



IN THE SUPREME COURT OF THE STATE OF DELAWARE

**STATE OF DELAWARE,** )  
 )  
 Plaintiff – Below, )  
 Appellant, )  
 )  
 v. ) **No. 140, 2016**  
 )  
 **DIMAERE BRADY,** )  
 )  
 Defendant – Below, )  
 Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

**STATE’S OPENING BRIEF**

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DATE: May 31, 2016

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## **NATURE AND STAGE OF THE PROCEEDINGS**

On October 26, 2016, a New Castle County Grand Jury returned an indictment against Dimaere Brady (“Brady”) alleging two counts of Possession of a Firearm By a Person Prohibited, Carrying a Concealed Deadly Weapon and Resisting Arrest. A-1. Brady filed a Motion to Suppress on December 20, 2016. After a hearing, the Superior Court granted Brady’s motion on February 25, 2016. A-2. On February 26, 2016, upon certification by the State that the prosecution could not go forward without the suppressed evidence, the Superior Court entered an order dismissing the case pursuant to 10 *Del. C.* § 9902(b). A-3. The State filed its notice of appeal on March 22, 2016. This is the State’s Opening Brief.

## **SUMMARY OF THE ARGUMENT**

I. The Superior Court abused its discretion when it granted Brady's Suppression Motion. Officers from the Department of Correction and Wilmington Police possessed reasonable suspicion that Brady was in possession of illegal drugs when they searched his girlfriend's car. The totality of the circumstances, which included an almost identical interaction with Brady three weeks prior to the instant case and resulted in his arrest for a violation of probation and new drug charges, demonstrated that the officers properly sought and received approval to search Brady's home and his girlfriend's car.

## **STATEMENT OF FACTS**

On September 24, 2015, Wilmington Police Detective Neil Evans (“Cpl. Evans”) and Probation Officer William Walker (“P.O. Walker”) were working in the City of Wilmington as part of their assignment to Operation Safe Streets.<sup>1</sup> At approximately 10:50 p.m., while driving in an unmarked police car, Cpl. Evans saw Brady walking in the 700 block of Adams Street.<sup>2</sup> Cpl. Evans knew that Brady was an active Level III probationer with a 7:00 p.m. curfew.<sup>3</sup> Cpl. Evans and P.O. Williams stopped Brady and advised him of the curfew violation.<sup>4</sup> Brady told the officers that he was going to the store to get something for his grandmother.<sup>5</sup> P.O. Williams testified that he did not believe Brady’s explanation because he was stopped about a half block away from the store in the direction away from his residence.<sup>6</sup> Because Brady was in violation of one of the conditions of his probation, the officers attempted to place him under arrest.<sup>7</sup>

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<sup>1</sup> A-26.

<sup>2</sup> A-26.

<sup>3</sup> A-26.

<sup>4</sup> A-27.

<sup>5</sup> A-27.

<sup>6</sup> A-35.

<sup>7</sup> A-27.

The officers told Brady to place his hands behind his back and he refused.<sup>8</sup> With the assistance of other officers, Cpl. Evans was eventually able to handcuff Brady.<sup>9</sup> After handcuffing Brady, Cpl. Evans conducted a search incident to arrest and discovered \$781.00 in cash and the key to a car. The officers knew that Brady was not permitted to drive because his driver's license was suspended.<sup>10</sup> The key belonged to a Hyundai Sonata that was parked near Brady's residence.<sup>11</sup> Cpl. Evans conducted a registration check on the Hyundai and discovered that it was registered to Brady's girlfriend.<sup>12</sup> During the encounter, Brady repeatedly told officers that they could not search the car.<sup>13</sup>

After Brady was searched, P.O. Walker requested and received supervisor approval to conduct an administrative search of the Hyundai and Brady's home.<sup>14</sup> As a result of the search, officers discovered a loaded .30 caliber rifle and three ammunition magazines in the Hyundai.<sup>15</sup>

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<sup>8</sup> A-27.

<sup>9</sup> A-27.

<sup>10</sup> A-32.

<sup>11</sup> A-27-28.

<sup>12</sup> A-28.

<sup>13</sup> A-27-28.

<sup>14</sup> A-34.

<sup>15</sup> A-49.

Three weeks prior to the above arrest, Cpl. Evans and P.O. Walker had arrested Brady and charged him with Possession of Heroin, Resisting Arrest, Driving While Suspended and a violation of probation (“VOP”).<sup>16</sup> On that occasion, Brady was driving his girlfriend’s car when the officers spotted him.<sup>17</sup> Brady’s driver’s license was suspended and the officers stopped the car.<sup>18</sup> When the officers attempted to take him into custody, Brady became combative and had to be forcibly handcuffed.<sup>19</sup> When the officers searched Brady, they discovered \$903.00 in cash and 39 bags of heroin.<sup>20</sup> Brady told the officers that he was a heroin user and only sold heroin to support his habit.<sup>21</sup>

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<sup>16</sup> A-34.

<sup>17</sup> A-33.

<sup>18</sup> A-33.

<sup>19</sup> A-33-34.

<sup>20</sup> A-34.

<sup>21</sup> A-28; A-38.



## **ARGUMENT**

### **I. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT GRANTED BRADY’S MOTION TO SUPPRESS.**

#### **Question Presented**

Whether the Superior Court abused its discretion when it granted Brady’s suppression motion.

The State preserved this question below when it opposed Brady’s suppression motion.<sup>22</sup>

#### **Standard and Scope of Review**

“This Court reviews the trial court’s factual findings in granting of a motion to suppress, after an evidentiary hearing, under an abuse of discretion standard. The trial judge’s decision can be reversed only if this court finds the decision below to be clearly erroneous.”<sup>23</sup>

#### **Merits of the Argument**

Under Delaware law, probationers do not share the same liberties as ordinary citizens.<sup>24</sup> “The special nature of probationary supervision justifies a

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<sup>22</sup> A-24-44.

<sup>23</sup> *State v. Henderson*, 892 A.2d 1061, 1066 (Del. 2006) (citing *Woody v. State*, 765 A.2d 1257, 1261 (Del. 2001)).

<sup>24</sup> *Donald v. State*, 903 A.2d 315, 318-19 (Del. 2006) (citing *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *McAllister v. State*, 807 A.2d 1119 (Del. 2002)).

departure from the usual warrant and probable cause requirements for searches, but a search of a probationer's home must be reasonable.”<sup>25</sup> Consequently, “[a] probation officer must have a reasonable suspicion or reasonable grounds to justify an administrative search of a residence or car.”<sup>26</sup> “Reasonable suspicion exists where the totality of the circumstances indicates that the officer had a particularized and objective basis for suspecting legal wrongdoing.”<sup>27</sup>

Under Section 4321(d) of Title 11 of the Delaware Code, probation and parole officers are permitted to conduct searches of individuals and their residences under Department of Correction (“DOC”) supervision in accordance with DOC procedures.<sup>28</sup> Probation and Parole Procedure 7.19 requires (in relevant part) that:

- a. The officer and supervisor will hold a case conference using the Search Checklist as a guideline. During the case conference, the supervisor will review the “Yes” or “No” responses of the officer to the following search decision factors:
  - 1) Sufficient reason to believe the offender possesses contraband.
  - 2) Sufficient reason to believe the offender is in violation of probation/parole.
  - 3) Information from a reliable informant, indicating offender possessed contraband or is violating the law.
  - 4) Information from the informant is corroborated.

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<sup>25</sup> *Id.*

<sup>26</sup> *Murray v. State*, 45 A.3d 670, 678 (Del. 2012) (collecting cases).

<sup>27</sup> *Murray v. State*, 2010 WL 626068, at \*2 (Del. Feb 23, 2010) (quoting *Sierra v. State*, 958 A.2d 825, 828 (Del. 2008));

<sup>28</sup> 11 *Del. C.* § 4321(d).

5) Approval is obtained from Supervisor, Manager, or Director.<sup>29</sup>

“Under those regulations, a probation and parole officer must have personal ‘knowledge or sufficient reason to believe’ or must have received ‘information from a reliable informant’ that the probationer or parolee possesses contraband, is in violation of probation or parole, or is violating the law.”<sup>30</sup> Procedure 7.19 “makes it plain that probation officers must rationally assess the facts made known to them before reaching the critical conclusion that there is a reasonable basis to search a probationer’s dwelling.”<sup>31</sup>

Here, the Superior Court concluded that officers from Operation Safe Streets did not possess reasonable suspicion to search Brady’s car or residence:

The totality of the circumstances demonstrates that the officers did not have reasonable suspicion to justify an administrative search of Brady’s residence or the 2006 Hyundai Sonata. The officers did not ask Brady whether he was employed or introduce any evidence that the denominations found on Brady were consistent with drug dealing. The only connection between Brady and Tylen Bailey’s 2006 Hyundai was the fact that Brady had a suspended license, had the car keys in his pocket, and had previously been found in possession of heroin while driving another vehicle registered to Tylen Bailey.<sup>32</sup>

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<sup>29</sup> Delaware Department of Correction Bureau of Community Corrections Probation and Parole Procedure No. 7.19 § VI.

<sup>30</sup> *Jacklin v. State*, 2011 WL 809684, at \*2 (Del. Mar. 8, 2011) (citing *Sierra*, 959 A.2d at 829).

<sup>31</sup> *Culver v. State*, 956 A.2d 5, 11 (Del. 2007).

<sup>32</sup>Exhibit A at 3-4.

The court abused its discretion when it made this determination. The evidence in this case demonstrated that the officers' prior encounter with Brady, his criminal history, his probation history, and the fact that officers stopped and arrested him for violating the terms of his probation, all amounted to reasonable suspicion.

An officer's prior encounters with and personal knowledge of a defendant or probationer can be a substantial consideration when assessing the totality of the circumstances to determine whether the officer possessed reasonable suspicion to conduct a search.<sup>33</sup>

The Superior Court based its decision on what the hearing judge thought was a tenuous connection between Brady and the Hyundai Sonata.<sup>34</sup> In this case, the officers' dealings with Brady as a probationer, his arrest three weeks prior to his arrest in this case and the officers' interaction with him when he was arrested in this case were important factors to be considered under the totality of the circumstances. However, the court did not take into account the officers' familiarity with Brady or the remarkable similarities between the September 3 arrest and the September 24 arrest. In other words, the court failed to consider the totality of the circumstances surrounding the September 24 search.

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<sup>33</sup> See, e.g., *Cropper v. State*, 123 A.3d 940, 945 (Del. 2015) (officer's subjective familiarity with defendant (which included dozens of interactions and two arrests) gave rise, in large part, to reasonable suspicion to conduct a pat-down for weapons).

<sup>34</sup> Ex. A at 3-4.

### *Officers' Familiarity with Brady*

P.O. Walker testified that he had supervised Brady three to four years prior to September 2015.<sup>35</sup> At that time, Brady was unemployed.<sup>36</sup> Cpl. Evans testified that Brady was not employed.<sup>37</sup> Brady was on Level III probation for Attempted Robbery Second Degree and Possession of a Firearm During the Commission of a Felony.<sup>38</sup> He had prior adjudications of delinquency - one of which involved possession of drugs.<sup>39</sup>

### *The September 3, 2015 Arrest*

Cpl. Evans and P.O. Walker encountered Brady on September 3, 2015, and observed him driving a black Chrysler 300.<sup>40</sup> The car was registered to Brady's girlfriend, Tylen Bailey ("Bailey").<sup>41</sup> The officers knew that Brady was a Level III probationer and that he was not permitted to drive because his license was

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<sup>35</sup> A-32.

<sup>36</sup> A-32.

<sup>37</sup> A-28. When Brady was arrested on both September 3, 2015 and September 25, 2015, the place to designate an "Employer" was left blank in his pedigree information contained in the affidavits of probable cause authored by Cpl. Evans. A-47; A-54.

<sup>38</sup> A-54-56.

<sup>39</sup> A-58-67.

<sup>40</sup> A-33.

<sup>41</sup> A-28.

suspended.<sup>42</sup> Brady was stopped in front of Bailey's house at 8 Jensen Drive.<sup>43</sup> When the officers attempted to arrest Brady, he resisted.<sup>44</sup> After a brief struggle, the officers subdued Brady and took him into custody.<sup>45</sup> When the officers searched Brady, they discovered three bundles (39 bags) of heroin and \$903.00.<sup>46</sup> At that time, Brady told the officers that he sold drugs to support his own drug habit.<sup>47</sup>

### *The September 24, 2015 Arrest*

On September 24, 2015, Cpl. Evans and P.O. Walker again encountered Brady. It was 10:50 pm and the officers saw Brady walking in the 700 block of Adams Street.<sup>48</sup> Brady was out past his 7:00 p.m. curfew and the officers stopped him.<sup>49</sup> Brady acknowledged that he was out past his curfew and told the officers that he was going to the store to get some things for his grandmother.<sup>50</sup> P.O.

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<sup>42</sup> A-28.

<sup>43</sup> A-28.

<sup>44</sup> A-28.

<sup>45</sup> A-28.

<sup>46</sup> A-34.

<sup>47</sup> A-38.

<sup>48</sup> A-26.

<sup>49</sup> A-26-27.

<sup>50</sup> A-33.

Walker testified that Brady's address is 816 Adams Street and that there is a store on the corner of 8<sup>th</sup> and Adams Streets.<sup>51</sup> Because Brady was stopped in the 700 block of Adams Street, one half block past the corner store, P.O. Walker did not find his story credible.<sup>52</sup> When the officers attempted to take him into custody for the curfew violation, Brady resisted and refused to be handcuffed.<sup>53</sup> The officers were eventually able to handcuff Brady and search him.<sup>54</sup> As a result of the search officers found \$781.00 in cash and key to a Hyundai.<sup>55</sup> According to Cpl. Evans, Brady attempted to shift the officers' focus away from the car key by offering to identify an individual who possessed a firearm and individuals involved in drug sales in the Riverside area of the city.<sup>56</sup> The officers located a Hyundai Sonata registered to Brady's girlfriend, Tylen Bailey, who had permitted Bailey to transport drugs in her car three weeks prior to the September 24 arrest.<sup>57</sup> The Hyundai was parked in the 800 block of Adams Street – the block in which

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<sup>51</sup> A-35.

<sup>52</sup> A-35.

<sup>53</sup> A-27; A-33.

<sup>54</sup> A-27.

<sup>55</sup> A-27.

<sup>56</sup> A-27.

<sup>57</sup> A-28.

Brady's residence is located.<sup>58</sup> Brady repeatedly told the officers that they could not search the car.<sup>59</sup>

When the officers first saw Brady on September 24, 2015, they knew following:

- Brady was on Level III probation.
- Brady had a curfew.
- Brady was prohibited from driving.
- They had arrested Brady three weeks prior when he was driving his girlfriend's car – in his girlfriend's neighborhood.
- Brady had resisted arrest.
- Brady possessed \$903 in cash and 39 bags of heroin when he was searched on September 3, 2015.
- At that time Brady admitted to selling drugs to support his drug habit.
- Brady was unemployed.<sup>60</sup>

When the officers stopped Brady on September 24, 2015, the following facts developed:

- Brady admitted to a curfew violation.
- Brady's story about going to the store for his grandmother was not credible.
- Brady resisted arrest.
- Officers found \$781.00 in cash when they searched Brady.

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<sup>58</sup> A-28.

<sup>59</sup> A-27-28.

<sup>60</sup> In its decision, the Superior Court found that “[t]he officers did not ask Brady whether he was employed or introduce any evidence that the denominations found on Brady were consistent with drug dealing.” Ex. A at 3-4. While accurate, the court's finding does not take into account Cpl. Evans' testimony that “[f]rom my interactions with the defendant, he's not employed, not to my knowledge” or P.O. Walker's testimony that Brady was not employed when P.O. Walker supervised him. A-28; A32.



- Brady was in possession of the key to his girlfriend's car which was parked in the 800 block of Adams Street – Brady's address is 816 Adams Street.
- Brady attempted to distract the officers' attention away from the car key.

The officers in this case possessed reasonable suspicion to search the Hyundai taking the pre-September 24, 2015 facts and considering them together with the facts of the September 24, 2015 arrest. Brady, who was an unemployed active Level III probationer, had been arrested three weeks earlier while driving his girlfriend's car, and possessed drugs and a large quantity of money. He admitted to selling drugs to support a drug habit. On September 24, 2015, Brady admitted to a curfew violation, had the key to the same girlfriend's car which he was prohibited from driving, and again possessed a large sum of money. The Superior Court abused its discretion when it failed to consider all of the above facts. Under the totality of the circumstances in this case, the officers "had a particularized and objective basis for suspecting legal wrongdoing."<sup>61</sup>

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<sup>61</sup> *Murray*, 2010 WL 626068, at \*2 (quoting *Sierra*, 958 A.2d at 828 (internal quotes omitted)).

## CONCLUSION

For the foregoing reasons the order of the Superior Court should be vacated and the matter be remanded for trial.

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3. Detective Evans and SPO Walker obtained an administrative search warrant to search the Brady's residence and Tylen Bailey's 2006 Hyundai Sonata. A fully loaded Enforcer 3-caliber rifle was found in a black backpack located on the front passenger seat of the Hyundai.

4. Although probationers are not afforded the same liberties as ordinary citizens, "Delaware case law and administrative law do not permit suspicionless probationer searches . . . ." <sup>1</sup> "A probation officer must have a reasonable suspicion or reasonable grounds to justify an administrative search of a residence or car." <sup>2</sup> "Reasonable suspicion exists where the totality of the circumstances' indicates that the officer had a particularized and objective basis for suspecting legal wrongdoing." <sup>3</sup>

5. The State argues that the officers had reasonable suspicion to believe that Brady possessed contraband and was in violation of a condition of his probation

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<sup>1</sup> *Murray v. State*, 45 A.3d 670, 678 (Del. 2012), *as corrected* (July 10, 2012); *McAllister v. State*, 807 A.2d 1119, 1124 (Del. 2002); *Jacklin v. State*, 2011 WL 809684, at \*2 (Del. 2011). 11 *Del. C.* § 4321(d) grants probation and parole officers statutory authority to effect searches of probationers in accordance with Department of Correction ("DOC") regulations. Pursuant to that authority, the DOC has adopted regulations governing warrantless searches and arrests of probationers. *Jacklin*, 2011 WL 809684, at \*2. The Delaware Supreme Court considers probation officers to have acted reasonably so long as they substantially comply with DOC regulations. *Murray*, 45 A.3d at 678. "Generally, the following factors should be considered when deciding whether to search: [1] The Officer has knowledge or sufficient reason to believe [that] the offender possesses contraband; [2] The Officer has knowledge or sufficient reason to believe [that] the offender is in violation of probation or parole; [3] There is information from a reliable informant indicating [that] the offender possesses contraband or is violating the law; [4] The information from the informant is corroborated; [5] Approval for the search has been obtained from a Supervisor." *Sierra v. State*, 958 A.2d 825, 829 (Del. 2008).

<sup>2</sup> *Murray*, 45 A.3d at 678.

<sup>3</sup> *Jacklin*, 2011 WL 809684, at \*2.

based on the following facts: (1) Brady was out past curfew and resisted arrest by refusing to put his arms behind his back; (2) Brady possessed a large sum of United States Currency; (3) Brady possessed car keys to Tylen Bailey's Hyundai, and the officers knew that Brady had a suspended license; (4) the Hyundai was located nearby and Brady attempted to distract the officers' attention away from the Hyundai; and (5) the incident was similar to another encounter Detective Evans and SPO Walker had with Brady three weeks earlier. On September 3, 2015, Detective Evans and SPO Walker initiated a traffic stop with Brady because he was driving with a suspended or revoked license. At that time, Brady was driving a Chrysler 300 registered to Tylen Bailey. During the traffic stop, Brady resisted arrest, possessed \$905 in United States Currency, and possessed thirty-nine bags of suspected heroin. During a post-arrest interview, Brady admitted to possessing heroin, being a heroin user, and denied selling heroin, but stated that some users give him money to deliver heroin.

6. The totality of the circumstances demonstrates that the officers did not have reasonable suspicion to justify an administrative search of Brady's residence or the 2006 Hyundai Sonata.<sup>4</sup> The officers did not ask Brady whether he was employed or introduce any evidence that the denominations found on Brady were

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<sup>4</sup> The State did not raise the issue of standing in its briefing and conceded at the suppression hearing that Defendant has standing to contest the search of Tylen Bailey's 2006 Hyundai Sonata.

consistent with drug dealing. The only connection between Brady and Tylen Bailey's 2006 Hyundai was the fact that Brady had a suspended license, had the car keys in his pocket, and had previously been found in possession of heroin while driving another vehicle registered to Tylen Bailey.

7. While the rights of a probationer to object to a warrantless search of his residence or vehicle is diminished, "[a]t a minimum, the officer must have a reasonable basis to suspect wrongdoing, and evidence thereof will be found at the location to be searched."<sup>5</sup> Under totality of the circumstances, the facts in this case are insufficient to support a reasonable basis to suspect that Brady possessed contraband in his residence or the 2006 Hyundai Sonata. The fact that Brady violated probation with no connection to the residence or vehicle to be searched cannot support reasonable suspicion.

**NOW THEREFORE,** Defendant's Motion to Suppress is **GRANTED.**  
**IT IS SO ORDERED.**

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Jan R. Jurden, President Judge

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<sup>5</sup> *State v. Johnson*, 2014 WL 6661154, at \*3 (Del. Super. 2014).

## CERTIFICATION OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on this 31st day of May, 2016, he caused one copy of the attached *State's Opening Brief* to be delivered via Lexis/Nexis File and Serve to the following persons:

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