IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANZARA BROWN,	)	
	)	
Defendant Below,	)	
Appellant,	)	Case No. 603, 2013
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE'S ANSWERING BRIEF

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DATE: February 10, 2014

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NATURE AND STAGE OF THE PROCEEDINGS

On May 31, 2012, Delaware State Police arrested Anzara Brown ("Brown") during a stop of his vehicle. A1. Police had reason to believe he had just purchased cocaine from a drug dealer whose house was under surveillance and whose phones were being tapped. B123, 125-29. A Kent County grand jury indicted Brown of one count each of racketeering (11 *Del. C.* § 1503), drug dealing (16 *Del. C.* § 4754(1)), aggravated possession of a controlled substance (16 *Del. C.* § 4752(3)), carrying a concealed deadly weapon (11 *Del. C.* § 1442), possession of a deadly weapon during the commission of a felony (11 *Del. C.* § 1447), possession of a deadly weapon by a person prohibited (11 *Del. C.* § 1448), conspiracy second (11 *Del. C.* § 512), criminal solicitation second degree (11 *Del. C.* § 502) and possession of marijuana (16 *Del. C.* § 4764(a)). A8-47 (Indictment).

Prior to trial, Brown filed a motion to suppress evidence obtained during a traffic stop, a motion to suppress evidence obtained from a wiretap, a motion to sever Brown's case from his co-defendants' cases, and a motion to sever his charge of possession of a deadly weapon by a person prohibited from his other charges. A2-3 (DI 13, 19, 20, 27). The Superior Court held a hearing on Brown's motions on April 5, 2013, at which time it granted Brown's motions to sever his case from his co-defendants' cases and to sever his person prohibited charge from the remaining charges. A3-4 (DI 35, 41); B133. The Superior Court reserved decision

on Brown's motions to suppress, later denying them on July 30, 2013.[1] A3-4 (DI 34, 41, 42, 43).

Trial was held from September 9 to 11, 2013. After jury selection, the State dismissed the charge of racketeering. B137. The jury convicted Brown of all remaining charges (other than possession of a deadly weapon by person prohibited, for which he has not yet been tried). B180-82; Ex. A to Op. Br. (Sent. Order). The counts of criminal solicitation and conspiracy second were merged by the trial court at sentencing. A5 (DI 55).

The Superior Court determined that Brown was a habitual offender under 11 *Del.C.* § 4214(b) and sentenced him on October 29, 2013 to two life sentences for the charges of drug dealing and aggravated possession of a controlled substance. Ex. A to Op. Br. at 1-2. On the remaining charges, the Superior Court sentenced Brown to a total of twenty-nine years and six months at Level V, suspended after twenty-seven years, for one year of Level II probation. Ex. A to Op. Br. at 2-3. Brown filed a timely notice of appeal to this Court. He filed his Opening Brief on January 7, 2014. This is the State's answer to the Appellant's Opening Brief.

[1] *State v. Brown*, 2013 WL 4051046 (Del. Super. July 30, 2013); *State v. Brown*, 2013 WL 4051050 (Del. Super. July 30, 2013).

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. The Superior Court did not abuse its discretion when it denied Brown's motion to suppress evidence obtained as a result of a traffic stop. At the time of the traffic stop, police had probable cause to believe Brown had committed a crime. Police had listened through a wiretap to an unknown male plan a drug deal with a known drug dealer, Galen Brooks. The man said he would arrive at Brooks's house in seven minutes. Sixteen minutes later, an unknown male arrived in a Green van, met with Brooks out of sight of officers watching the house, and left shortly thereafter. A police officer followed the green van, stopped it, and learned the man driving was Anzara Brown. While arresting Brown, the officer discovered a large amount of cocaine in his front pants pocket. Based on the totality of the circumstances leading up to the vehicle stop, there was a fair probability that the man driving the green van, Anzara Brown, had just purchased cocaine from Galen Brooks. Even if the officer did not have probable cause to stop Brown's vehicle, he had a reasonable articulable suspicion to do so.

II. Appellant's second claim is DENIED. The Superior Court did not abuse its discretion when it denied Brown's motion to suppress wiretap evidence. Police had obtained an order authorizing a wiretap of the number Galen Brooks used to set up the drug sale with Brown. The wiretap authorization was obtained on May 25, 2012 and police intercepted the calls between Brooks and Brown on

May 31, 2012 and on June 1, 2012. There was sufficient information provided within the four corners of the affidavit supporting the application for the wiretap to support the issuing judge's finding that there was probable cause to believe the number to be intercepted belonged to Galen Brooks and that he used it to deal drugs. Therefore, there was probable cause for the officers to have listened to the phone conversations between Galen Brooks and Brown on May 31, 2012 and on June 1, 2012.

III. Appellant's third claim is DENIED. The Superior Court did not abuse its discretion when it overruled Brown's chain of custody objection to the State's cocaine evidence. The arresting officer collected four bags of suspected crack cocaine and one bag of powder cocaine from Brown's front pants pocket. The officer processing and field testing the evidence noted that there were three bags of crack cocaine and two bags of powder cocaine. The forensic examiner tested three bags of crack cocaine and two bags of powder cocaine. The forensic examiner also pointed out that powder cocaine often clumps together, resembling crack cocaine. The State presented all witnesses necessary to establish chain of custody. There was a reasonable probability that the cocaine collected by the arresting officer was the same cocaine tested by the forensic examiner and presented as evidence during trial.

STATEMENT OF FACTS

Anzara Brown's charges arise from his purchase of powder and crack cocaine from a dealer, Galen Brooks ("Brooks"), whose organization was the subject of an active wiretap investigation. *See* B1-83 (Aff. in Support of Interception of Wire Communications); A48-57, 59, 63-68. The Delaware State Police and the Dover Police Department had been investigating Brooks's organization for a number of years.[2] As part of their investigation, on May 15, 2012, they obtained a wiretap warrant for Brooks's cell phones. B68. Officers were also conducting video surveillance of Brooks's residence and physical surveillance of the entrance to his neighborhood. A54; B138.

On May 31, 2012, Delaware State Police officers were monitoring calls made to and from Brooks's cell phone. B123-24. During the afternoon and early evening, officers listened to four calls between Brooks and an unknown male who went by the nickname "Trell."[3] B123-24. Based on their training and experience, officers could tell that Brooks and Trell were arranging a drug deal and that Trell wanted to buy a half ounce of crack cocaine and a half ounce of powder cocaine. B123, 127. In the last call, which occurred at 5:35 p.m., Trell told Brooks he

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[2] *See Brown*, 2013 WL 4051050, at *1 (noting the investigation of Brooks's organization had begun in 1996).

[3] *See* transcripts of recorded phone calls attached as Ex. A to State's Response to Defs. Mot. to Suppress (B106-114).

would be at his (Brooks's) home in seven minutes. B114, 123. One of the officers listening to the four phone conversations conveyed the information to officers conducting surveillance of Brooks's residence and his neighborhood. B123.

Detective Jordan Miller ("Detective Miller") of the Dover Police Department was watching and videotaping Brooks's residence at 55 Huntley Circle. B124-25. He watched as a man, John Price, left Brooks's residence at 5:48 p.m. and a black male, later identified as Anzara Brown, arrived at 5:51 p.m. with a white female. B126. Officers were familiar with John Price and knew he was not the unknown subject of the four phone calls with Brooks. B128. Brown met with Brooks outside his residence and the two of them went around to the side of the house where the video camera and Detective Miller lost sight of them.[4] B125-26. At 5:57 p.m., Brooks and the white female left in a green van.[5] B126. A minute later, Brooks also left his residence.[6] B126, 128. Detective Miller informed the other officers involved in the investigation what he had seen. B126.

In the meantime, Sergeant Lance Skinner of the Delaware State Police, one of the officers who had been listening to Brooks's telephone conversations that afternoon, was en route to the Huntly Circle subdivision to attempt a traffic stop of

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[4] *Brown*, 2013 WL 4051046, at *1.

[5] *Id.*

[6] *Id.*

the unknown man who had bought drugs from Brooks. B127. Soon after hearing the description of the green van, Sergeant Skinner located it and followed it. B128. He stopped the van and asked the driver, Brown, to get out. B129. Sergeant Skinner told Brown that he had stopped him because there was a problem with his registration. B129. There was, in truth, nothing wrong with Brown's registration. A66. Sergeant Skinner believed that Brown had just purchased drugs from Brooks, but did not want to jeopardize the wiretap investigation. B129.

During a pat down search of Brown, Sergeant Skinner felt a lump in his front pocket, which, based on its feel, was immediately apparent to him to be an illegal substance. A67. Sergeant Skinner detained Brown. A67. From Brown's pocket, he retrieved a bag containing approximately eight grams of powder cocaine (B143, 157); and a pouch containing a bag of crack cocaine, weighing approximately 3.7 grams, and a bag with two individual bags of crack cocaine and one bag of powder cocaine, weighing approximately 8.2, 8.1 and 1.2 grams, respectively. B143, 158; Ex. F to Op. Br. Back at the police station, Sergeant Skinner also located a small bag of marijuana and a pair of brass knuckles in Brown's back pocket. A68.

ARGUMENT

I. THE SUPERIOR COURT ACTED WITHIN ITS DISCRETION WHEN IT DENIED BROWN'S MOTION TO SUPPRESS EVIDENCE OBTAINED AS THE RESULT OF A TRAFFIC STOP.

Question Presented

Whether the Superior Court abused its discretion by denying Brown's Motion to Suppress on the basis that police officers had probable cause to arrest Brown at the time of the traffic stop. Ex. B to Op. Br.; B94-114, 130-31.

Scope of Review

This Court reviews a trial judge's denial of a motion to suppress for abuse of discretion.[7] Legal conclusions are reviewed *de novo*, while factual findings are reviewed for abuse of discretion to determine "whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous."[8]

Merits of the Argument

Brown argued in his motion to suppress that the officer who stopped his vehicle did not have a reasonable articulable suspicion to justify the traffic stop and that he did not have probable cause to arrest him. B95-97, 130. The Superior Court found that based on the totality of the circumstances, a fair probability

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[7] *Stafford v. State*, 59 A.3d 1223, 1227 (Del. 2012).

[8] *Id.* (quoting *Lopez–Vazquez v. State*, 956 A.2d 1280, 1285 (Del.2008)).

existed that Brown had purchased cocaine at Brooks's house and that "when he departed probable cause existed to believe he was then in possession of the drugs just purchased."[9] The court based its decision on testimony presented at the suppression hearing that Brooks and an unknown caller had planned a drug transaction in several phone conversations in the afternoon and evening of May 31, 2012.[10] Sixteen minutes after the last phone call, Brown arrived at Brooks's residence.[11] Brown and Brooks disappeared around the side of Brooks's house, and a few minutes later Brown departed in a green van.[12] Sergeant Skinner witnessed the green van leave Brooks's neighborhood, followed it for a few miles and then pulled it over.[13]

Brown argues on appeal that Sergeant Skinner did not have probable cause to stop and arrest him because at the time of the stop he did not know Brown's identity and had not observed him engage in any criminal activity. Op. Br. at 9-10.

Evidence seized in violation of the fourth and fourteenth amendments and of the Delaware constitution's prohibitions against unreasonable searches and

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[9] *Brown*, 2013 WL 4051046, at *2.

[10] *Id.* at 1-2.

[11] *Id.* at 2.

[12] *Id.*

[13] *Id.* at 1.

seizures is inadmissible at trial.[14] Police officers are authorized to stop a vehicle without a warrant when they "have probable cause to believe that an automobile . . . is carrying contraband, is being driven in violation of the motor vehicle laws, or the occupants are or have been committing criminal violations."[15] In addition, a police officer may arrest an individual without a warrant when the officer has probable cause to believe the person has committed a felony.[16] Probable cause is measured by the totality of the circumstances as viewed from the standpoint of a reasonable police officer in light of his training and experience.[17] It exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."[18] An officer need not have information sufficient to prove guilt beyond a reasonable, nor even to prove that guilt is more likely than not.[19] "[T]he police need only present

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[14] *See State v. Prouse*, 382 A.2d 1359, 1362 (Del. 1978).

[15] *Prouse*, 382 A.2d at 1363.

[16] *Tatman v. State*, 494 A.2d 1249, 1253 (Del. 1985); 11 *Del. C.* § 1904(b).

[17] *See Miller v. State*, 4 A.3d 371, 373 (Del. 2010) ("We determine probable cause by the totality of the circumstances, as viewed by a reasonable police officer in the light of his or her training and experience."); *State v. Maxwell*, 624 A.2d 926, 929 (Del. 1993) ("[P]robable cause is now measured, not by precise standards, but by the totality of the circumstances through a case by case review of 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" (citation omitted)).

[18] *Ornelas v. U.S.*, 517 U.S. 690, 696 (1996).

[19] *Miller*, 4 A.3d at 373-74.

facts suggesting, in the totality of the circumstances, that a fair probability exists that the defendant has committed a crime."[20]

In Brown's case, officers listened via wiretap to an unknown male set up a drug transaction with Galen Brooks over the course of several phone conversations. B123, 127. In the last conversation, the unknown male told Brooks that he would be at his house in seven minutes. B114, 123. An officer watching and videotaping Brooks's residence observed a black male arrive in a green van at the residence sixteen minutes later. B126. Just prior to the man in the green van's arrival, a man named John Price ("Price") left Brooks's house. B124, 126. Officers knew that Price was not responsible for the transaction because they were familiar with him and with his phone and knew he had not been involved in the phone conversations setting up the drug transaction. B128. At the suppression hearing, Sergeant Skinner testified:

> The reason why we focused on that green van specifically is because no one else arrived there that we didn't already know. And what I mean by that is John Price had arrived, and we already knew what phone John Price was using and the vehicle he was driving and who he was, so when the green van arrived, we put two and two together and figured that was the person requesting the cocaine that I had heard on the telephone calls. . . ."

B128.

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[20] *Id.* at 373.

The unknown man met with Brooks outside of his house, the two of them disappeared around the side of the house and the unknown man left in the green van only minutes later. B126. Brooks left a minute after (B126, 128), which would indicate he was no longer waiting for his buyer to show up. Sergeant Skinner, waiting in his patrol vehicle about a half mile away from the entrance to Brooks's neighborhood, watched the van leave the neighborhood. B128. He followed it for two to three miles, during which time it made no stops. B129. When Sergeant Skinner stopped the van, there were two occupants – a black male and a female passenger. B129. The driver was Anzara Brown. B129.

Given the totality of the circumstances, including the content of the four phone conversations overheard by officers, the arrival of Brown at Brooks's residence sixteen minutes after the last phone conversation, and his departure minutes later, there was a fair probability that Brown had purchased cocaine from Galen Brooks. Therefore, Sergeant Skinner had probable cause to stop the green van Brown was driving, to arrest Brown and to conduct a search incident to that arrest.[21]

Even if Sergeant Skinner did not have probable cause to stop Brown's vehicle, the totality of the circumstances surrounding the stop support a finding

[21] *Cf. Tatman*, 494 A.2d at 1250-51 (finding officer had probable cause to stop and search vehicle when he received a reliable tip from an informant that defendant, a known drug dealer, would be driving from New York to Wilmington that night in a white Buick with newly purchased drugs).

that he had a reasonable suspicion that Brown had committed a crime.[22] Police are authorized to stop an individual for investigatory purposes if they have a reasonable, articulable suspicion that the person has committed or is committing a crime.[23] Reasonable suspicion is a less demanding standard than probable cause.[24] "Police suspicion of a person's involvement in criminal activity is reasonable if it is based on the detaining officer's 'ability to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.'"[25]

Sergeant Skinner personally listened to the telephone conversations between Brooks and the unknown male. B127. Based on his training and experience, he understood that the participants to the conversations were planning a cocaine deal. B127. Sergeant Skinner left the station with the intent to intercept the buyer after he purchased the drugs. B127. Detective Miller witnessed an unknown man arrive

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[22] *Cf. Miller v. State*, 25 A.3d 768, 773-74 (Del. 2011) (finding informant's tip that accurately predicted that defendant would arrive at a particular time and park in a particular spot to deliver bundles of heroin was sufficient to establish reasonable suspicion that defendant was committing a crime); *Jarvis v. State*, 600 A.2d 38, 41 (Del. 1991) (finding police observation of occupants of out-of-state vehicle parking in deserted area near neighborhood known for drug trafficking and meeting an individual on the street who took them to a house in which they stayed no more than ten minutes to be sufficient to establish reasonable suspicion that a crime had been committed).

[23] *Miller*, 25 A.3d at 771.

[24] *Harris v. State*, 806 A.2d 119, 130 (Del. 2002). *See also Coleman v. State*, 562 A.2d 1171, 1174 (Del. 1989) ("[T]he quantum of evidence necessary for reasonable suspicion is less than that which is required for probable cause to arrest.").

[25] *Harris*, 806 A.2d at 126.

in a green van at Brooks's residence shortly after the last phone conversation occurred and close in time to when the buyer told Brooks he would arrive. B123, 125-26. Although Detective Miller did not see a drug exchange, the unknown man contacted Brooks and left his house only six minutes after arriving. B126. Brooks left a minute later. B126, 128. By process of elimination, Detective Miller and Sergeant Skinner realized the unknown man in the green van must have been the buyer from the phone conversations. B125-26, 128. Detective Miller provided the description of the green van to Sergeant Skinner. B126, 128. Sergeant Skinner observed the green van leave Brooks's neighborhood, followed it and stopped it a few miles later. B128-29.

Sergeant Skinner had a reasonable, articulable suspicion that the driver of the green van had just purchased cocaine from Galen Brooks. He was justified in relying on Detective Miller's description of the vehicle the suspected buyer was driving.[26] Once Sergeant Skinner had lawfully stopped the vehicle, he could then legally ask Brown to exit the vehicle and submit him to a pat down search.[27] The

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[26] *Cf. Thomas v. State*, 8 A.3d 1195, 1198 (Del. 2010) (finding officer was justified in making *Terry* stop of individual who matched description of a suspect provided over a police radio broadcast).

[27] *Cf. Loper v. State*, 8 A.3d 1169, (Del. 2010) (finding police may order the driver to exit a car after a valid traffic stop, and such order is not a "seizure" under the Fourth Amendment); *Ingram v. State*, 2004 WL 2154325, *2 (Del. September 17, 2004) (noting that officers who stop a vehicle for a traffic violation are permitted to conduct a pat-down search for safety reasons); *Walker v. State*, 1992 WL 115945, *2 (Del. Apr. 20, 1992) (finding officers were justified in conducting pat down search for safety in part because they suspected the defendant had just participated in a narcotics sale and they knew that drug dealers often carry weapons; and, finding

cocaine he found in Brown's pocket provided probable cause to arrest him.[28]

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that under "plain touch" doctrine, drugs in pocket are found within the scope of the search as long as the lawful touching allows the officers to conclude with reasonable certainty that the pocket holds contraband). *See also Prouse*, 382 A.2d at 1363 ("A protective frisk of one suspected of criminal activity may also be conducted by police."). *But see Caldwell v. State*, 780 A.2d 1037, 1049 (Del. 2001) (finding frisk of defendant was unreasonable search because it was unrelated to traffic violation for which he had been stopped).

[28] *See Tatman*, 494 A.2d at 1253 (finding that an officer may arrest an individual without a warrant when the officer has probable cause to believe the person has committed a felony); 11 *Del. C.* § 1904(b). *See, e.g., Ingram*, 2004 WL 2154325, *2 (finding officer had probable cause to arrest defendant after he located drugs on defendant during pat-down search); *Jarvis*, 600 A.2d at 43 (finding probable cause to arrest defendant when search of co-occupant of vehicle revealed drugs).

II. THE SUPERIOR COURT ACTED WITHIN ITS DISCRETION WHEN IT DENIED BROWN'S MOTION TO SUPPRESS WIRETAP EVIDENCE.

Question Presented

Whether the Superior Court abused its discretion when it denied Brown's motion to suppress wiretap evidence on the basis there was probable cause to believe Galen Brooks was using the phone number that was the subject of the order authorizing the wiretap. Ex. D to Op. Br.; B88-93, 115-19, 133-36.

Scope of Review

This Court reviews a trial judge's denial of a motion to suppress for abuse of discretion.[29] Legal conclusions are reviewed *de novo*, while factual findings are reviewed for abuse of discretion to determine "whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous."[30]

Merits of the Argument

Prior to trial, Brown filed a motion to suppress evidence of the telephone calls intercepted by wiretap between himself and Galen Brooks.[31] He argued that the number (302-535-9787), which he was alleged to have called and from which

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[29] *Stafford v. State*, 59 A.3d 1223, 1227 (Del. 2012).

[30] *Id.* (quoting *Lopez–Vazquez v. State*, 956 A.2d 1280, 1285 (Del.2008)).

[31] *See* Mot to Suppress Evidence of Wiretap (B88-91).

he received calls on May 31, 2012 and June 1, 2012[32] was once removed from the known number of Galen Brooks (302-222-5082) that was the subject of the wiretap. B89-91, 133-34. He claimed that since there was no evidence the 9787 number belonged to Brooks, there was no probable cause for the officers to have listened to the phone calls between Brown's number and the 9787 number. B134.

The Superior Court denied Brown's motion to suppress the wiretap evidence, noting that the police had applied for and acquired a warrant authorizing a wiretap of the 9787 number as one of Brooks's numbers on May 25, 2012.[33] The court reviewed the State's Affidavit in Support of Application for Interception of Wire Communications (the "Affidavit") and found that the totality of the circumstances presented in it demonstrated that there was a fair probability that communications intercepted from the 9787 number would reveal evidence of drug trafficking and that the 9787 number was a number commonly used by Brooks himself.[34]

On appeal, Brown argues that police obtained the wiretap to intercept calls to and from the 9787 number based on mere suspicion that Brooks was using the

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[32] On June 1, 2012, the day after his arrest, police listened to and recorded three more phone conversations between Brown and Brooks. A72-73. The recordings of those conversations were admitted at trial. A73.

[33] *Brown*, 2013 WL 4051050, at*2.

[34] *Id.* at *3.

number, not probable cause. Op. Br. at 12. 11 *Del. C.* § 2407(c)(1) provides that a judge may issue an order authorizing interception of wire, oral or electronic communications for a criminal investigation upon a finding that:

> a. There is probable cause for belief that an individual is committing, has committed, or is about to commit an offense enumerated in § 2405 of this title;
>
> b. There is probable cause for belief that particular communications concerning that offense will be obtained through the interception;
>
> c. Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; and
>
> d. There is probable cause for belief that the facilities from which or the place where the wire, oral or electronic communications are to be intercepted are being used or are about to be used in connection with the commission of the offense or are leased to, listed in the name of, or commonly used by an individual engaged in criminal activity described.

On May 15, 2012, as part of an ongoing investigation into a drug trafficking syndicate believed to be headed by Galen Brooks, police obtained a court order authorizing the interception of calls from Brooks's known phone numbers, including his phone number (302) 222-5082 ("5082"). B68. Brown does not challenge the sufficiency of the evidence supporting the authorizing court's determination that there was probable cause to issue a warrant to wiretap the 5082 number. During the course of their investigation, officers learned that Brooks

would purchase new prepaid cell phones approximately every forty-five days to avoid police detection. B47, 59, 71.

According to the Affidavit, on May 22, 2012, Brooks called three separate numbers from the 5082 number. Officers listened to the content of those calls. B68-71. In the first call, Brooks asked the unknown male who answered the call if he saw a strange number on his phone and told him to answer that number. B68. A minute later, the unknown male received a call from the number (302) 535-9787 ("9787"). B68. At 8:48 a.m., Brooks called the second number and advised the unknown male who answered that he would call right back. B69. Four minutes later, at 8:52 a.m., the second unknown male received a call from the 9787 number. B69. A little later the same morning, Brooks called another unknown male at a third number and told him to answer his phone. B69-70. One minute later, the third unknown male received a call from the 9787 number. B69-70.

In each case, subpoenaed phone records of the three called numbers revealed that almost immediately after Brooks would call from the 5082 number and tell the recipient to answer his phone, the recipient would receive a call from the 9787 number. B68-70. Based on Brooks's pattern of obtaining new cell phones about every forty-five days, officers believed he was in the process of switching phones from the 5082 number to the 9787 number. B70-71. The Superior Court

authorized interception of calls to and from the 9787 number on May 25, 2012. B84-87 (Ord. Authorizing the Interception of Wire Communications).

Brown does not argue that the State did not have probable cause to intercept Brooks's 5082 number.[35] Nor does he challenge the authorizing judge's determination that there was probable cause to believe Brooks was committing drug dealing offenses via his cell phones.[36] Instead, Brown simply argues that police officers did not have probable cause to connect the 9787 number to Galen Brooks.

Probable cause must be determined on the basis of the evidence contained within the four corners of the affidavit submitted in support of the wiretap application.[37] The affidavit must be considered as a whole.[38] "A determination of probable cause by the issuing magistrate will be paid great deference by a

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[35] The court found in the cases of *State v. Brooks*, 2013 WL 4051049 (Del. Super. July 30, 2013); *State v. Matthews*, 2013 WL 4046299 (Del. Super. July 31, 2013); and *State v. Scarborough*, 2013 WL 4051047 (Del. Super. July 31, 2013) that there was a sufficient factual basis in the Affidavits in Support of Application for Interception of Wire Communications to support the issuing judge's findings of probable cause to intercept Brooks's 5082 number and his other numbers.

[36] It should also be noted that Brown did not challenge the requirement in 11 *Del. C.* § 2407(c)(1)c that normal investigative procedures have been tried and have failed or are unlikely to succeed if tried or to be too dangerous. Therefore, the lower court did not address that requirement in its decision denying Brown's motion to suppress the wiretap evidence. *See Brown*, 2013 WL 4051050, at *2 n.5.

[37] *United States v. Swan*, 545 F. Supp. 799, 804 (D. Del. 1982).

[38] *State v. Holden*, 60 A.3d 1110, 1115 (Del. 2013).

reviewing court and will not be invalidated by a hypertechnical, rather than a common sense, interpretation of the warrant affidavit."[39]

The issue here is whether, when viewing the totality of the circumstances from a practical, common sense point of view, the affidavit establishes a fair probability that Galen Brooks was using the 9787 number to pursue his drug business.[40] Brooks had a history of conducting his drug business through his cell phones.[41] In addition, through their work with confidential informants, officers had known him to change cell phones from time to time in order to avoid police detection. B47, 59. On May 22, 2012, Brooks called three different individuals from his 5082 number while officers listened. He told those individuals to answer their phones when he called again. Then, moments later each individual would receive a call from the 9787 number. Based on the totality of the circumstances, there was a fair probability that Brooks was attempting to pursue his drug business

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[39] *Jensen v. State*, 482 A.2d 105, 111 (Del. 1984). *See also Holden*, 60 A.3d at 1115 ("A magistrate's determination of probable cause 'should be paid great deference by reviewing courts.'").

[40] *See Gardner v. State*, 567 A.2d 404, 409 (Del. 1989) (noting search warrant affidavits should be given common-sense interpretation and applying totality of the circumstances standard to affidavit). *Cf. State v. Cooke*, 2006 WL 2620533, *8 (Del. Super. September 08, 2006) ("The issue before the Court is whether, when viewing the totality of the circumstances from a practical, common sense point of view, the affidavit establishes a fair probability that Cooke's DNA, rape kit samples and boots will connect him to the homicide.").

[41] *See* B44, 46-52, 56, 58-60 (enumeration in Affidavit of instances in which Brooks had engaged in drug transactions using his phones).

from a new cell phone. Therefore, the Superior Court did not abuse its discretion when it denied Brown's motion to suppress wiretap evidence.

III. THE SUPERIOR COURT ACTED WITHIN ITS DISCRETION WHEN IT ADMITTED THE STATE'S COCAINE EVIDENCE OVER BROWN'S CHAIN OF CUSTODY OBJECTION

Question Presented

Whether the Superior Court abused its discretion when it admitted the State's cocaine evidence over Brown's chain of custody objection. Ex. E to Op. Br.; B161-178.

Scope of Review

A trial judge's evidentiary rulings are reviewed on appeal for abuse of discretion.[42]

Merits of the Argument

During trial, Brown objected to the admission of State's Exhibit G for identification[43] ("State's Exhibit G"), an evidence bag consisting of "#1 bag containing approx. 3.7 gm of crack cocaine/ #2 bag containing 3 individual bags = approx. 8.2 gm crack cocaine Bag B = approx 8.1 gm crack cocaine Bag C = 1.2 gm powder cocaine." Ex. F to Op. Br.;[44] B160-62. State's Exhibit G contained three bags of crack cocaine and one bag of powder cocaine, all but one of the bags

[42] *See Gallaway v. State*, 65 A.3d 564, 569 (Del. 2013); *Watkins v. State*, 23 A.3d 151 (Del. 2011); *McNair v. State*, 990 A.2d 398, 401 (Del. 2010); *Stickel v. State*, 975 A.2d 780, 782 (Del. 2009).

[43] State's Exhibit G for identification was admitted as State's Exhibit 7. B179.

[44] Some of the writing on the evidence bag was covered by "evidence" tape.

of cocaine found in Brown's front pants pocket during his arrest. Ex. F to Op. Br.; B140, 142-43. Sergeant Skinner described the bags of cocaine that he had removed from Brown's pocket as "several baggies of suspected crack cocaine." B143. The Office of the Chief Medical Examiner referred to the same evidence bag (State's Exhibit G) for its purposes as "envelope C." *See* Exs. F and G to Op. Br. The forensic chemist who tested the drugs found in "envelope C" reported that it contained: "C.I. One plastic bag containing white powder with a net weight of 0.67 grams. C.II. Three plastic bags each containing an off-white chunky substance with a total net weight of 15.53 grams." Ex. G to Op. Br.

Brown argued to the trial court that the State had not adequately established chain of custody because 1) Sergeant Skinner could not remember whether he transported the drugs on his front passenger seat or in his trunk, 2) there was no evidence as to how the evidence got from Troop 3 to the medical examiner's office, and 3) there were discrepancies between the amounts and types of cocaine reported on the evidence bags and in the medical examiners report ("ME Report"). B161-62. The court overruled Brown's objection, finding there was no reasonable possibility that the drugs had gotten mixed up with some other drugs that were not on Brown's person. Ex. E to Op. Br. On appeal, Brown claims that based on the discrepancies between the evidence bag label and the ME Report, it is physically

impossible that the cocaine introduced into evidence was that seized from Brown. Op. Br. at 18.

"Pursuant to D.R.E. 901(a), a party offering an item into evidence bears the burden of proving that the item in question is what the proponent claims it to be."[45] A party may authenticate physical evidence by establishing a chain of custody, which establishes the evidence's continuous whereabouts.[46] "The proper standard for the admission of items into evidence over a chain of custody objection is whether there is a reasonable probability that the evidence offered is what the proponent says it is-that is, that the evidence has not been misidentified and no tampering or adulteration has occurred."[47] When there is no clear abuse of discretion, breaks in the chain of custody go to the weight of the evidence, not its admissibility.[48]

During Brown's trial, the State presented evidence sufficient to show that there were no breaks in the chain of custody of the drug evidence offered as State's

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[45] *Hendricks v. State*, 871 A.2d 1118, 1121 (Del. 2005). *See also* D.R.E. 901(a) ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.").

[46] *See Hendricks*, 871 A.2d at 1121-22.

[47] *Word v. State*, 2001 WL 762854, *3 (Del. June 19, 2001). *See also McNally v. State*, 980 A.2d 364 (Del. 2009) ("[T]he party attempting to admit the evidence must eliminate possibilities of misidentification and adulteration, 'not absolutely, but as a matter of reasonable probability.'" (quoting *Tricoche v. State*, 525 A.2d 151, 153 (Del. 1987)).

[48] *Word*, 2001 WL 762854, at *3.

Exhibit G. Sergeant Skinner testified that he found a bag of powder cocaine and several bags of suspected crack cocaine in Brown's left front pant pocket during a pat-down search. B140, 142-43. He transported the drugs either on his front passenger seat or in the trunk of his car to Troop 3, where he turned them over to Sergeant Jeremiah Lloyd and Master Corporal Jeffrey Lavere for processing. A75; B144, 145-46. Corporal Lavere field tested and weighed the evidence and filled out the front of the evidence envelope. B154-55, 157-58. Sergeant Lloyd placed the drugs in the evidence bags and put them in the temporary evidence locker. B150-55. The forensic examiner from the Office of the Chief Medical Examiner who tested the drugs testified that when she received the envelope, the seal was intact and there were no signs of tampering. B159. Sergeant Lloyd testified at trial that, other than the medical examiner's seals, the envelope containing State's Exhibit G was no different than the last time he had seen it. B155-58.

The State presented all witnesses necessary to prove chain of custody.[49] This Court has found that such chain of custody testimony eliminates the possibility of misidentification or adulteration of the evidence "as a matter of

[49] *See* 10 *Del. C.* § 4331 (defining chain of custody to include seizing officer, packaging officer and the forensic chemist who touched the substance).

reasonable probability."[50] Brown argues that because there were discrepancies between the types and weight of the drugs from the police evidence tag to the ME Report, the drugs the forensic examiner received could not possibly have been the same drugs Sergeant Skinner seized from Brown. Op. Br. at 17-18. Brown, however, mischaracterizes the evidence.

State's Exhibit G contained three bags of crack cocaine and one bag of powder cocaine. *See* Exs. F and G to Op. Br. Brown claims the bag of powder cocaine (Bag C in #2 bag on the evidence label) corresponds with one of the bags of off-white chunky substance in C.II. of the ME Report, and that one of the bags of crack cocaine (#1 bag on the evidence label) corresponds with C.I. on the ME Report, which consisted of white powder. Op. Br. at 16. If the bags correspond as Brown claims they do, it appears that one bag of powder cocaine turned into crack cocaine and one bag of crack cocaine turned into powder, making it appear as if tampering of the bags had occurred. Brown does not disclose, however, that the forensic examiner testified that she did not group the bags according to how the police officers had labeled them. B170-71. She grouped the bags according to whether they appeared to contain powder or crack cocaine. B170. Therefore, the bags actually correspond as follows:

[50] *Tinnin v. State*, 2010 WL 778949, *2 (Del. Mar. 8, 2010) (quoting *McNally*, 980 A.2d at 371-72).

State's Exhibit G	Envelope C on ME Report
#1 bag containing approx. 3.7 grams of crack cocaine #2 bag - Bag A with approximately 8.2 grams of crack cocaine - Bag B with approximately 8.1 grams of crack cocaine	C.II. – Three plastic bags each containing an off-white chunky substance with a total net weight of 15.53 grams
#2 bag, Bag C with approximately 1.2 grams of powder cocaine	C.I. – One plastic bag containing white powder with a net weight of 0.67 grams

When the bags are properly grouped, the substances match, and the small weight discrepancies are easily explained by the difference in the weight of packaging and variances between scales and methods of weighing.[51] The court understood that all bags were properly accounted for and thus found that there was a reasonable probability they were the same bags that Sergeant Skinner had found in Brown's pocket.

To the extent Brown may be arguing that Sergeant Skinner's testimony on cross examination that there were four bags of crack cocaine and only one bag of powder cocaine is further evidence that tampering of the bags must have occurred (Op. Br. at 16), such argument fails. Sergeant Skinner initially testified that he located several bags of *suspected* crack cocaine in Brown's front pocket. B143.

[51] *See* Testimony of forensic examiner, Patricia Phillips (B160) (noting that she does not weigh the packaging when she weighs the substance). *Cf. Word*, 2001 WL 762854, at *3 (finding heroin evidence was what the prosecution said it was and it had not been tampered with or adulterated, despite the apparent discrepancy in the reporting of weight between police report and ME report).

During her testimony, the forensic examiner explained that sometimes powder cocaine clumps together and appears to be chunky, stating: "[I]t's really not uncommon for the powder cocaine to sort of chunk together and it becomes described as chunky versus powder. The ultimate test will be in the analysis, the GC-MS, and it all comes out as cocaine, whether it's crack or whether it's the salt." B167-69.

Sergeant Skinner had the training and experience to know that what he had found in Brown's pocket appeared to be cocaine. Although Sergeant Skinner suspected he had found four bags of crack cocaine and one bag of powder cocaine, Corporal Lavere field tested the bags and correctly identified them on the evidence labels as two bags of powder cocaine and three bags of crack cocaine.[52] B6-7, 9-10; Ex. F to Op. Br. The forensic examiner's tests confirmed that there were, in fact, two bags of powder cocaine and three bags of crack cocaine. Therefore, the court did not abuse its discretion in admitting State's Exhibit G over Brown's chain of custody objection.

[52] *Cf. Loper v. State*, 1994 WL 10820, *3 (Del. Jan. 3, 1994) (finding State failed to establish chain of custody when officer had purchased crack cocaine, three officers testified they had a chunky substance, and medical examiner tested a powdery substance).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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DATED: February 10, 2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANZARA BROWN,	)	
	)	
Defendant Below,	)	
Appellant,	)	Case No. 603, 2013
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

CERTIFICATE OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on February 10, 2014, she caused the attached *State's Answering Brief* and *Appendix to State's Answering Brief* to be served on the following person by way of Lexis Nexis File and Serve:

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