



IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

Appellant,

v.

DIMAERE BRADY,
Appellee.

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No. 140, 2016
On Appeal From The Superior
Court Of Delaware In And For
New Castle County

APPELLEE'S ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS 2

NATURE OF THE PROCEEDINGS 3

SUMMARY OF THE ARGUMENT 4

STATEMENT OF FACTS 5

 A. The Arrest- Detective Evan’s Testimony 5

 B. The Arrest- Officer Walker’s Testimony 8

 C. The Motion To Suppress Hearing Oral Argument 9

 D. The Superior Court’s Order 11

I. SUPERIOR COURT PROPERLY GRANTED MR. BRADY’S
MOTION TO SUPPRESS AFTER IT WEIGHED THE TOTALITY OF
THE CIRCUMSTANCES AND WAS NOT PERSUADED BY THE
TESTIMONY PRESENTED THAT OFFICERS POSSESSED
SUFFICIENT ARTICULABLE SUSPICION TO BELIEVE THAT
EVIDENCE OF CRIMINAL ACTIVITY WOULD BE FOUND IN A
VEHICLE LOCATED SEVERAL BLOCKS AWAY FROM WHERE
MR. BRADY WAS ARRESTED FOR A CURFEW VIOLATION 13

 A. Question Presented 13

 B. Standard And Scope Of Review 13

 C. Merits Of The Argument 14

 i. The State Failed To Present Persuasive Evidence That Officers
 Had Articulate Suspicion, As Opposed To A Hunch, That A Nearby
 Hyundai Sonata Contained Evidence Of Criminal Activity 14

 a. This Court Should Not Consider Factors Not Properly Raised
 Below 21

 b. The Court Properly Considered Both Arrests In Its Analysis
 And Concluded That The First Arrest, Three Weeks Prior Involving
 A Different Car And Different Circumstances, Did Not Establish A
 Sufficient Nexus To Properly Search The Hyundai 21

 c. There Are No Other Factors That Strengthen The Nexus
 Between Mr. Brady And The Hyundai 26

CONCLUSION 30

TABLE OF CITATIONS

UNITED STATES CONSTITUTION

U.S. Const. Amend IV..... 14

DELAWARE CONSTITUTION

Del. Const. Art. I § 6. 15

UNITED STATES SUPREME COURT

Samson v. California, 547 U.S. 843 (2006)..... 20

United States v. Knights, 534 U.S. 112 (2001)..... 20

DELAWARE SUPREME COURT

Holden v. State, 23 A.3d 843 (Del. 2011). 13

Murray v. State, 45 A.3d 670 (Del. 2012). 15, 16

Sierra v. State, 958 A.2d 825 (Del. 2008). 13, 15

Zhurbin v. State, 104 A.3d 108 (Del. 2014). 21

DELAWARE SUPERIOR COURT

State v. Holden, 2011 WL 4908360 (Del. Super. Ct. Oct. 11, 2011) 14

OTHER JURISDICTIONS

United States v. Baker, 221 F.3d 438 (3d Cir. 2000). 17, 18, 29

United States v. Rivera, 727 F. Supp. 2d. 367 (E.D. Pa. 2010)..... 18, 19, 20

STATUTES

10 Del. C §9902(b) 3

11 Del. C. § 4321 15

11 Del. C. §2306..... 14

RULES OF PROCEDURE

DEL. SUP. CT. R. 8..... 11

NATURE OF THE PROCEEDINGS

On September 24, 2015, Mr. Brady was arrested while he was walking along a street approximately one and a half blocks from his home after his mandated curfew.¹ He was subsequently charged with Possession Of A Firearm/Ammunition after police officers searched a vehicle associated with a key found on Mr. Brady's person at the time of his detention.² Mr. Brady, through his then-counsel, filed a Motion to Suppress alleging an unconstitutional search and seizure, and he argued that police possessed only a hunch, unsupported by articulable facts, that evidence of criminal activity would be found inside.³

After a hearing on February 19, 2016 in which the State presented the testimony of the two arresting officers,⁴ Superior Court issued a written order granting Mr. Brady's Motion To Suppress.⁵ The State, under the authority of 10 Del. C. § 9902(b), certified that it could not proceed with the prosecution without the suppressed evidence and appealed as a matter of right.⁶ The State filed its Opening Brief on May 31, 2016.

This is Mr. Brady's Answering Brief.

¹ A-30.

² A-4, A-5, A-27.

³ A-7, A-8, A-41.

⁴ A-24 - A-42.

⁵ State's Exhibit A.

⁶ A-44; 10 Del. C §9902(b).

SUMMARY OF THE ARGUMENT

I. Denied. The Superior Court's assessment of the officers' articulable suspicions, after hearing the State's witnesses and arguments from both parties, properly considered the totality of the circumstances presented and concluded that officers lacked sufficient information to believe that evidence of criminal activity would be located in a nearby vehicle.

In its written Order, the Superior Court noted that the State failed to present any evidence that the currency found on Mr. Brady was indicative of drug activity. The State also failed to present evidence that the curfew violation for which Mr. Brady was arrested provided a sufficient basis to believe that evidence of criminal activity would be found in a nearby vehicle, particularly in light of the facts adduced at the hearing that Mr. Brady was neither seen near or driving the vehicle, nor was it registered to him.

STATEMENT OF FACTS

A. The Arrest- Detective Evan's Testimony

The State called Wilmington Police Department (“WPD”) detective, Neil Evans, as one of two witnesses to explain the September 26, 2015 search of a 2006 Hyundai Sonata, the subject of Mr. Brady’s Motion To Suppress.⁷ Det. Evans worked in conjunction with Probation and Parole (“P&P”) to monitor probationers in the community.⁸ He testified that on September 26, 2015, he and probation officer, William Walker, arrested Mr. Brady for a curfew violation in the 700 block of Adams Street at approximately 10:50 P.M.⁹ Det. Evans “believed” that Mr. Brady’s curfew was 7:00 P.M. until 6:00 A.M.¹⁰ Det. Evans had no personal knowledge of Mr. Brady’s probation status or conditions, but relied on Officer Walker’s representations.¹¹

Mr. Brady explained to the officers that he had been going to the store to procure items for his grandmother.¹² Officers thereafter attempted to take Mr. Brady into custody. According to Det. Evans’ testimony, Mr. Brady resisted the officer’s commands, straightened out his hands and refused to put his hands behind

⁷ A-26.

⁸ A-26.

⁹ A-26.

¹⁰ A-26.

¹¹ A-29.

¹² A-27.

his back.¹³

After searching Mr. Brady's person, officers located \$781, as well as a set of house and vehicle keys.¹⁴ Upon finding the keys, Det. Evans ordered other officers to conduct a search of the area for a vehicle that corresponded to the car key found on Mr. Brady's person.¹⁵ After a canvas of the area, officers determined that the key belonged to a 2006 maroon Hyundai Sonata registered to Tylen Bailey, apparently Mr. Brady's girlfriend.¹⁶

Officers questioned Mr. Brady, who denied the officers permission to search the vehicle, but nevertheless offered to provide officers with information about criminal activity in the Riverside area of Wilmington.¹⁷ Det. Evans testified that he had previously arrested Mr. Brady three weeks earlier when Mr. Brady was driving a Chrysler 300 and stopped him for the traffic offense of Driving With A Suspended License.¹⁸ The Chrysler 300 was registered to Ms. Bailey.¹⁹ On that occasion, Mr. Brady was found to have 39 bags of heroin on his person and a large sum of currency.²⁰ At that time, he indicated that as a matter of practice, he did not

¹³ A-27.

¹⁴ A-27.

¹⁵ A-27.

¹⁶ A-27, A-31.

¹⁷ A-27.

¹⁸ A-28.

¹⁹ A-28.

²⁰ A-28.

sell drugs, but occasionally delivered drugs for other people.²¹

When pressed by defense counsel for the reasons supporting the search of the Hyundai, Det. Evans testified that the search was “one of the stipulations for probation... he [Mr. Brady] had keys in his pocket...he has a suspended driver’s license, he shouldn’t have the vehicle. The vehicle comes back to his girlfriend. It’s just very similar to the first incident that we had with him.”²² On cross-examination, Det. Evans indicated that the money found on Mr. Brady’s person had never been tested for drugs, either with a dog sniff or by other means.²³ Further, Det. Evans lacked knowledge of whether Mr. Brady was employed.²⁴ The officer apparently did not ask Mr. Brady about the money or otherwise determine the source of the money.

Det. Evans indicated that he did not observe Mr. Brady conduct any suspicious activities.²⁵ The detective specifically stated that he did not observe any drug activity.²⁶ According to the detective, Mr. Brady was the only individual on the block at the time.²⁷ When stopped, Mr. Brady was located only a “block, block-and-a-half” from his home and the Detective agreed that officers had no reason to

²¹ A-28.

²² A-29.

²³ A-28.

²⁴ A-30.

²⁵ A-30.

²⁶ A-30.

²⁷ A-30.

suspect that Mr. Brady had actually driven the Hyundai Sonata.²⁸ In fact, the officer testified that not only had he never seen Mr. Brady drive the Hyundai, he had not received any tips about Mr. Brady on the evening in question, and he had never seen the defendant “have any relationship to or contact with the Hyundai Sonata at any point.”²⁹

B. The Arrest- Officer Walker’s Testimony

P&P Officer William Walker testified that he was aware of Mr. Brady’s probation status because of Mr. Brady’s arrest three weeks earlier.³⁰ According to his testimony, he confirmed that Mr. Brady was on Level Three probation with a curfew and did not have an active driver’s license.³¹ Officer Walker testified consistent with Det. Evans’s testimony about the circumstances of the arrest. He testified that he received administrative approval for the arrest and search.³²

Officer Walker confirmed that Mr. Brady was not found to be in possession of any contraband and that although he had known Mr. Brady to be unemployed three or four years ago, he did not know if Mr. Brady was employed at the time of his 2015 arrest.³³ The officer confirmed that he had not seen Mr. Brady in or near

²⁸ A-30.

²⁹ A-30.

³⁰ A-32.

³¹ A-32.

³² A-34, A-36.

³³ A-36.

the Hyundai, nor had he seen Mr. Brady engage in suspicious activity.³⁴ The officer agreed that his suspicions were based on Mr. Brady's possession of currency.³⁵ However, the officer did not ask Mr. Brady about the source of the currency, he did not test the money for drug residue, and he did not have current information about Mr. Brady's employment status.³⁶

C. The Motion To Suppress Hearing Oral Argument

The Superior Court *sua sponte* raised the issue of standing.³⁷ The State conceded that it made a "strategic decision" not to contest Mr. Brady's standing to raise issues involving the search of the Hyundai Sonata.³⁸ Consequently, the court considered the issue moot and proceeded to hear the merits of the arguments.³⁹

The State argued that the following factors supplied reasonable suspicion to believe that evidence of criminal activity would be found inside the Hyundai Sonata:

1. Mr. Brady was in violation of his curfew condition;
2. Mr. Brady resisted arrest during both of his arrests;
3. Mr. Brady was found in possession of money and drugs three weeks earlier;
4. Mr. Brady was found in possession of money on September 24, 2015;
5. Mr. Brady had previously driven a car belonging to his girlfriend, Ms. Bailey;
6. Mr. Brady gave statements to police communicating his ability to locate other individuals involved with criminal activity;

³⁴ A-36.

³⁵ A-37.

³⁶ A-37.

³⁷ A-38.

³⁸ A-38, A-39.

³⁹ A-39.

7. Mr. Brady has made money in the past delivering drugs.

Mr. Brady, through counsel, argued that while the officers may have had reason to arrest Mr. Brady for a curfew violation, the evidence failed to support the conclusion that evidence of criminal activity would be located in the Hyundai Sonata.⁴⁰ Counsel argued that resisting arrest does not have a logical relevance to possession of contraband in a vehicle located a few blocks away.⁴¹ Counsel argued that the officers did not observe any activity of drug dealing or suspicious activity⁴². Rather, the officers relied on Mr. Brady's possession of a sum of money. The money, alone, without even asking Mr. Brady about the source of the money or without any other information regarding the source of the money, was insufficient to establish reasonable suspicion to search Mr. Brady's girlfriend's vehicle.⁴³

In its rebuttal argument, the State implored the court to consider the previous arrest in its analysis and not to consider the September 24, 2015 arrest in isolation.⁴⁴ The State conceded, "taking this one incident, standing alone, the State

⁴⁰ A-40.

⁴¹ A-41.

⁴² A-41.

⁴³ A-41.

⁴⁴ A-41.

would agree that that may not offer anything.”⁴⁵ The court agreed, stating, “Right. And that’s not what the court’s supposed to do. I understand.”⁴⁶

Despite the State’s inclusion of the Affidavit of Probable Cause and Mr. Brady’s DELJIS Charge Summary in its Appendix submission, neither document was admitted into evidence at the Motion To Suppress hearing. To the extent that either document is relevant or probative to the review of the trial court’s decision, they were not fairly presented to the trial court and should not be considered in this Court’s review.⁴⁷

D. The Superior Court’s Order

On February 25, 2016, the Superior Court issued its written Order granting Mr. Brady’s Motion to Suppress.⁴⁸ The Court made several findings of fact:

1. Det. Evans and Officer Walker observed Mr. Brady walking on Adams Street and he was subsequently arrested for violating his curfew.⁴⁹
2. Mr. Brady possessed currency, house keys, and car keys to a Hyundai, which was located nearby.⁵⁰
3. The Hyundai was registered to Mr. Brady’s girlfriend, Tylen Bailey.⁵¹
4. Officers obtained an administrative warrant to search both Mr. Brady’s home and Tylen Bailey’s Hyundai Sonata.⁵²
5. Officers located a loaded gun inside the Hyundai Sonata.⁵³

⁴⁵ A-41.

⁴⁶ A-41.

⁴⁷ A-45 – A-67, DEL. SUP. CT. R. 8.

⁴⁸ State’s Exhibit A at 1.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* The correct spelling of Ms. Bailey is unclear from the record.

⁵² *Id.* at 2.

⁵³ *Id.*

The Court reiterated the arguments that the State presented during the suppression hearing and numbered them (1) through (5) in its Order.⁵⁴ After considering the arguments, including the circumstances of Mr. Brady's arrest three weeks earlier, the court concluded that there was insufficient evidence to justify a search of the Hyundai Sonata.⁵⁵ The court held that the only nexus between Mr. Brady and the Hyundai was that Mr. Brady had 1) a suspended license, 2) the car keys in his pocket, and 3) was previously in possession of heroin while driving another vehicle registered to Ms. Bailey.⁵⁶

The Superior Court held that the information did not support the conclusion that Brady possessed contraband in the Hyundai on September 24, 2015 and that the curfew violation in and of itself did not support the search without additional evidence of criminal activity establishing a nexus to the Hyundai.⁵⁷ Consequently, the court granted Mr. Brady's motion.

⁵⁴ *Id.* at 3.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 4.

I. SUPERIOR COURT PROPERLY GRANTED MR. BRADY’S MOTION TO SUPPRESS AFTER IT WEIGHED THE TOTALITY OF THE CIRCUMSTANCES AND WAS NOT PERSUADED BY THE TESTIMONY PRESENTED THAT OFFICERS POSSESSED SUFFICIENT ARTICULABLE SUSPICION TO BELIEVE THAT EVIDENCE OF CRIMINAL ACTIVITY WOULD BE FOUND IN A VEHICLE LOCATED SEVERAL BLOCKS AWAY FROM WHERE MR. BRADY WAS ARRESTED FOR A CURFEW VIOLATION

A. Question Presented

Whether under the Fourth Amendment and Art. I § 6, the Superior Court abused its discretion by analyzing the totality of the circumstances as presented by the State in a Motion To Suppress hearing and concluding that officers lacked reasonable articulable suspicion that evidence of criminal activity would be found in a vehicle located several blocks away from where Mr. Brady was arrested for a curfew violation. Mr. Brady, through counsel, timely raised the suppression issue by motion and thereafter in a hearing.⁵⁸

B. Standard And Scope Of Review

This Court reviews the Superior Court’s order granting the motion to suppress for an “abuse of discretion.”⁵⁹ This Court reviews the Superior Court’s factual findings under a “clearly erroneous” standard.⁶⁰ To the extent the Superior Court’s holding implicates questions of law, the review is *de novo*.⁶¹

⁵⁸ A-7, A-8, A-41.

⁵⁹ *Holden v. State*, 23 A.3d 843, 846 (Del. 2011).

⁶⁰ *Id.*

⁶¹ *Sierra v. State*, 958 A.2d 825, 828 (Del. 2008).

C. Merits Of The Argument

i. **The State Failed To Present Persuasive Evidence That Officers Had Articulable Suspicion, As Opposed To A Hunch, That A Nearby Hyundai Sonata Contained Evidence Of Criminal Activity**

Under the Delaware Constitution, Art. I, Section Six,

The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.⁶²

The Fourth Amendment of the United States Constitution also protects Delaware citizens from unlawful searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.⁶³

Accordingly, police may lawfully search a person's property upon the issuance of a search warrant by a neutral magistrate in response to a specific and delineated request supported by probable cause.⁶⁴ A magistrate must have a reasonable belief that "an offense has been committed and the property to be seized *will be found in a particular place.*"⁶⁵

⁶² Del. Const. Art. I § 6.

⁶³ U.S. Const. Amend IV.

⁶⁴ 11 Del. C. §2306.

⁶⁵ *State v. Holden*, 2011 WL 4908360, at *3 (Del. Super. Ct. Oct. 11, 2011) (italicized for emphasis). *See also* 11 Del. C. §2306 (delineating the requirements of search warrant applications).

Probationers do not retain the full gamut of constitutional protections; however, probationer searches and seizures must satisfy Department of Correction (“DOC”) regulations.⁶⁶ Officers must possess a reasonable suspicion of criminal activity concerning the place to be searched.⁶⁷ “Reasonable suspicion exists where the totality of the circumstances indicates that the officer had a particularized and objective basis for suspecting legal wrongdoing.”⁶⁸ DOC Administrative Procedure 7.19 requires officers to complete a checklist designed to facilitate the reasonable suspicion inquiry. The checklist requires the officers to determine whether:

[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.⁶⁹

In *Murray v. State*, this Court held that officers seized a probationer without reasonable suspicion when the officers illegally prolonged a traffic stop without any additional reasonable suspicion to support the officer’s quest to locate evidence of drug activity in the vehicle.⁷⁰ In *Murray*, officers observed two men

⁶⁶ 11 Del. C. § 4321

⁶⁷ *Sierra v. State*, 958 A.2d 825, 828 (Del. 2008).

⁶⁸ *Id.* (Internal citations omitted).

⁶⁹ *Id.* at 829.

⁷⁰ *Murray v. State*, 45 A.3d 670 (Del. 2012).

quickly disperse as police drove by in an unmarked car.⁷¹ One of the men walked away and the other entered a car and drove away.⁷² Officers did not see any evidence of drug activity; however, they believed that the men were suspicious because of their nervous behavior.⁷³

The officers conducted a traffic stop of the vehicle for a speeding violation.⁷⁴ Murray was a passenger in the vehicle and a Level II probationer.⁷⁵ Almost immediately, officers focused their investigation on locating evidence of drug activity based on their hunch that the occupants acted nervously and despite having no objective information that drug activity had occurred.⁷⁶ After officers gave the driver a “verbal reprimand,” the traffic stop came to a close.⁷⁷

Nevertheless, officers continued their search for drug activity and asked Murray, a probationer, to exit the car and submit to a pat down check for illegal contraband.⁷⁸ The search revealed no evidence of criminal activity. Continuing to prolong the stop, one officer elicited information that a bag on the front floor of the car belonged to Murray and contained drugs inside.⁷⁹

⁷¹ *Id.* at 671-73.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 679.

A majority of the Court held that officers lacked reasonable suspicion to prolong the stop because nervousness and a person's decision to leave an area do not rise to the level of reasonable suspicion.⁸⁰ Officers testified that they had not observed any drug activity and could not point to any articulable fact, save a hunch, that evidence of drug activity would be located inside the vehicle.⁸¹ Consequently, the drug evidence was suppressed as an unreasonable search and seizure.

In *United States v. Baker*, a Third Circuit opinion, the court determined that officers did not have reasonable suspicion to search the trunk of a parolee's car based solely on a violation of parole for driving a vehicle without a license.⁸² In *Baker*, the parolee, Manny Baker, drove to the parole office in violation of a condition that prohibited driving.⁸³ Officers searched the passenger compartment and trunk of the vehicle.⁸⁴ Inside the trunk, officers located drug paraphernalia.⁸⁵ A search of Mr. Baker's home revealed weapons and heroin.⁸⁶

After determining that Mr. Baker had standing to contest the search of his friend's vehicle,⁸⁷ the Court held that officers failed to articulate specific indicia

⁸⁰ *Id.* at 674.

⁸¹ *Id.*

⁸² 221 F.3d 438, 443-45 (3d Cir. 2000).

⁸³ *Id.* at 440-41.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 442-423.

that evidence of criminal activity would be located in the trunk.⁸⁸ Officers conducted a search because they had violated Mr. Baker for driving without a license. The trial court postulated that Baker could not prove who owned the vehicle; therefore, officers might have suspected that the car was stolen or there could have been evidence in the trunk of further parole violations.⁸⁹ The Third Circuit panel held that a hunch that the car was stolen, the parole violation for driving, and a failure to provide documentation of the car's registration was insufficient to satisfy the reasonable suspicion standard because "[r]easonable suspicion requires more specificity" than whether there "might" be evidence of a parole violation in the trunk of the vehicle.⁹⁰

In *United States v. Rivera*, the defendant, a parolee, was not permitted to operate a vehicle without a valid license and consented, per his parole conditions, to a search of his person and property.⁹¹ Rivera's parole officer had supervised Rivera for a period of ten months and the officer had grown suspicious that Rivera was manipulating the timing of his monthly supervision meetings and visits.⁹² At the final parole meeting, Rivera gave a urine sample with equivocal results, indicating an inconclusive test.⁹³ He also admitted that he had been around other

⁸⁸ *Id.*

⁸⁹ *Id.* at 444-45.

⁹⁰ *Id.* at 445.

⁹¹ 727 F. Supp. 2d. 367, 368 (E.D. Pa. 2010).

⁹² *Id.* at 368-69.

⁹³ *Id.*

individuals who used marijuana and that he had driven to the parole office in contravention of his parole condition not to drive without a license.⁹⁴ When asked about the car keys in his possession, Rivera adamantly told officers that another individual would come by and pick up the keys.⁹⁵

Rivera was arrested for a violation of parole.⁹⁶ The parole officer took the keys to the parking lot and pressed the key fob until she heard a car respond. She approached the beeping car, unlocked the trunk, and searched the vehicle.⁹⁷ Officers located a gun, ammunition, and other items in the car.⁹⁸ Rivera was charged with several offenses, and he filed a motion to suppress the evidence found in the car because the officer lacked reasonable suspicion to believe that evidence would be found inside the vehicle.⁹⁹

When asked by the court at the suppression hearing why the officer had searched the vehicle, the officer responded, “to find, you know, possible violation [sic], technical violations.”¹⁰⁰ She further explained,

I searched the car because, again, he was driving without my permission, he was operating the vehicle that I had no knowledge of, and then that was the main reason, but in combination of his behavior and him violating, as far as hanging around people who are using drugs. So that led me to believe that something else other-else is going

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 370.

on with Mr. Rivera, because I noticed this type of behavior, the way he was acting.¹⁰¹

The Court determined that the officer had ample cause to arrest Mr. Rivera for a violation of parole because, per his admission, he associated with marijuana users, which was explicitly prohibited by the conditions of parole.¹⁰² Relying on *Baker v. State* and the Pennsylvania Constitution,¹⁰³ the court determined that although the parole officer had reason to arrest Mr. Rivera for a violation of parole, there were insufficient facts to support a reasonable suspicion that evidence of criminal activity would be located in the car.¹⁰⁴

Rivera was arrested for driving without a license and “associating with drug users.”¹⁰⁵ The parole officer offered no articulable facts as to why either basis for the parole violation would be affiliated with the car.¹⁰⁶ Instead, the officer

¹⁰¹ *Id.*

¹⁰² *Id.* at 371.

¹⁰³ The *Rivera* court distinguished the Supreme Court cases, *United States v. Knights* and *Samson v. California*, because the former case used a reasonable suspicion analysis, consistent with Pennsylvania law, and the latter case permitted suspicionless searches under a California state law regime, inapposite to the Pennsylvania analysis. *United States v. Knights*, 534 U.S. 112 (2001); *Samson v. California*, 547 U.S. 843 (2006). In the *Samson* decision, the United States Supreme Court also distinguished between parolees and probationers in its determination of whether the California scheme ran afoul of the Fourth Amendment. *Id.* at 850 (stating that “parolees have fewer expectations of privacy than probationers...”). Here, Delaware law requires a reasonable suspicion analysis; therefore, *Samson* is similarly inapplicable.

¹⁰⁴ *Id.* at 375.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 376.

essentially admitted to an “ill-defined fishing expedition” for technical parole violations.¹⁰⁷ Consequently, the evidence found in the vehicle was suppressed.

a. This Court Should Not Consider Factors Not Properly Raised Below

In its Opening Brief, the State argues that the court should have considered Mr. Brady’s criminal history and probation history as part of the totality of the circumstances.¹⁰⁸ Neither of these facts or reports were presented or argued at the Motion to Suppress hearing before the trial court. Therefore, Supreme Court Rule Eight precludes the State from relying on those factors in its Opening Brief.¹⁰⁹

b. The Court Properly Considered Both Arrests In Its Analysis And Concluded That The First Arrest, Three Weeks Prior Involving A Different Car And Different Circumstances, Did Not Establish A Sufficient Nexus To The Hyundai

Despite the Superior Court’s explicit reference to the officers’ prior interaction with Mr. Brady, including the September 3, 2015 arrest, the State argues that the court failed to consider the first arrest in the totality of the circumstances analysis.¹¹⁰ In its Order, the court indicated that both officers were “aware” of Mr. Brady’s probation status and that the September 24, 2015 incident was “similar to another encounter Detective Evans and SPO Walker had with

¹⁰⁷ *Id.* at 376.

¹⁰⁸ State’s Opening Brief (“OB”) at 9.

¹⁰⁹ *Zhurbin v. State*, 104 A.3d 108, 113 (Del. 2014).

¹¹⁰ OB at 9.

Brady three weeks earlier.”¹¹¹ The court recounted the salient facts of the September 3, 2015 arrest in its opinion, thereby confuting the State’s baseless assertion that the Court failed to consider the “remarkable similarities” between the two arrests.¹¹²

The Superior Court’s holding did not ignore the September 3, 2015 arrest, but simply acknowledged that the factors adduced at the hearing failed to establish a nexus to the Hyundai Sonata found nearby. Officers observed no activity on September 24, 2015 that would give rise to the requisite level of suspicion to believe that evidence of criminal activity would be located on Mr. Brady, let alone in a nearby Hyundai for which Mr. Brady had a tenuous connection. Defense counsel elicited the following information from the officers about their level of suspicion:

Counsel: “You did not observe him engage in any kind of suspicious activities?”

Det: “Did not.”

Counsel: “There was no drug related activity that you observed or anybody coming up to him or him going up to anyone else; is that right?”

Det: “No, not at the time. He was the only one in the block.”

Counsel: “Do you know...where he lived at that time?”

Det: “He lived in the 800 block of Adams Street.”

¹¹¹ State’s Exhibit A at 3.

¹¹² State’s Exhibit A at 1, 3.

Counsel: “So where you stopped him was very close to where he lived; is that right?”

Det: “Correct; about a block, block, block-and-a-half.”

Counsel also asked Officer Walker about his observations of Mr. Brady on September 24, 2015. Officer Walker testified that he searched Mr. Brady’s person and did not find any drugs or contraband on his person or in the area of Mr. Brady’s arrest. The officer did not see Mr. Brady in or near the Hyundai Sonata. Officer Walker also agreed that the officers had not seen Mr. Brady participate in any drug related activity on September 24, 2015. The officer agreed that he based his suspicions on the fact that Mr. Brady had a sum of money on his person; however, he was unable to determine whether the money was drug-related and the State failed to elicit testimony that the sum of money was indicative of drug activity.

Like the parole officer’s “ill-defined fishing expedition” in *Rivera*, probation officers searched Mr. Brady incident to arrest, found no contraband and proceeded to canvas the neighborhood for the vehicle that correlated to the car key in his pocket, all without a shred of suspicion that evidence would be located in the vehicle. Not only could neither officer articulate suspicion of criminal activity as it related to Mr. Brady on September 24, 2015, neither officer had ever seen Mr. Brady near or in possession of the Hyundai Sonata at any time.

In contrast to *Rivera* and *Baker*, where the defendants in those cases actually drove the vehicle at issue, Mr. Brady had no apparent connection to the car. Mr. Brady did not own the car; the Hyundai was registered to a woman named Tylen Bailey, who officers believed to be Mr. Brady's girlfriend. The only fact that connected Mr. Brady to the Hyundai was that the key was found in his possession at the time of the stop, along with his house keys and other standard personal possessions. It was not an abuse of discretion for the judge to find that the possession of the key, without even the slightest information indicating that Mr. Brady had actually been in or around the vehicle, was insufficient to support a reasonable suspicion finding as to the Hyundai.

Instead, the State essentially contends that Mr. Brady's prior arrest three weeks earlier *ipso facto* provided reasonable suspicion to search Mr. Brady's girlfriend's car.¹¹³ In its Opening Brief, the State refers to the "remarkable" similarities between the two events.¹¹⁴ A review of the motion hearing testimony reveals that there are a few similarities between the events, but none that provide reasonable suspicion to believe that criminal activity would be inside the Hyundai.

In both cases, Mr. Brady was found to possess money and according to officers, he resisted arrest. After being taken into custody, he fully cooperated

¹¹³ The State prosecutor told the judge during oral argument that the September 24th incident "standing alone...may not offer anything [referring to reasonable suspicion]. A-41. It follows, then, that the State relies on the prior arrest three weeks earlier to provide the requisite reasonable suspicion for the search.

¹¹⁴ OB at 9.

with the police on both occasions. On the earlier occasion, he admitted that although he did not sell drugs,¹¹⁵ he delivered them for other people. During the latter arrest, Mr. Brady told police of his intentions telling them that he was going to the store.

The similarities stop there. On September 24th, Mr. Brady was arrested while walking along a street- not driving a vehicle as before- and both officers testified that there was no indication that Mr. Brady was near a vehicle or in control of a vehicle. Mr. Brady had previously driven a Chrysler 300, not the Hyundai at issue in this case, although both were registered to Tylen Bailey. The Hyundai was parked in the neighborhood, but, like in *Rivera*, police had to canvas the neighborhood to find it because it was not readily observable immediately upon Mr. Brady's arrest. Unlike the prior arrest, officers searched Mr. Brady on September 24th and found no drugs or any contraband on his person or in the area of the arrest. Additionally, the drugs found during the first arrest were located on Mr. Brady's person; none were found in the Chrysler 300.

Consequently, while the prior arrest is generally related to Mr. Brady and his interaction with the probation officers, it does not strengthen the "tenuous

¹¹⁵ Perhaps it is a distinction without a difference, but the testimony at the hearing was inconsistent as to whether Mr. Brady delivered drugs or sold drugs. A-28, A-37. The Superior Court credited the first officer's testimony that Mr. Brady did not sell drugs, contrary to the State's rendition in its Opening Brief. OB at 11, A-40, State's Exhibit A at 3.

connection”¹¹⁶ between Mr. Brady and the Hyundai Sonata. The prior arrest fails to inform the analysis regarding whether evidence of criminal activity would be found inside of an arbitrary car that police had never before seen prior to canvassing the neighborhood. There is no evidence that Mr. Brady was clutching the Hyundai key or had any intention of using the Hyundai; officers merely located it in his pocket with the rest of his keys and personal effects.

The Hyundai is not related to the first arrest. There was never any contraband found in the vehicle during the first arrest that would even arguably raise suspicion that drugs might be found in a different vehicle, three weeks later. Consequently, the Superior Court properly held that officers were unable to articulate a connection between Mr. Brady’s arrest three weeks earlier in a different vehicle, in a different area, and the Hyundai.

c. There Are No Other Factors That Strengthen The Nexus Between Mr. Brady And The Hyundai

The fact that Mr. Brady resisted arrest does not make it more likely than not that evidence would be found in the Hyundai, particularly in light of the fact that no contraband was found on Mr. Brady’s person, establishing that he was not resisting arrest in order to hide evidence, but rather because he was resisting the officer’s authority and commands.

¹¹⁶ OB at 9.

Although the officers and the State argue that Mr. Brady's statement about going to the store was not credible, there is no information in the record to support their disbelief, and the Superior Court did not credit the officer's baseless assumption in its Order. Det. Evans testified that Mr. Brady did not indicate what items he was shopping for or what store he intended to either go to or from.¹¹⁷ Instead, officers assumed that Mr. Brady was lying because he was a half block past the corner store on Eighth and Adams Streets, a store that Mr. Brady did not identify and which was never the topic of any conversation between Mr. Brady and the officers.¹¹⁸

On the contrary, Mr. Brady's statement is consistent with the record in that he was located near his home, he supplied the State with information, as he had done on a prior occasion, and despite admitting to incriminating activity in early September, did not make any statements about drug activity on the second occasion, consistent with officers' failure to located any contraband on his person or in the area. Consequently, it was not an abuse of discretion for the court to have minimized the importance on the defendant's statement to police in light of the lack of evidence.

¹¹⁷ A-27.

¹¹⁸ A-35.

The State further argues that the court did “not take into account” either Cpl. Evans’ or Officer Walker’s testimony that Brady was not employed.¹¹⁹ The State’s argument misstates the record. Both officers testified that they did not know whether Mr. Brady was employed.¹²⁰ Instead, the officers assumed Mr. Brady was not employed because he had not been employed when Officer Walker supervised Mr. Brady “three or four years ago.”¹²¹ It was well within the court’s discretion to determine that the officer’s testimony was unreliable after both officer’s clarified that they had no actual knowledge of Mr. Brady’s current employment status.

Further, the State did not present any testimony that the amount of money or the denominations of money was indicative of drug dealing. Therefore, it was not clearly erroneous for the court to acknowledge that the officers had no information, other than an uncorroborated hunch, to determine the source of the money on Mr. Brady’s person.

Like the parole officer’s suspicions in *Rivera* who was looking in the trunk for “you know, possible violation, technical violations,” officers testified that they observed no suspicious activity and they searched because it was “one of the stipulations for probation...he had keys in his pocket...he has a suspended driver’s

¹¹⁹ OB at 13.

¹²⁰ A-30, A-35.

¹²¹ A-30, A-35.

license, he shouldn't have the vehicle..."¹²² According to both officer's testimony, Mr. Brady did *not* have the vehicle. He was not near the Hyundai, neither officer had ever seen the Hyundai before, and Mr. Brady was observed walking down the street. Rather, like the officers in both *Baker* and *Rivera*, the officers arrested Mr. Brady for a probation violation and proceeded to search the area for a car that might produce additional technical violations. As the Third Circuit held in *Baker*, "[r]easonable suspicion requires more specificity..."¹²³ than whether something "might" contain evidence of criminal activity.¹²⁴ Consequently, the Superior Court properly concluded that the State failed to show a sufficient nexus to the Hyundai when it granted Mr. Brady's Motion To Suppress.

¹²² A-29.

¹²³ *Baker*, 221 F.3d at 445.

¹²⁴ *Id.* at 444-45.

CONCLUSION

The Superior Court heard the evidence presented at a Motion To Suppress hearing, weighed the testimony, and concluded that the probation officer's search of a Hyundai Sonata was not supported by sufficient evidence. In its Order, the court articulated its reasoning and identified, in writing, all of the factors that the State has now alleged that the court failed to consider. While the Superior Court considered the prior arrest that the State has argued establishes the requisite suspicion, officers presented no testimony that Mr. Brady was in possession of the Hyundai, had driven the Hyundai, or that any suspicious activity had occurred involving the Hyundai.

Instead, the State argues that because Mr. Brady was in possession of a car key and had previously been involved in criminal activity, officers were legally entitled to assume that evidence of criminal activity existed in the Hyundai, despite that officers had never before seen the vehicle, had previously arrested Mr. Brady under different circumstances, and admittedly had not observed either criminal activity or any connection to the Hyundai at issue. The Superior Court properly determined, and articulated its reasoning in writing, that such a paucity of evidence failed to establish a nexus to the Hyundai. Therefore, the Superior Court's Order, supported by the record, was proper and consistent with existing case law that administrative warrants must be supported by a reasonable articulable suspicion of

criminal activity.

Based upon the facts and legal authorities set forth above, Defendant-Below, Appellant Dimaere Brady respectfully requests that this Honorable Court defer to the Superior Court's analysis of the totality of the circumstances and AFFIRM its Order granting Mr. Brady's Motion To Suppress.

Respectfully submitted,

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