IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
v.	)	I.D. No. 1706011498 A/B
	)	
JAMES DEMBY,	)	
	)	
Defendant.	)	

Submitted: January 10, 2022
Decided: April 29, 2022

ORDER GRANTING JAMES DEMBY'S
MOTION FOR POSTCONVICTION RELIEF

This 29th day of April 2022, upon consideration of the Motion for Postconviction Relief (the "Postconviction Motion") filed on behalf of James Demby, Trial Counsel's and the State's responses thereto, the record in this matter, and the applicable legal authorities, including Rule 61 of the Superior Court Rules of Criminal Procedure ("Rule 61"), it appears to the Court that:

FACTUAL AND PROCEDURAL BACKGROUND

1. These are the facts as the Court finds them based on the record and the testimony presented at an evidentiary hearing. On January 19, 2018, after a three-day trial, Defendant James Demby ("Defendant") was convicted of Concealed Carry of a Deadly Weapon ("CCDW"), Drug Dealing, Possession of a Firearm by a Person Prohibited ("PFBPP"), Possession of a Firearm

During the Commission of a Felony ("PFDCF"), and Possession or Control of Ammunition by a Person Prohibited ("PABPP").[1]

2. Defendant's convictions stem from a June 16, 2017 anonymous 911 call concerning drug activity near the 700 block of North West Street. At approximately 1:00 pm, Wilmington Police Officers Dmeza and Nolan ("Officers Dmeza and Nolan") responded to that area to investigate. The anonymous caller stated two females were selling drugs out of a car parked in front of 615 West Street, and a male was selling drugs in front of 609 West Street. The caller described the male as heavyset with a blue hat, white shirt, and tan khakis and the vehicle as a gold Lincoln Continental.

3. When the officers arrived in the area, they observed a gold Lincoln Continental with three occupants: a female in the driver seat, a male in the front passenger seat, and another female in the backseat.[2] Without waiting to

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[1] Defendant's PFBPP and PABPP charges were severed and separately tried before the same jury immediately following the jury's verdict in the "A" case.

[2] The parties agree Officers Dmeza and Nolan observed the Lincoln with the occupants inside when they arrived in the area. A factual dispute exists, however, concerning the sequence of events following the officers' arrival. At one point during the course of this case, the State contended the officers independently observed drugs inside the vehicle when they approached it to question the occupants. *See, e.g.,* D.I. 70, State's Supp. Resp. to Def.'s Mot. at 8. ("It was only after seeing the marijuana in the center console and being given consent to search by the driver, that the officers asked the occupants to step out of the vehicle.") *and* D.I. 89, State's Post-Hearing Submission, at 2 ("When asked by the Court, 'do you see the marijuana before you ever begin speaking to the driver?' Dmeza responded 'yes.'") (citing Tr. A362). But the State also contended the officers did not independently observe drugs in the vehicle but that the *driver* pointed to marijuana in the console. *See* State's Resp. to Def.'s Motion at 2 ("When asked whether there were any drugs in the vehicle, the driver pointed to the center console and indicated that it was a marijuana cigar, and the driver consented to Officer Dmeza's search request of the vehicle.") Because of the various

verify any of the 911 caller's statements regarding drug dealing, the officers approached the vehicle and asked for the occupants' identification. Defendant questioned the reason for the inquiry, and an officer explained they had received a report of drug sales from a gold Lincoln on West Street. Officer Dmeza then took the individuals' identification to his marked vehicle to run DELJIS checks while Officer Nolan stood next to the vehicle and continued to observe its occupants.

4. After completing the DELJIS checks, Officer Dmeza returned to the Lincoln and asked the occupants if there were any drugs in the vehicle, at which point the driver pointed at a marijuana cigarette in the center console. Officer Dmeza then asked to search the vehicle, and the female driver consented.
5. Officer Dmeza's testimony varied regarding the sequence of events and when, specifically, he observed marijuana in the vehicle. His initial testimony, however, and his police report, reflect that he did not see the marijuana until the driver pointed it out after Officer Dmeza returned to the Lincoln following the DELJIS check.[3] Later, Officer Dmeza testified he independently observed the marijuana when he initially approached the vehicle.[4] The Court finds the

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inconsistencies, the Court held an Evidentiary Hearing on July 29, 2021. This factual recitation sets forth the sequence of events as the Court finds them after considering the record and weighing the witnesses' credibility.

[3] Tr. A335, A350-51.

[4] *Id.* at A336-37.

police report, prepared close in time to the search, and Officer Dmeza's initial testimony to be the most credible.

6. After receiving the driver's consent to search, the officers instructed the occupants to exit the vehicle. Officer Nolan asked Defendant to place his hands on the vehicle for a pat-down search. Defendant stepped away and stated the officer did not have permission to search him. Officer Nolan approached Defendant, grabbed his wrist, and noticed the butt of a gun inside his pocket. Officer Nolan removed the gun from Defendant's pocket. It was loaded with seven rounds of ammunition. Defendant was placed under arrest and transported to Howard R. Young Correctional Institution. Upon arrival, the officers discovered sixty-two bags of heroin on Defendant.

7. After indictment, David Skoranski, Esq. ("Trial Counsel") filed a motion to sever, which the Court granted in part. At the pretrial conference, Trial Counsel moved to exclude the anonymous 911 call on the basis that it was hearsay and violated the Confrontation Clause of the United States Constitution. Trial Counsel argued there was less than an indicia of reliability because the tip was anonymous, and Trial Counsel would be unable to cross-examine the witness. The State responded by arguing the call fell within the present sense impression exception to the hearsay rule, and the Court agreed. The Court also found the call to be a non-testimonial statement that fell

outside the Confrontation Clause. The call therefore was admitted into evidence.

8. On January 17, 2018, Defendant was convicted. Following trial, the State moved to declare Defendant a habitual offender under 11 *Del. C.* § 4214(a) and (d), subjecting him to a mandatory thirty-five-year sentence.[5] After a presentence investigation, the Court sentenced Defendant to the minimum mandatory Level V term.[6] On December 14, 2018, the Delaware Supreme Court issued an order affirming Defendant's convictions on direct appeal.[7]

9. Defendant filed his original *pro se* postconviction motion and motion to appoint counsel on June 19, 2019.[8] The Court entered an order appointing counsel on June 28, 2019.[9] Patrick Collins, Esq. ("Postconviction Counsel") was appointed to represent Defendant for purposes of seeking postconviction relief.[10] Postconviction Counsel filed an amended motion for postconviction relief (the "Motion") on December 2, 2019.[11] In his Motion, Defendant raised

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[5] D.I. 40.
[6] *State v. Demby*, I.D. No. 1706011498 (Del. Super. Ct. June 1, 2018) (SENTENCING ORDER). Demby's sentence was effective June 16, 2017.
[7] *Demby v. State*, 2018 WL 6605649 (Del. Dec. 14, 2018). The Supreme Court issued its mandate on January 7, 2019. D.I. 49.
[8] D.I. 50.
[9] D.I. 55.
[10] D.I. 58.
[11] D.I. 59. Amended Mot. for Postconviction Relief (hereinafter "Am. Mot."). The arguments and focus of the postconviction motion have shifted over time. After an evidentiary hearing for Defendant's Postconviction Relief Motion, the Court explained some of its preliminary factual findings and asked counsel to provide supplemental briefing on the basis of those findings. *See* D.I. 90, Letter to Counsel, Dec. 8, 2021 ("I have concluded that the officers did not see the

one ineffective assistance of counsel claim. Trial Counsel and the State responded to Defendant's argument,[12] and Defendant filed a reply in further support of his claim.[13] On July 29, 2021, the Court held an evidentiary hearing under Rule 61(h), and the State and Postconviction Counsel filed supplemental submissions addressing the facts developed at the hearing.

ANALYSIS

10. Before addressing the merits of any claim for postconviction relief, this Court must determine whether the motion procedurally is barred under Rule 61.[14] A motion for postconviction relief may be barred for timeliness and repetition, among other things. A Rule 61 motion is untimely if it is filed more than one year after a final judgment of conviction.[15] A defendant also is barred from filing successive motions for relief under the Rule.[16] The Rule

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marijuana before the DELJIS check occurred. This prompts a different consideration than the arguments counsel have presented to date. Specifically, did Officer Dmeza taking the occupants' identification cards and running DELJIS checks in his vehicle amount to a detention under Delaware law? ... I had not previously focused on the seizure of the identification and the associated DELJIS check when I directed the parties to provide post-hearing supplemental submissions. I therefore wanted to give both sides the opportunity to present argument on that question, particularly with the benefit of my factual findings regarding the sequence in which the events of this stop occurred.")

[12] D.I. 61. *See* Aff. of Defense Counsel in Resp. to Rule 61 Mot. for Postconviction Relief (hereinafter, "Skoranski Aff."); State's Resp.

[13] D.I. 66. Def.'s Reply to State's Resp. to Am. Mot. for Postconviction Relief (hereinafter, "Def.'s Reply").

[14] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

[15] Super. Ct. Crim. R. 61(i)(1).

[16] *Id.* 61(i)(2); *See id.* 61(d)(2)(i)-(ii) (regarding the pleading requirements for successive motions).

further prohibits motions based on grounds for relief that were not asserted in the proceedings leading up to the judgment of conviction, *unless* the movant demonstrates "[c]ause for relief from the procedural default" and "[p]rejudice from violation of the movant's rights."[17] Finally, the Rule bars consideration for relief on grounds that previously were adjudicated in the case.[18]

11. Defendant's Motion was filed less than a year after his sentence became final and it is therefore timely. This Motion is his first for postconviction relief, so it is not barred as repetitive. Lastly, the Motion alleges ineffective assistance of counsel, which could not be raised at any earlier stage in the proceedings;[19] ineffective assistance claims may not be raised until postconviction proceedings.[20]

I. Defendant's ineffective assistance of counsel claim has merit.

12. To prevail on a claim for ineffective assistance of counsel, a defendant must meet the "*Strickland* standard" by demonstrating to the Court that: (i) trial counsel's representation fell below an objective standard of reasonableness, and (ii) there is a reasonable probability that, *but for* counsel's errors, the

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[17] *Id.* 61(i)(3)(A)-(B).
[18] *Id.* 61(i)(4).
[19] *Whittle v. State*, 138 A.3d 1149 (Del. 2016); *State v. Evan-Mayes*, 2016 WL 4502303, at *2 (Del. Super. Ct. Aug. 25, 2016).
[20] *See, e.g., Malloy v. State*, 2011 WL 1135107, at *2 (Del. Mar. 28, 2011).

result of the proceeding would have been different.[21] Trial Counsel is strongly presumed to have been effective.[22] Accordingly, a defendant must make specific allegations of actual prejudice and substantiate them; mere allegations or conclusory statements will not suffice.[23] Defendant meets this burden.

13. Defendant contends Trial Counsel was ineffective because he failed to move to suppress the evidence obtained from the search of Defendant's person, which Defendant argues arose from an unlawful seizure. The absence of such a motion, therefore, allowed the State to introduce the firearm, ammunition, and drugs at trial, prejudicing him. Defendant also asserts there is a reasonable probability that *but for* the alleged errors the result of the proceeding would have been different. Defendant argues that if a motion to suppress had been filed, it would have been granted, and the State would have been barred from using at trial the evidence it collected against him during the search. That illegally obtained evidence, Defendant contends, led to his wrongful conviction. Considering the facts of the instant case, I find Trial

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[21] *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (emphasis added) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.") *Id.* at 685. ("More specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.") *Id.* at 688.

[22] *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

[23] *Id.*; *see Monroe v. State*, 2015 WL 1407856, at *3 (Del. Mar. 25, 2015) (citing *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996)).

Counsel's representation did fall below an objective standard of reasonableness because Trial Counsel failed to file a motion to suppress despite a strong likelihood of success.[24] Had the evidence, that is the firearm, ammunition, and drugs been suppressed, the State could not have proceeded to trial against Defendant. My reasoning follows.

A. Trial Counsel should have filed a motion to suppress evidence challenging the officers' reasonable articulable suspicion to detain Defendant.

14. The United States Constitution's Fourth Amendment as incorporated through the Fourteenth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]"[25] An officer may seize an individual for investigatory purposes of limited scope and duration only when "reasonable

[24] Delaware courts have held an attorney's failure to file a motion to suppress, when he had a reasonable belief that such motion would not be successful, does not fall below an objective standard of reasonableness. *State v. Day*, 2010 WL 2861852, at * 3 (Del. Super. Ct. 2010). But unlike *Day,* this case does not involve counsel who (i) reviewed the circumstances surrounding the stop; (ii) analyzed whether a motion to suppress would be successful and (iii) concluded otherwise. *Id.* Further, there is no indication in the record that Trial Counsel found the filing of a motion to suppress based on the known facts "meritless" or "frivolous." *See State v. McGlotten*, 2011 WL 987534, at *11 (Del. Super. Ct. 2011). Rather, Trial Counsel's affidavit indicates he believed the 911 call contained "indicia of reliability" because "the caller was physically watching the defendant deal drugs." D.I. 61, p.3. As discussed below, settled caselaw compels the opposite conclusion. *See supra*, Analysis, ¶¶ 14-17.

[25] 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. For purposes of the issues raised in this motion, the protections are identical.

and articulable suspicion of criminal activity" supports that detention.[26] A person is considered to be "seized" when, in view of the surrounding circumstances, a reasonable person would not feel free to leave or ignore police presence.[27]

15. The anonymous 911 call did not provide the officers with the reasonable articulable suspicion necessary to conduct an investigatory stop, and Trial Counsel should have, at a minimum, filed a motion to suppress on that basis.[28] Courts generally have found that "an anonymous tip standing alone does not give rise to" reasonable articulable suspicion to execute an investigatory stop.[29] Additionally, an anonymous tip providing police with "no predictive information that they may use to assess the reliability and knowledge of an

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[26] *Flonnory v. State*, 805 A.2d 854, 856-57 (Del. 2001) (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

[27] *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (citing *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980)); *State v. Huntley*, 777 A.2d 249, 254 (Del. Super. Ct. 2000).

[28] Although the events immediately preceding the taking of Defendant's driver's license do not raise suppression issues, since the interaction between Defendant and the officers was consensual at that time, a suppression issue arose once Defendant's driver's license was taken away from him for a DELJIS check while the other officer remained by the vehicle. At that point, this Court finds a seizure of Defendant occurred. These are facts that only became apparent after the post-conviction evidentiary hearing, but that would have come to light had Trial Counsel filed a motion to suppress. Trial Counsel should have done so on the basis of the anonymous 911 call so as to challenge whether the officers' interaction with Defendant was consensual.

[29] *Flonnory*, 805 A.2d at 858 ("[T]he simple confirmation of readily observable facts does not enhance the reliability of an anonymous tip to the level required for a finding of reasonable suspicion.")

informant" does not provide police with reasonable articulable suspicion to justify even a limited search and seizure.[30]

16. For example, in *Flonnory v. State,*[31] the Delaware Supreme Court reversed the Superior Court's denial of a motion to suppress evidence police seized from a defendant's vehicle during an investigatory stop. An anonymous caller alleged a vehicle's occupant possessed an illegal substance, gave police a description of the vehicle and the license plate number, and stated the occupants were "scrunched low" in the front seat.[32] The Court found the informant "gave no other information that would have indicated to the officers that the informant possessed an inside knowledge of illegality."[33] Upon arrival, the police did not observe any illegal activity that, standing alone, would have warranted the defendant's detention. The Court found the police lacked reasonable articulable suspicion because the anonymous tip "lacked an indicia of reliability and was unsupported by independent police corroboration of present or predicted future criminal activity."[34]

17. Here, the anonymous 911 caller described only readily observable information regarding the vehicle's location and its occupants before alleging

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[30] *Id.* (citing *Florida v. J.L.*, 529 U.S. 266, 271-72 (2000)).
[31] *Flonnory,* 805 A.2d 854 (Del. 2001).
[32] *Id.* at 856.
[33] *Id* at 859.
[34] *Id.*

those three individuals were selling drugs in nearby locations. None of the caller's information suggested an "inside knowledge" of illegal activity. When the officers arrived at the scene, they identified the vehicle and observed two females and a male. They neither confirmed illegal activity as they approached the vehicle nor independently observed any.

18. Accordingly, when they approached the vehicle, the officers did not have reasonable articulable suspicion to detain its occupants, including Defendant. The officers may only have pursued their investigation with Defendant if the encounter was consensual. But, for the reasons set forth below, I find the officers seized Defendant before establishing reasonable articulable suspicion, which is unlawful under the protections of the Fourth Amendment. All evidence that flowed from such illegal detention therefore is inadmissible evidence under the fruit of the poisonous tree doctrine.[35]

B. The police and Defendant did not engage in a consensual encounter.

19. Police may engage in consensual encounters without establishing reasonable articulable suspicion.[36] For example, an officer may ask a person their name,

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[35] *U.S. v. Dupree*, 617 F.3d 724 n. 5 (3d Cir. 2010) ("The fruit of the poisonous tree doctrine applies to evidence recovered both during and *as a result of* a Fourth Amendment violation.")

[36] *See, e.g., Florida v. Bostick*, 501 U.S. 429, 434 (1991) ("Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.") (citations omitted).

destination, and business abroad.[37] Additionally, an officer may examine an individual's identification, such as a driver's license, during a consensual encounter without triggering constitutional issues.[38] Police may investigate an anonymous 911 call by attempting to engage with individuals who consent to speak with them.[39]

20. Whether and when a detention occurs is determined based on the totality of circumstances; that analysis is guided by six factors articulated in the United States Supreme Court's *Scheets* case.[40] No one factor is determinative or dispositive.[41] Jurisdictions are divided as to whether and to what degree an officer's retention of a driver's license to search for outstanding warrants may

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[37] *Florida v. Royers,* 460 U.S. 491, 497 (1983) ("...[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.") *See also Muehler v. Mena*, 544 U.S. 93, 101 (2005) ("...[T]he officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status.")

[38] *Muehler v. Mena*, 544 U.S. 93, 101 (2005).

[39] *Diggs. v. State,* 257 A.3d 993, 1003 (Del. 2021).

[40] *U.S. v. Scheets*, 188 F.3d 829, 836-37 (1999). Those six factors include: (i) whether the encounter occurred in a public or private place; (ii) whether the suspect was informed that he was not under arrest and free to leave; (iii) whether the suspect consented or refused to talk to the investigating officers; (iv) whether the investigating offers removed the suspect to another area; (v) whether there was physical touching, display of weapons, or other threatening conduct; and (vi) whether the suspect eventually departed the area without hindrance. *Id.* Delaware officially adopted the six factors from *Scheets* in *Jones v. State*, 28 A.3d 1046, 1053 (Del. 2011).

[41] *See, e.g., U.S. v. Weaver*, 282 F.3d 302, 310 (4th Cir. 2002) ("Time and again, the Supreme Court has noted that the inquiry into whether a police-citizen encounter is a 'seizure' for purposes of the Fourth Amendment is determined by examining the totality of the circumstances, and no one factor is dispositive."); *see also Florida v. Bostick*, 501 U.S. 429, 437 (1991) ("Where the encounter takes place is one factor, but it is not the only one.")

escalate a consensual encounter to a seizure.[42] Some courts have found withholding an individual's identification constitutes a seizure.[43] A per se rule, however, that retention of a license *always* constitutes a seizure is inconsistent with Delaware law, which requires each court to weigh the totality of the circumstances surrounding an encounter. But it seems irrefutable that police retention of an individual's identification is "highly material" to the totality of circumstances analysis, and some courts explicitly have stated as much.[44]

21. As to the *Scheets* factors, Defendant's encounter with police occurred in a public place. Defendant initially consented to speaking with the investigating officers and was not removed to another area but remained in the vehicle at that time. Although no physical touching or display of weapons occurred, Officer Nolan remained beside the vehicle containing the occupants,

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[42] *Commonwealth v. Cost*, 224 A.3d 641, 650-51 (Pa. 2020). *Cost compares United States v. Jordan*, 958 F.2d 1085, 1087 (D.C. Cir. 1992) ("[O]nce the identification is handed over to police and they have a reasonable opportunity to review it, if the identification is not returned to the detainee, [it is] difficult to imagine that any reasonable person would feel free to leave without it.") *with Weaver*, 282 F.3d at 312 ("While it is without question that a driver's license is one of the most valuable pieces of personal identification possessed by any citizen, it does not logically follow that any time an officer retains someone's driver's license that such retention blossoms into an unconstitutional seizure[.]")

[43] *See, e.g., U.S. v. Jefferson,* 906 F.2d 346, 349 (8th Cir. 1990) ("We have also noted that in certain circumstances a consensual encounter may become a seizure if the officer retains the individual's driver's license.") (citing *United States v. Campbell*, 843 F.2d 1089, 1093 (8th Cir. 1988)).

[44] *See Weaver*, 282 F.3d at 310 ("[N]umerous courts have noted that the retention of a citizen's identification or other personal property or effects is highly material under the totality of the circumstances analysis.")

including Defendant, while Officer Dmeza took the occupants' state-issued identification to the officers' vehicle and conducted the DELJIS check. Lastly, Defendant did not depart without hinderance.

22. Again, although no single factor is dispositive to this Court's analysis, the second *Scheets* factor[45] weighs heavily in favor of finding the encounter between Defendant and the police was non-consensual.[46] Defendant was not informed he was free to leave at any point during the encounter but instead was advised of an ongoing drug dealing investigation in response to a 911 call regarding the vehicle Defendant occupied.[47] Further, Officer Dmeza took Defendant's identification back to his marked police car, making it difficult - if not functionally impossible - for Defendant to consider asking for his identification back. [48]

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[45] Once more, the second *Scheets* factor reads: "whether the suspect was informed that he was not under arrest and free to leave." *U.S. v. Scheets*, 188 F.3d 829, 836-37 (1999).

[46] *See, e.g., State v. Pollman*, 190 P.3d 234, 240 (Kan. 2008) ("[I]f a law enforcement officer retains a driver's license, this can be a factor considered in the totality of the circumstances and may, absent offsetting circumstances, mean a reasonable person would not feel free to leave without his or her license.") (citing *State v. Thompson,* 166 P.3d 1015 (Kan. 2007)).

[47] These facts would communicate to a reasonable person they are not free to leave.

[48] Defendant first submits the officers seized Defendant when they approached the vehicle where Defendant was seated as a passenger. Defendant contends this approach from both sides of a vehicle did not allow the occupants to feel they were free to leave the encounter with the officers and were thus seized under the Fourth Amendment. For his argument, Defendant relies on a case where the Court found a defendant seized when officers flanked three sides of the vehicle. *See Flonnory*, 805 A.2d 854 (Del. 2001). But the Court rejects Defendant's argument that two officers approaching either side of a vehicle automatically amounts to a detention. The Court instead finds a seizure occurred when Officer Dmeza left to return to his vehicle with the occupants' identifications.

23. Because Officer Nolan remained next to the car to observe the occupants, and because she would be risking a traffic citation, the driver of the vehicle could not be expected to feel free to drive away without her driver's license in her possession.[49] The State contends this fact is unrelated to whether Defendant was seized, since Defendant was not the driver and the State posits he could have walked away at any time. But this conclusion would require the Court to ignore common sense. First, Defendant could not simply ask for his identification back; even if Officer Nolan allowed Defendant to exit the vehicle, he would not have been permitted to approach the police vehicle where Officer Dmeza sat. Second, had he walked away, Defendant would have had to abandon his state-issued identification. Reasonable citizens would feel uncomfortable with the option of simply abandoning their identification, thereby requiring them to undertake both the time and expense of replacing it.[50] Further, there is no evidence that Defendant arrived on the scene as a pedestrian; expecting him to leave as one defies logic.

24. The State's cited cases, which it presents for the proposition that Defendant and police were engaged in a consensual encounter, are distinguishable from the instant action. For example, in *Lattimore,*[51] the officers did not question

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[49] *Weaver*, 282 F.3d at 311.
[50] *See., e.g., U.S. v. De La Rosa*, 922 F.2d 675, 683-84 (11th Cir. 1991) (dissent).
[51] *U.S. v. Lattimore*, 87 F.3d 647 (4th Cir. 1996).

the defendant about the presence of narcotics or contraband until after defendant's driver's license had been returned, indicating all official enforcement business was completed and defendant was free to leave.[52] Likewise, in *Sullivan,*[53] the officer returned the driver's license to the defendant before questioning him.[54] Here, in contrast, the officers told Defendant about an investigation stemming from an anonymous call concerning drug sales before obtaining and retaining his license. The State has not pointed to any evidence that Dmeza returned the Defendant's identification before asking whether the car contained contraband. The State's *Rusher*[55] case also is not on point.[56] The Court there found a detention occurred when the officer first took the defendant's driver's license, but held that such detention reverted to a consensual encounter right before the officer began questioning defendant about contraband.[57] Those facts are unlike the ones presented here.

25. Even if a reasonable person otherwise would feel free to leave despite having to abandon their identification, there are additional factors here that the Court must consider, namely that Defendant was aware the officers were

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[52] *Id.* at 653.
[53] *U.S. v. Sullivan*, 138 F.3d 126 (4th Cir. 1998).
[54] *Id.* at 132.
[55] *U.S. v. Rusher*, 966 F.2d 868 (4th Cir. 1992).
[56] *Id.* at 877.
[57] *Id.*

investigating possible drug dealing by the car's occupants, and Officer Nolan stood next to Defendant's side of the vehicle throughout the wait on the DELJIS check. In sum, none of the cases the State cited support its argument that a defendant is free to leave when the police officer, in communicating they are responding to an on-going criminal investigation, has taken the defendant's identification to another location and the defendant would have to abandon their identification to end the encounter. [58] A reasonable person would not think they were free to leave given the circumstances in this case, and the encounter therefore became a detention once Officer Dmeza returned to his vehicle.[59]

26. The Delaware Supreme Court's opinion in *Jones v. State*[60] supports this conclusion. In that case, when the officers arrived on the scene, their

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[58] Officer Dmeza did not need to take Defendant's driver's license with him to his marked vehicle. Officer Dmeza could have looked at the licenses, written down the information needed for the DELJIS check, and then proceeded to his vehicle, leaving the driver's license within Defendant's possession.

[59] *Weaver*, 282 F.3d at 312 ("[I]t does not logically follow that any time an officer retains someone's driver's license that such retention blossoms into an unconstitutional seizure. Under the totality of the circumstances, however, something more is required.") That "something more" is found in Defendant's case. The retention of the license is coupled with additional facts that distinguish this case from *Weaver*. Defendant was informed he was the focus of a criminal investigation before the officers asked for his identification. And one officer remained next to Defendant while the other returned to the marked vehicle to run the DELJIS check. In *Weaver*, the defendant could have asked for the identification back. But here, Defendant would not have been able to ask for his identification back because Officer Dmeza had walked away and ran the DELJIS check from inside his marked vehicle.

[60] *Jones v. State*, 745 A.2d 856, 863 (Del. 1999) ("A determination of reasonable suspicion must be evaluated in the context of the totality of the circumstances…") *Id.* at 861.

observations added nothing to the facts obtained from the anonymous 911 caller's statements.[61] Here, when the officers arrived, they witnessed Defendant in a car matching the vehicle description from the 911 call but observed nothing else that would indicate Defendant was conducting drug sales. Moreover, the officers in *Jones* engaged in conduct that would communicate to a reasonable person that he or she was not free to ignore police presence. Officers Dmeza and Nolan similarly engaged in such conduct, including: a discussion of their current investigation with Defendant, removal of Defendant's identification, and continued presence beside Defendant while the DELJIS check occurred.

27. To reiterate, there is no dispute that Officers Dmeza and Nolan had the right to request Defendant's name, identification, and business abroad in the context of a consensual encounter. Those requests did not convert the encounter from a consensual one to a seizure. But it also is not disputed that the officers could have recorded the pertinent information, returned the identification, and conducted a DELJIS check without retaining the identification. The retention and removal of his identification, after Defendant was told police were conducting a criminal investigation and when

[61] *Id.* at 870 ("Here…the facts contained in the 911 complaint were readily observable to anybody who saw the defendant…[T]he caller here stated only that the person was 'suspicious' without providing any articulable support for that subjective conclusion.")

one officer remained next to the car, converted the encounter into a seizure. Therefore, at the moment Officer Dmeza returned to his marked vehicle with Defendant's license after communicating an intent on investigating a 911 call concerning drug sales, Defendant was detained. This detention constituted a seizure of the vehicle's occupants.

28. Because Defendant was "seized," the officers must have possessed reasonable articulable suspicion of criminal activity to conduct the investigatory stop. Reasonable articulable suspicion carries its own "totality of the circumstances" test:

> We have defined reasonable and articulable suspicion as an officer's ability to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. A determination of reasonable suspicion must be evaluated in the context of 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. Delaware has codified this standard for investigatory stops and detentions in 11 *Del. C.* Section 1902. For purpose of this analysis, 'reasonable ground' as used in Section 1902(a) has the same meaning as reasonable and articulable suspicion.[62]

[62] *Id.* at 861 (internal citations and alterations omitted).

29. As explained above, the officers did not meet this standard. The officers did not have reasonable articulable suspicion to conduct an investigatory stop.[63] Defendant's Fourth Amendment rights therefore were violated as a result of his detention.

C. Without the evidence obtained from the illegal detention, the outcome of Defendant's trial would have been different.

30. Trial Counsel's representation fell below an objective standard of reasonableness because he failed to file a motion to suppress despite the likelihood such a motion would have succeeded.[64]

31. If a motion to suppress had been filed, it would have been granted because no reasonable articulable suspicion existed at the time of Defendant's seizure. There is no reasonable dispute regarding *Strickland*'s prejudice element. The State would have had no choice but to dismiss the case if the motion to suppress was granted.

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[63] Both parties agree the officers did not have reasonable articulable suspicion to conduct an investigatory stop when they arrived in the area based on the anonymous tip alone. But the State argued "...prior to the conversation beginning, the officers observed marijuana and had probable cause to detain the occupants of the vehicle including Demby." D.I. 89, State's Post-Hearing Submission at 5. If these facts were found in the instant case, the Court would agree with the State's position. For the reasons explained above, however, the Court finds the officers removed and did not return the occupants' identification before observing the marijuana. *See infra,* Factual and Procedural Background, ¶¶ 3-4; n. 4. And leaving the occupants without their state-issued identification while an officer remained with them amounted to a seizure.

[64] *See infra* n. 24.

32. In sum, Defendant has met his burden of demonstrating (i) Trial Counsel's performance objectively was unreasonable by not pursuing a motion to suppress evidence obtained as a result of an illegal Fourth Amendment detention; and (ii) Defendant was prejudiced as a result of that alleged deficiency.

CONCLUSION

33. Postconviction relief due to ineffective assistance of counsel must be granted in circumstances where the Court finds trial counsel's efforts fell below a reasonable standard and *but for* those errors, the outcome of the proceeding would have been different. Those challenging hurdles were met here. For all the foregoing reasons, Defendant's Motion is **GRANTED.**

IT IS SO ORDERED.

Abigail M. LeGrow, Judge

Original to Prothonotary
cc: Timothy Maguire, Deputy Attorney General
Patrick J. Collins, Esquire