith" exception—for violation of Article I, § 6's search-and-seizure protections.

Against this background, we turn to Juliano's argument that we should apply Article I, § 6's more expansive protections to the circumstances surrounding her seizure. As mentioned, Juliano claims that the motor vehicle stop made by the Safe Streets team was purely pretextual and should therefore be deemed unreasonable under Article I, § 6.

Despite the longstanding and sometimes heated controversy surrounding law enforcement's use of pretextual traffic stops and the attendant spilling of ink by

[53] *Id.*
[54] 367 U.S. 643 (1961).
[55] *Mason*, 534 A.2d 242.
[56] *Dorsey*, 761 A.2d at 821.

commentators on both sides of the question,[57] the parties' arguments in this case are devoid of any discussion of the merits of the practice or its more suspect uses. Juliano merely cites *State v. Heath*,[58] a 2006 Delaware Superior Court opinion, not since adopted by this Court or any other Superior Court judges, holding that purely pretextual traffic stops violate Article I, § 6's prohibition of unreasonable searches and seizures. For its part, the State says that we should overrule *Heath* and instead adopt the United States Supreme Court's reasoning in *Whren v. United States*[59] when it rejected a pretextual-stop claim under the Fourth Amendment similar to Juliano's claim under Article I, § 6 here.

Our analysis accepts as settled—under *Jones*, *Dorsey*, and *Mason*—that Article I, § 6 of the Delaware Constitution provides different and broader protections than the Fourth Amendment. Consequently, we are not bound by the United States Supreme Court's answer under the Fourth Amendment to the question we must answer under Article I, § 6. This is not to say, however, that the unanimously-decided *Whren* is uninstructive. To the contrary, we will begin our discussion there.

[57] *See* 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §1.4(f) n.86 (5th ed. 2012).
[58] *Heath*, 929 A.2d 390.
[59] *Whren*, 517 U.S. 806.

2. Whren v. United States

In *Whren*, plainclothes police officers were patrolling a "high drug area" in the District of Columbia. They noticed a truck with temporary tags and "youthful occupants" waiting at a stop sign for what seemed to the officers to be an unusually long time (more than 20 seconds). When the unmarked police car made a U-turn to head back toward the truck, the truck made a sudden right turn without signaling and sped off at an "unreasonable speed." The police followed and detained the truck while it was stopped at a light. Upon approaching the driver's door, one of the officer's immediately observed two large plastic bags containing what appeared to be crack cocaine in Whren's hands. Whren and another occupant of the truck were arrested and charged with various drug offenses.

Whren and his codefendant moved the trial court to suppress the seized drugs on the grounds that, at the time of the stop, the officers had neither reasonable suspicion nor probable cause to believe that they were engaged in illegal drug activity and that the stated reason for effecting the stop—to give the driver a warning concerning traffic violations—was pretextual. The court denied the motion, Whren was convicted, and the Court of Appeals affirmed.

When Whren appealed, Justice Scalia, writing for a unanimous court, framed the issue:

> [W]hether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws.[60]

Because Juliano never really says why pretextual stops should be considered unreasonable and therefore prohibited by Article I, § 6 of the Delaware Constitution, it is worth reviewing here what Whren and his co-petitioner argued in the United States Supreme Court.

The *Whren* petitioners argued that, because it is next to impossible for motorists to comply with the innumerable rules of the road, police officers can, for all intents and purposes, stop any given motorist at will. "This [according to the petitioners] creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists."[61] They further contended that, because police officers exercise very broad discretion in deciding which motorists to stop, they might allow "impermissible factors, such as the race of the car's occupants,"[62] to influence the exercise of that discretion. Therefore, according to the *Whren* petitioners, who were both black, "in

[60] *Id.* at 808.
[61] *Id*. at 810.
[62] *Id*.

the unique context of civil traffic violations probable cause is not enough . . . [and that] the Fourth Amendment test should be, not the normal one . . . of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given."[63]

Although this argument appears to urge the adoption of an objective standard, the Court rejected it, in part, because it "is plainly and indisputably driven by subjective considerations,"[64] and the Court's precedents "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."[65] Thus, the Court held that the temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws is not an unreasonable seizure under the Fourth Amendment, even if a reasonable officer would not have stopped the motorist absent another law enforcement objective. To the argument that the selective enforcement of traffic laws results in placing too much discretion—discretion likely to be abused—in the hands of police officers, the Court responded that "acting upon observed [motor

[63] *Id*. (internal quotations omitted).
[64] *Id*. at 814.
[65] *Id*. at 813.

vehicle] violations, . . . afford[s] the quantum of individualized suspicion necessary to ensure that police discretion is sufficiently constrained."[66]

According to the New York Court of Appeals' opinion in *People v. Robinson*,[67] in the five years following *Whren*, more than 40 states and the District of Columbia had either adopted the objective standard approved by *Whren* or cited it with approval.[68] More recently, Professor Wayne R. LaFave, an esteemed Fourth Amendment scholar and critic of *Whren*, acknowledged that the *Whren* approach has been accepted in most states.[69]

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[66] *Id.* at 817–18 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654–55, 659 (1979)) (internal citations and quotation marks omitted).

[67] 767 N.E. 2d 638, 642 (N.Y. 2001).

[68] The *Robinson* majority, which followed *Whren*, attached an appendix to its opinion, entitled State Courts Approving *Whren* or Approving Identical Police Conduct, broken down into three groups: state courts that "follow[] *Whren*," state courts that "cite[] *Whren* with approval," and opinions that "ha[ve] *Whren* analysis without citing *Whren*." *Id*. at 649–50. Not to be outdone, the *Robinson* dissent attached an appendix of its own, listing numerous law review articles, case notes and other writings that are critical of *Whren*. *Id*. at 661–62.

[69] LaFave, *supra* note 57, § 1.4(f) n.86. *But see State v. Sullivan*, 74 S.W.3d 215, 221 (Ark. 2002) (concluding that, in light of the Supreme Court of Arkansas precedent and the Arkansas Constitution, "pretextual arrests—arrests that would not have occurred *but for* an ulterior investigative motive—are unreasonable police conduct warranting application of the exclusionary rule") (emphasis in original); *State v. Ochoa*, 206 P.3d 146, 151–55 (N.M. Ct. App. 2008) (finding greater protection for motorists against unreasonable searches and seizures in New Mexico than under federal law and adopting a totality of the circumstances rule, relying in part on *Heath*, to "determine whether a stop is pretextual subterfuge"); *State v. Ladson*, 979 P.2d 833, 842 (Wash. 1999) (finding pretextual stops violate the Washington Constitution "because they are seizures absent the 'authority of law' which a warrant would bring"), *modified by State v. Arreola*, 290 P.3d 983, 991 (Wash. 2012) (holding that "despite other motivations or reasons for the stop, a traffic stop should not be considered pretextual so long as the officer actually and consciously makes an appropriate and independent determination that addressing the suspected traffic infraction (or multiple suspected infractions) is reasonably necessary in furtherance of traffic safety and the general welfare").

3. State v. Heath

In the face of widespread acceptance of *Whren*, Juliano urges us to follow *State v. Heath*,[70] a 2006 opinion in which the Superior Court held that a pretextual stop of the defendant's vehicle to investigate the officer's "hunch of non-traffic criminal activity"[71] violated Article I, § 6 of the Delaware Constitution, even though the officer had a reasonable suspicion that the defendant had committed a traffic offense. In response, the State labels *Heath* an "outlier that has been overwhelmingly rejected by subsequent trial court decisions in Delaware."[72] *Heath*, according to the State, "should be overruled and the continuing debate over claims of pretextual motor vehicle stops ended."[73]

The State's characterization of *Heath* as an "outlier" is accurate. Before *Heath* was decided, the Superior Court consistently followed *Whren*;[74] after *Heath* was decided, the Superior Court has "repeatedly declined to follow [it]."[75] And

[70] *Heath*, 929 A.2d 390.
[71] *Id.* at 404.
[72] Answering Br. at 2.
[73] *Id*.
[74] *See, e.g.*, *State v. McDannell*, 2006 WL 1579818 (Del. Super. Ct. May 16, 2006); *State v. Karg*, 2001 WL 660014 (Del. Super. Ct. May 31, 2001); *State v. Caldwell*, 1999 WL 1240828 (Del. Super. Ct. Oct. 22, 2001).
[75] *State v. Bordley*, 2017 WL 2972174, at *3 n.17 (*citing State v. Seth*, 2017 WL 2116941 (Del. Super. Ct. June 16, 2017); *State v. Stevens*, 2017 WL 2480803, at *2 n.5 (Del. Super. Ct. June 8, 2017); *State v. Hall*, 2017 WL 1449915, at *1 (Del. Super. Ct. Apr. 21, 2017); *State v. Darling*, 2007 WL 1784185, at *4 (Del. Super. Ct. June 8, 2007), *as corrected* (July 3, 2007).

although this Court has not addressed *Heath* head-on, in *Turner v. State*,[76] we noted that it had not been followed in any other Superior Court decisions.

Despite *Heath*'s lack of popularity in the Superior Court, the consideration of its underlying facts and resulting legal analysis is a worthwhile exercise. The arresting officer in *Heath* was in a driveway on New Street in Harrington hoping to serve warrants in a drug investigation. Unable to make contact with the individuals to be served, the officer backed out of the driveway. Heath happened to be driving in that same area and stopped his vehicle to allow the officer to enter the roadway. The officer made eye contact with Heath, rolled down his window, and asked Heath if he was turning onto New Street, which was, according to the officer, a "high drug area."[77] Heath responded that he was heading to Clark Street, which concluded the conversation.

As Heath drove away, the officer checked Heath's vehicle registration and learned that the vehicle was tied to a Bridgeville or Greenwood address. The officer testified that this aroused his suspicion because those towns are south of Harrington, while Heath was traveling in a northerly direction. It is unclear why the officer thought that Heath's driving away from the address to which his vehicle was registered was suspicious. Just the same, the officer doubled back so that he could

[76] 25 A.3d 774 (Del. 2011).
[77] *Heath*, 929 A.2d at 394.

follow Heath. A couple of blocks later, Heath activated his left turn signal and turned left from Ward Street onto Hanley Street. But because Heath signaled his turn only 20 to 30 feet before turning—not the minimum 300 feet (a football field) required under 21 *Del. C.* § 4155(b)[78]—the officer activated his emergency equipment and pulled Heath over.

The officer thought that Heath's eyes looked bloodshot, but he did not appear to be nervous, confused, or under the influence of alcohol or drugs. Heath, who had no active warrants in his name, produced a valid driver's license, vehicle registration card, and his vehicle was properly registered to his sister. The officer took note, however, of the presence of several air fresheners hanging from the handles in the rear compartment of the vehicle, although there was no odor emanating from the air fresheners. Nevertheless, the officer said that he knew from his training in drug interdiction that air fresheners can be used to mask the odor of certain controlled substances.

Rather than issue a traffic citation, the officer asked Heath to get out of his car so that he could conduct a "road side investigation"—an investigation that the officer admitted had nothing to do with Heath's failure to signal his turn. Nothing in the

[78] Of note here is the trial court's observation that the officer's suppression hearing testimony "raised doubt as to whether 300 feet even existed between Ward Street and Hanley for the Defendant to signal his intention to turn." *Id*. at 405.

court's opinion indicates that the officer believed that Heath or his passenger was armed, but he subjected both of them to pat-down searches. The pat-down of the passenger yielded 29 sandwich bags containing marijuana, and a consent search of the vehicle uncovered a small amount of cocaine. After Heath was arrested and taken back to the Harrington Police Department, the police found a larger amount of cocaine that Heath attempted to discard while in an investigation room. Heath was then charged with multiple drug-related offenses.

Heath moved to suppress the evidence that was the fruit of the traffic stop and resulting searches. He made two claims, both of which are relevant to our review of the police conduct in this case. First, Heath argued that the officer effected the traffic stop—characterized by Heath as "pretextual"—for the purpose of conducting an unlawful search in violation of Article I, § 6 of the Delaware Constitution. Second, he claimed that, even if the traffic stop were lawful, the subsequent detention and search exceeded the permissible scope of a traffic stop and thus ran afoul of our holding in *Caldwell v. State*.[79]

The Superior Court launched its analysis with a definition: a pretextual stop "occurs when an officer has probable cause or reasonable suspicion to believe that a motorist has violated a traffic law, but which the officer would not have made absent

[79] *Caldwell*, 780 A.2d 1037.

a desire, not supported by probable cause or reasonable suspicion, to investigate a more serious offense."[80] The court then turned to Heath's state constitutional claim under Article I, § 6, asking "whether that provision sanctions or prohibits 'merely' or 'purely' pretextual traffic stops."[81]

The Superior Court recognized that, to find that Article I, § 6 provides different and broader protections from pretextual stops than exists under the Fourth Amendment, the court would need to identify something distinctive in our state's history, traditions, or jurisprudence that would justify a departure from *Whren*. The court concluded that the Delaware Constitution's historical rejection of the use of general warrants met this need. A general warrant is "[a] search warrant that specifies neither the place to be searched nor a particular person to be apprehended, giving the holder almost limitless discretion."[82] In the *Heath* court's view, "[a]llowing the police unfettered discretion to use a . . . traffic violation to search for evidence to support an officer's hunch about a [criminal] or [drug] offense becomes, in circumstances confronting the Court in this case, the equivalent of granting the

[80] *Heath*, 929 A.2d at 397 (quoting Brian J. O'Donnell, Note, *Whren v. United States: An Abrupt End to the Debate Over Pretextual Stops*, 49 Me. L. Rev. 207, 208 n.3 (1997)).
[81] *Id*. at 402.
[82] Black's Law Dictionary (11th ed. 2019). *See also Wheeler v. State*, 135 A.3d 282, 296–97 (Del. 2016) (discussing the history of general warrants leading to the "inclusion of the Fourth Amendment in the Federal Bill of Rights").

police a general warrant to search and seize virtually all travelers on the roads of this State."[83]

The Court then, relying on "[v]arious commentators [who] have written on this topic,"[84] announced a three-part test for determining whether a traffic stop should be deemed pretextual and therefore unlawful. Under the test, the court first asks "if, at the time of the stop, the police officer reasonably believed the defendant was committing a traffic offense, and whether the law authorizes a stop for such an offense."[85] The State has the burden on this issue. If the answer is no, the inquiry stops, because the seizure "was simply unreasonable regardless of the underlying motivation."[86] If yes, proceed to the second step.

In the second step, the burden is on the defendant to show that an unrelated purpose motivated the stop, and whether, absent the unrelated purpose, a reasonable police officer would have made the stop.[87]

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[83] *Heath,* 929 A.2d at 402.
[84] *Id*. at 402 & n.49.
[85] *Id*. at 402.
[86] *Id*. at 403.
[87] The court set forth in great detail how this step should work:

> The defendant meets this burden by showing that: (1) he was stopped only for a traffic violation; (2) he was later arrested for and charged with a crime unrelated to the stop; (3) the crime or evidence of the crime was discovered as a result of the stop; (4) the traffic stop was merely a pretextual purpose, alleging that the officer had a hunch about, or suspected the defendant of, a non-traffic related offense *unsupported* by reasonable suspicion; and (5) the pretext can be inferred, at least,

In the third and final step, the State is afforded the opportunity to rebut the presumption triggered in the second step by demonstrating that a non-pretextual rationale existed for the stop. The court explained:

> The required totality can be met by the State's showing: (1) that reasonable suspicion existed for the underlying criminal offense; (2) that this traffic stop was completely routine; (3) that this traffic stop was made under the perception that it was necessary to protect traffic safety; (4) that the officer's subjective intent in making the stop was legitimate. As in the second step, this is not an exhaustive checklist.[88]

Applying this test to the facts, the court found that the stop of Heath's vehicle for a turn-signal violation was purely pretextual.

4. Juliano's claim

Beyond her citation of *Heath*, Juliano has not offered any reasons why pretextual stops should be treated differently under Article I, § 6 than under the

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> when the salient question presented is whether defendant could meet his burden through *inter alia*: (1) evidence of the arresting officer's non-compliance with written police regulations; (2) evidence of the abnormal nature of the traffic stop; (3) testimony of the arresting officer that his reason for the stop was pretextual; (4) evidence that the officer's typical employment duties do not include traffic stops; (5) evidence that the officer was driving an unmarked car or was not in uniform; and (6) evidence that the stop was unnecessary for the protection of traffic safety. The above six factors are not exhaustive, but merely suggested ways for the court to get a view of the totality of the circumstances surrounding the stop. If the defendant fails to meet his burden, then the initial traffic stop is not shown to be purely pretextual, in which event it would be constitutional. However, if the defendant meets his burden, pretextualism is presumed. In that event the State would have an opportunity to offer evidence in rebuttal, the final stop of this test.

Id. at 402-03 (emphasis in original).
[88] *Id*. (internal footnote omitted).

Fourth Amendment. Nor has she asked us to adopt any particular standard by which allegedly pretextual traffic stops should be judged. We therefore assume from her exclusive reliance on *Heath* that she wishes us to adopt its rationale and the three-part test outlined above. This we are not prepared to do. To be clear, *Heath*'s pretextual-stop conclusion does not accurately reflect the law of this State.

As an initial matter, we question *Heath*'s reliance on Delaware's historical aversion to general warrants to justify a more protective approach to pretextual stops under Article I, § 6 than would be available under *Whren*. As we observed in *Wheeler v. State*, Delaware was not alone in this aversion; the Fourth Amendment to the United States Constitution "was the founding generation's response to . . . reviled general warrants."[89] Thus, to the extent the court in *Heath* suggested that Delaware's opposition to general warrants during the founding era was unique and therefore weighs in favor of affording broader protection to motorists under Article I, § 6, we find the suggestion to be historically untenable.

But the general warrant analogy is flawed in other respects. It is simply inaccurate to suggest that, when making a stop based on a reasonable suspicion of a violation, an officer's discretion is without limit or constraint. Unlike a general warrant's limitless scope, even "purely pretextual" traffic stops must be supported

[89] *Wheeler*, 135 A.3d at 297 (quoting *Riley v. California*, 573 U.S. 373, 403 (2014)).

by articulable individualized suspicion. We therefore reject *Heath*'s general-warrant holding.

Moreover, we view the *Heath* three-part test, which calls for a review of both subjective and objective evidence, as unwieldly and unworkable. That it is unwieldy is demonstrated by its lengthy formulation in *Heath* itself; the second step, for instance, has five elements, one of which can be shown in six different ways. Moreover, unlike the petitioners in *Whren*, who attempted to "disavow any intention to make the individual officer's subjective good faith the touchstone of 'reasonableness,'"[90] the *Heath* test explicitly calls for the plumbing of the officer's subjective intent to determine whether it is "legitimate."[91] To be sure, the test purports to embrace an objective component—whether a "reasonable police officer" would have made the stop. But the evidentiary difficulties that this hybrid analysis of objective reasonableness and subjective intent is likely to spawn are obvious.[92] We therefore reject *Heath*'s three-part test for evaluating the reasonableness of traffic stops.

[90] *Whren*, 517 U.S. at 813.
[91] *Heath*, 929 A.2d at 403.
[92] *See, e.g.*, *United States v. Botera-Ospina*, 71 F.3d 783, 786–87 (outlining inconsistent application of "reasonable officer" test adopted by 10th Circuit seven years earlier in *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988)).

We are, however, cognizant of the legitimate concerns that warrant careful scrutiny of law-enforcement's discretionary use of traffic stops to look for evidence of other, more serious, violations of the law. It has been observed—rightly so—that it is almost impossible for motorists to maintain total compliance with the countless statutory rules of the road. And it is widely recognized that, as a practical matter, police officers cannot—and do not—stop vehicles for every infraction they witness. It follows that this gives the police a wide range of discretion in determining when they should make a traffic stop. There is little doubt that this discretion can be exercised, not based on highway safety concerns but in the hope that the stop will, through a consent search, a "plain view" discovery, or other means, uncover evidence of serious criminal conduct. This case indeed illustrates precisely how it works. Most troubling of all is the charge that racial profiles influence the exercise of police discretion in this area.

The solution to this problem, however, does not reside in a strained reading of Article I, § 6, which, after all, prohibits only *unreasonable* searches and seizures. Simply put, we see nothing unreasonable in a motor vehicle stop based on a police officer's reasonable suspicion that the operator or occupant of the vehicle has committed or is committing a violation of the law, which includes our traffic laws. Equally so, we are not prepared to say that, once a vehicle is lawfully stopped, the

police must ignore evidence of other criminal activity when that evidence itself is lawfully uncovered.

Because both of these conclusions are unassailable, the argument for the unconstitutionality of pretextual stops introduces a new factor, modifying, if not upending, the unremarkable proposition that motor vehicle stops on reasonable suspicion or probable cause are not unreasonable. That new factor, explicitly identified in the third step of *Heath* (and implicit in the second step), is the officer's subjective intent in making the stop. If the officer was subjectively motivated by a desire to do anything but enforce the traffic laws, then, the argument goes, his decision to stop the vehicle is arbitrary and therefore unreasonable under Article I, § 6. Under this view, a stop based on an objectively observable fact—say, exceeding the speed limit by seven miles per hour—would be constitutionally permissible, while another stop based on that same fact would be unconstitutional if the officer was hopeful that he might uncover evidence of an unsolved crime. We can identify nothing in our case law or our state traditions—nor has Juliano—that supports adoption of a rule that would lead to such discordant results.

To the contrary, we have long tied the legitimacy of motor vehicle stops to the existence of "a reasonable suspicion that a legal violation has occurred."[93] Indeed,

[93] *State v. Prouse*, 382 A.2d 1359, 1361 (Del. 1978), *aff'd*, 440 U.S. 648, (1979).

in *State v. Prouse*, we found that the reasonable-suspicion standard was required by "State constitutional guarantees."[94] And since *Prouse*, we have consistently applied that standard to motor vehicle stops and other investigative detentions.[95] The "reasonable suspicion" standard, moreover, has been codified in the Delaware Criminal Code for investigative detentions generally.[96]

It is an inescapable fact that the enforcement of our laws requires police officers to use their discretion in countless situations. The exercise of that discretion is circumscribed, of course, by the dictates of our constitution. It is not properly exercised when used for illegitimate purposes, such as to harass or intimidate members of specific communities. We decline, however, to announce a state constitutional rule that implies that the detection of crime is not a legitimate purpose. In this regard, we are satisfied that our longstanding "reasonable suspicion" and

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[94] *Id*.

[95] *Downs v. State*, 570 A.2d 1142, 1145 (Del. 1990) (acknowledging the reasonable suspicion standard established in *Prouse* and the definition of reasonable suspicion, as defined in *Coleman*, as "an 'officer's ability to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion'") (alteration in original) (internal citations omitted); *Coleman v. State*, 562 A.2d 1171, 1174 (Del. 1989) (citing the reasonable suspicion standard as a "well settled principle of law" that requires less evidence "than that which is required for probable cause to arrest"); *Holden v. State*, 23 A.3d 843, 847 (Del. 2011) ("Generally, police officers can stop an individual for investigatory purposes if they have a reasonable articulable suspicion that the person is committing, has committed, or is about to commit a crime."); *Stafford v. State*, 59 A.3d 1223, 1227 (Del. 2012) ("A traffic stop initially must be justified by a reasonable suspicion of criminal activity and 'the scope of the stop must be reasonably related to the stop's initial purpose.'" (internal citations omitted)).

[96] 11 *Del. C.* § 1902 ("A peace officer may 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.").

"probable cause" standards sufficiently constrain the discretion of our law enforcement officers.

Those standards are well settled. Police may forcibly stop and detain a person whom they reasonably suspect of criminal activity.[97] A "reasonable suspicion" exists when the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion."[98] We have recognized that "the quantum of evidence necessary for reasonable suspicion is less than that which is required for probable cause to arrest."[99] It follows that a detention based on the higher probable-cause standard is constitutionally permissible and that a police officer may seize any person the officer sees breaking the law.[100] Here, Juliano does not contend that Corporal Barrett did not have a reasonable suspicion that the vehicle in which she was traveling was

[97] *Caldwell*, 780 A.2d at 1046. Motor vehicle stops are, by their nature, a form of investigatory detention. *Commonwealth v. Chase*, 960 A.2d 108, 118 (Pa. 2008) ("[S]ince the Fourth Amendment and Article I, § 8 [of the Pennsylvania Constitution] are coterminous for *Terry* purposes, and the Fourth Amendment allows for an investigation detention in the form of a vehicle stop, Article I, § 8 allows for a vehicle stop based on reasonable suspicion."); *United States v. Jones*, 44 F.3d 860, 871 (10th Cir. 1995) ("An ordinary traffic stop is a limited seizure and is more like an investigative *Terry* stop than a custodial arrest.").

[98] *Downs*, 570 A.2d at 1145 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). Because of this formulation, "reasonable suspicion" is frequently and equivalently referred to as "reasonable articulable suspicion." *See, e.g.*, *State v. Rollins*, 922 A.2d 379, 382–85 (Del. 2007); *Riley v. State*, 892 A.2d 370, 374 (Del. 2006); *State v. Williams*, 2011 WL 3248993, at *1 (Del. Super. Ct. July 29, 2011).

[99] *Coleman*, 562 A.2d at 1174 (citing *State v. Deputy*, 433 A.2d 1040, 1043 (Del. 1981), *appeal after remand*, 500 A.2d 581 (Del. 1983), *cert. denied* 480 U.S. 940 (1987).

[100] *Jones*, 745 A.2d at 872.

subject to detention for her violation of the seat-belt statute. And because we have rejected her claim that Corporal Barrett's subjective motivation for the stop is relevant, we agree with the Family Court's conclusion that the stop was lawful.

This conclusion, however, does not end our inquiry. The careful reader will recall that Heath argued in the alternative that, even if the stop of his vehicle was lawful, his detention and search were unrelated to the traffic stop and therefore impermissible under *Caldwell v. State*. In a nutshell, we held in *Caldwell* that "[t]he duration and execution of a traffic stop is limited by the initial purpose of the stop…. [A]ny investigation of the vehicle or its occupants beyond that required to complete the purpose of the traffic stop constitutes a separate seizure that must be supported by independent facts sufficient to justify the additional intrusion."[101] The application of *Caldwell* also requires a fact-intensive inquiry to ensure that the pursuit of the investigation unrelated to the traffic violation is not unreasonably attenuated from the initial purpose of the stop.

The importance of *Caldwell* in this area cannot be overstated. As then-Chief Justice Veasey wrote, "[the *Caldwell*] standard respects the State's interest in investigating suspicious conduct during a valid traffic stop, while restricting police officers' authority to employ marginally applicable traffic laws as a device to

[101] *Caldwell*, 780 A.2d at 1047 (citing *Ferris v. State*, 735 A.2d 491, 499 (Md. 1999)).

circumvent constitutional search and seizure requirements."[102] In striking this balance, *Caldwell*, in our view, provides an appropriate measure of protection for motorists against arbitrary police conduct of the kind alleged in this case.

We also note that in *Heath*, after a careful analysis under *Caldwell* of the events that unfolded after the officer stopped Heath's vehicle, the Superior Court agreed with Heath that the investigatory detention went beyond the purpose of the traffic stop and was not sufficiently justified by independent facts. And interestingly enough,[103] it was only after concluding that the officer lacked the reasonable suspicion to support Heath's "subsequent detention"[104]—that is, the detention beyond what was necessary to issue a traffic citation—that the court ruled "the evidence related to drugs obtained [as] a result of the purely pretextual stop [ ] and the subsequent unjustified detention must be suppressed."[105]

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[102] *Id.* at 1048.

[103] We cannot help but note that, in light of the court's *Caldwell* analysis in *Heath*, its pretextual-stop analysis and holding was unnecessary; the *Caldwell* violation, standing alone, justified suppression of the evidence seized.

[104] *Heath*, 929 A.2d at 410.

[105] *Id.* The relevant sentence in the *Heath* opinion reads: "Therefore, the Court finds that the evidence related to drugs obtained was a result of the purely pretextual stop, and the subsequent unjustified detention must be suppressed." *Id.* A strict grammatical reading would lead to a nonsensical result; read literally, the sentence means that "the detention must be suppressed," when the clear import of the sentence in the context of the court's opinion was that the evidence seized as a result of both the stop and the detention must be suppressed. It is unclear whether the Superior Court concluded that the two illegalities—the purely pretextual stop and the subsequent detention—provided independent bases for suppression.

Here, the Family Court properly recognized that "any investigation of the [Soto] vehicle and its occupants beyond that required to complete the purpose of the traffic stop constitutes a separate seizure that must be supported by independent facts sufficient to justify the additional intrusion."[106] The court then found that the totality of the circumstances, including the odor of marijuana, Corporal Barrett's experience and familiarity with Juliano's criminal history, and the eventual discovery of drug possession by two of the passengers, justified the extension of the traffic stop. Juliano does not contest this conclusion and we therefore will not disturb it. We will, however, address the adequacy of the Family Court's analysis of this issue later in this opinion. Before doing that, we address Juliano's claim under the Delaware Medical Marijuana Act.

C. Juliano's Medical Marijuana Claim

It is undisputed that, after stopping the Soto vehicle and smelling marijuana, the police did not attempt to determine whether any of the vehicle's occupants were permitted to possess marijuana under the Delaware Medical Marijuana Act (the "DMMA").[107] This, according to Juliano, violated the Delaware Constitution. She argues that "Delaware State Constitutional Law requires police to consider the

[106] *State v. Juliano* (Order Denying Mot. To Suppress Evid.), No 1901018130 at 2 (Del. Fam. Ct. June 3, 2019) [hereinafter "Order"].
[107] 16 *Del. C.* § 4903A(a) (2016).

possibility of DMMA compliant possession of marijuana, which was not done in the instant case, prior to escalating police-citizen encounters to full-blown arrests based solely on the perceived odor of marijuana."[108] This argument was not raised in the Family Court; we therefore review it for plain error.[109]

Under § 4903A(a) of the DMMA,

> [a] registered qualifying patient shall not be subject to arrest, prosecution, or denial of any right or privilege, including but not limited to civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau, for the medical use of marijuana pursuant to this chapter, if the registered qualifying patient does not possess more than 6 ounces of usable marijuana.[110]

When Juliano was arrested in January of 2019, a "qualifying patient" meant a person who had been "diagnosed by a physician as having a debilitating medical condition" as defined by the DMMA. There are special restrictions on the issuance of registry identification cards to qualifying patients who are younger than 18 years of age.[111]

It is undisputed that neither Juliano nor any of the other occupants of the Soto vehicle at the time it was stopped by Corporal Barrett and his fellow officers were registered qualifying patients under the DMMA. Even so, Juliano, citing *State v.*

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[108] Opening Br. at 18.
[109] *Mills v. State*, 201 A.3d 1163, 1167 (Del. 2019).
[110] 16 *Del. C.* § 4903A(a).
[111] 16 *Del. C.* § 4902A(13). In July 2020 the definition of "qualifying patient" was amended in ways that are irrelevant here.

Jernigan,[112] contends that the officers' failure to determine whether any of the occupants were registered under, and thus protected by, the DMMA rendered her detention unreasonable and thus violative of Article I, § 6. This contention betrays a misunderstanding of *Jernigan* and basic search-and-seizure principles.

In *Jernigan*, the police noticed an illegally stopped vehicle and, when they approached the vehicle, one of the officers noticed an odor of raw marijuana. Although the officer could not determine the quantity of marijuana from the smell, he immediately handcuffed Jernigan, who had been behind the wheel, and began searching the vehicle. During the search, the officer found a firearm, one-tenth of a gram of marijuana, ammunition, and a scale. It turned out that Jernigan held a valid DMMA card and was a registered qualifying patient as defined by the DMMA. This status was readily discoverable by the officers at the scene through a routine DELJIS check[113] but neither of the officers present conducted one before searching the vehicle.

Before his trial,[114] Jernigan moved to suppress the evidence seized during the warrantless vehicle search. The court identified the two issues raised by Jernigan's motion:

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[112] 2019 WL 2480808 (Del. Super. Ct. June 13, 2019).
[113] DELJIS is the Delaware Criminal Justice Information System.
[114] The Superior Court's opinion does not identify the charges brought against Jernigan. *Jernigan*, 2019 WL 2480808.

> The first issue involves the application of the automobile exception to the warrant requirement when the police base a search upon the odor of raw marijuana emanating from a vehicle. [Jernigan] argues that because he holds a medical marijuana card, the police did not have probable cause to arrest him or search his vehicle simply because an officer could smell raw marijuana in his car.
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> . . . .
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> Second, the motion raises the issue of whether the Court should consider facts readily available to an officer, though not known to the officer, when performing its probable cause analysis.[115]

Addressing the first issue, the Superior Court looked to our recent statement in *Valentine v. State*[116] that the decriminalization of the possession of personal-use amounts of marijuana did not render marijuana odors, raw or burnt, irrelevant to probable-cause determinations. The Superior Court did not conclude that the officers could not consider the odor of marijuana but, instead, incorporated Jernigan's DMMA status in its totality-of-the circumstances analysis. That, in turn, prompted the court to ask "to what extent, if any, a patrol officer is obligated to verify such status before conducting a vehicle search."[117] Finding that Jernigan's status as a registered qualifying patient under the DMMA was readily available to the officers, the court determined that, under the circumstances, "the officers' failure to avail themselves of [that] readily available fact that *exculpated* Mr. Jernigan was

[115] *Id.* at *1.
[116] 207 A.3d 166, 2019 WL 1178765 (Del. Mar. 12, 2019) (TABLE).
[117] *Jernigan*, 2019 WL 2480808, at *7.

objectively unreasonable."[118] The court then identified the totality of the circumstances, which included a traffic violation, suspicious—though legal—behavior (rolling up a window), an odor of raw marijuana and Jernigan's readily available DMMA status, and found that the evidence did not establish probable cause for the search of Jernigan's vehicle.

The State did not appeal the Superior Court's decision in *Jernigan*, so we were not called upon to determine whether the court's granting of Jernigan's motion to suppress was sound.[119] Nor does Juliano's argument require us to pass upon the Superior Court's decision in *Jernigan*. This is so because, assuming that we were to bless that decision—as Juliano urges us to do—the court's reasoning in *Jernigan* does not support Juliano's argument.

Jernigan plainly hinges on Jernigan's status as a DMMA cardholder and his corresponding right to possess up to six ounces of marijuana; take that status away and the rationale for the Superior Court's holding vanishes. This reading of *Jernigan* is supported by the emphasis the Superior Court placed on "the officers' failure to avail themselves of a readily available fact that *exculpated* Mr. Jernigan."[120] The

[118] *Id.* at *8 (emphasis added).
[119] *See* 10 *Del. C.* § 9902(b)–(c) (granting the State the absolute right of appeal from an order suppressing evidence upon certification by the Attorney General that the evidence is essential to the prosecution of the case).
[120] *Jernigan*, 2019 WL 2480808, at *8 (emphasis added).

lack of that status on the part of any of the occupants of the vehicle in this case renders *Jernigan* inapposite. And more to the point for present purposes, the purported error was not clearly prejudicial to substantial rights so as to call into question the fairness and integrity of Juliano's trial.

D. The Family Court Order

Although we have rejected both of Juliano's appellate claims, we nevertheless are compelled to address *sua sponte* certain conspicuous irregularities in the Family Court's order denying Juliano's motion to suppress. We do so reluctantly, as it cuts against the precept that limits our consideration of matters that are not specifically argued in an appellant's opening brief. But this case presents extraordinary circumstances. In particular, it became clear during oral argument in this Court that appellate counsel for both parties were unaware that the Family Court had entered a written order following its denial of Juliano's motion in a bench ruling. And the issues that have caught our attention are found in the court's written order. Under these circumstances, we are not inclined to allow counsel's omission to subvert Juliano's right to direct appellate review of her adjudication of delinquency.

1. Burden of Proof

The Family Court's order states that "[o]n a Motion to Suppress, [Juliano] bears the burden of establishing that the challenged search or seizure violated the

rights guaranteed her by the United State Constitution, the Delaware Constitution, or Delaware statutory law."[121] This is an incorrect statement of our law. As we clarified in *Hunter v. State*, "on a motion to suppress evidence seized during a *warrantless* search, the rule in Delaware should now be clear. The State bears the burden of proof."[122]

It is at least arguable that the court's misallocation of the burden did not affect its ultimate decision on Juliano's motion to suppress, but we are not confident that such is the case. The Family Court's finding, for instance, that the search of Juliano by Officer Johnson at the scene of the stop was "cursory" is debatable and could turn on the burden-of-proof allocation. Likewise, the Family Court's reliance on Corporal Barrett's experience in the enforcement of our drug laws, about which very little evidence was offered, could easily have been influenced by the trial judge's belief that Juliano—and not the State—carried the burden of proof.

One other important consideration heightens our concern about the Family Court's erroneous allocation of the burden of proof. We refer here to the court's reliance, in its analysis of the "independent facts" that justified the extension of the

[121] Order at 3.
[122] *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001) (emphasis in original). At oral argument, the State acknowledged that it bears the burden of proof when warrantless searches and seizures are challenged.

traffic stop to search for drugs, on "the familiarity of the officers with [Juliano's] criminal history."[123] Leaving aside the questionable relevance of that fact,[124] in the event, it appears to be based on factually erroneous testimony. Specifically, Corporal Barrett testified at the suppression hearing that he "knew that there were weapon . . . adjudications and also narcotic arrests and adjudications"[125] in Juliano's past. But the State produced (and admitted as an exhibit) Juliano's DELJIS Department of Justice Charge Summary and it showed no weapons adjudications and no narcotics arrests or adjudications. This factual discrepancy adds to our unease with the court's improper shift of the burden of proof.

2. The Lawfulness of Juliano's Custodial Arrest

Finally, we turn to the Family Court's conclusions "that the traffic stop was justified, that the search of [Juliano's] person was supported by probable cause, and that the arrest of [Juliano] was proper."[126] The conclusions regarding the search and

[123] Order at 3.

[124] In *Brinegar v. United States*, the United States Supreme Court held that evidence of the defendant's prior arrest on similar charges (illegal transportation of liquor) was admissible at a hearing on a motion to suppress in a subsequent case involving the same type of conduct. *Brinegar*, 338 U.S. 160 (1949). And Professor LaFave notes that "other courts have held that a suspect's prior convictions and prior arrests or charges are not barred from consideration on the issue of probable cause." 2 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment*, § 3.2(d) (6th ed. 2020) (internal footnotes omitted). But even in the context of a probable-cause determination, the relevance of a suspect's prior criminal offense "depends in part upon whether there is a relationship in kind between the prior and present offense." *Id*.

[125] App. to Answering Br. at B9.

[126] Order at 4.

arrest of Juliano are problematic in two respects. First, the court announced these conclusions immediately after it determined that the police had a reasonable suspicion sufficient to justify the extension of the traffic stop to investigate the vehicle's occupants for the possession of marijuana. But the court does not articulate a basis for finding that the reasonable suspicion that justified the extension of the stop developed into probable cause to arrest Juliano. Second, the court's order does not explain the basis upon which the custodial arrest and threatened strip search were justified. We now take up those concerns in turn.

As previously discussed, the Family Court properly considered whether facts independent of the observed seat-belt violation justified the extension of the motor vehicle stop and an expansion of the officers' investigative activities. As mentioned, in finding the existence of such facts, the court identified the following:

> the odor of marijuana emanating from [Juliano's] person; . . . the familiarity of the officers with [Juliano's] criminal history; . . . Corporal Barrett's experience with adults carrying drugs who compel accompanying females and juveniles to hide the drugs because of the difficulties associated with conducting a search of those females and juveniles;[127] . . . and [t]wo of the passengers in the vehicle were found to be carrying heroin, crack cocaine and marijuana.[128]

[127] We are disquieted by the implications that flow from reliance on this fact as justification for a search, especially a strip search. It seems to us that it exposes young females to a higher likelihood that they will be the target of such searches.
[128] Order at 3.

After making these findings, the court concluded that "these circumstances supported reasonable suspicion."[129] We understand this conclusion to signify that the court found the extension of the motor vehicle stop and the search of the Soto vehicle and its occupants, including Juliano, to have been justified. And we have no qualms with that determination to the extent that it is limited to the search of Juliano by Officer Johnson at the scene of the stop. But the court's ensuing conclusions—"that the search of [Juliano's] person was supported by probable cause . . . and . . . [Juliano's] arrest . . . was proper"[130]—raise serious questions that the Family Court's order does not answer.

a. The search of Juliano's person

According to our understanding of the record, the police searched Juliano's person twice—the search by Officer Johnson at the scene and the strip search at the police station. Although Johnson found $245.00 during the first search, neither search uncovered any contraband. Instead, Juliano handed over the marijuana and cocaine to the police at the station after being told of the police's intention to strip-search her. So it is unclear to us which search the Family Court was referring to and what, if any, legal significance inheres in its conclusion that the search was supported by probable cause.

[129] *Id*.
[130] *Id*. at 4.

We are left to ask: Did the Family Court mean to say that Officer Johnson's search of Juliano at the scene was supported by probable cause? If so, was it a search incident to a lawful arrest? Or was the Family Court's finding directed to the strip search of Juliano at the police station after she relinquished the drugs? If the strip search was not justified, was Juliano's handing over of the drugs voluntary?

In addition, it is equally unclear what facts, other than those relied upon in the court's reasonable-suspicion finding, formed the basis of the court's probable cause conclusion.

b. Juliano's arrest

Our second concern, inextricably related to the first, arises from the Family Court's conclusory statements that Juliano's arrest "was proper," an apparent response to Juliano's argument below that "the officers' arrest and subsequent search of [Juliano] was not supported by probable cause [] and thus not justified."[131] A logical starting point for the analysis of this issue would be a determination of when Juliano was placed under arrest. After all, an officer making an arrest without a warrant must have "such information in his possession as would constitute 'probable cause' *before* he could make an arrest."[132] Thus, the timing of Juliano's arrest is an important fact, especially to the extent that the State seeks to justify its search (or,

[131] Mot. to Suppress Evid. at 2.
[132] *State v. Moore*, 187 A.2d 807, 812 (Del. Super. Ct. 1963) (emphasis added).

more accurately, its threatened strip search) as incident to that arrest. But it does not appear as though the Family Court attended to this important fact.

We note, too, that the State's position on the timing of Juliano's arrest, as expressed at oral argument, casts a shadow over the adequacy of the Family Court's analysis of the propriety of Juliano's arrest. At oral argument in this Court, counsel for the State identified the time of the arrest as when "all four occupants of the vehicle were removed . . . after Porter tells Corporal Barrett that he could smell marijuana."[133] That testimony is consistent with the immediate handcuffing of the occupants in the apparent absence of any safety concerns. On further questioning about whether Porter's "10-15" code was a command to "*detain* all of the occupants of the vehicle, counsel for the State responded "Yes . . . I think . . . it is a signal to take everyone into custody."[134] While we recognize that "words cannot transfer a mere 'stop' into an arrest,"[135] the facts in this case including the immediate handcuffing of Juliano and taking her to the police station where she was told she would be strip-searched, would appear to exceed the scope of a *Terry*[136] detention.

[133] Oral Argument at 27:07–18, *[Juliano] v. State*, No. 320, 2019 (Del. Sept. 2, 2020).
[134] *Id.* at 33:10–16 (emphasis added).
[135] *Downs*, 570 A.2d at 1144.
[136] *Terry*, 392 U.S. 1.

IV. CONCLUSION

Although we reject Juliano's contentions that her detention and the search of her person at the scene of the motor vehicle stop violated Article I, § 6 of the Delaware Constitution, the questions and concerns raised above should be addressed in the first instance by the Family Court. Therefore, this case is remanded to the Family Court for a more complete statement of the factual and legal bases, consistent with this opinion, for the court's conclusion that "the search of [Juliano's] person was supported by probable cause [ ] and that [Juliano's] arrest . . . was proper."[137] The Family Court shall provide such statement in the form of a revised order and file the same within 90 days of the issuance of the certified copy of this opinion.[138] Jurisdiction is retained.

[137] Order at 4. We request that the Clerk of the Court release a copy of the oral argument in this Court so that Family Court may review the parties' arguments on appeal as it revisits its conclusions in accordance with this opinion.
[138] *See* Super. Ct. R. 19(c).